



Information and Privacy
Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER 142

Appeal 890227

Liquor Control Board of Ontario



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

January 25, 1990

VIA PRIORITY POST

Appellant

Dear Appellant:

Re: Order 142
Appeal Number 890227
Liquor Control Board of Ontario

This letter constitutes my Order in your appeal from a decision by the Liquor Control Board of Ontario (the "institution"), regarding your request for records under the Freedom of Information and Protection of Privacy Act, 1987 (the "Act").

On June 23, 1989, the institution received your request for access to the following information:

The report prepared by Mr. Bill Diamant relating to the issue of a license to sell liquor at [a specified location] in the Hamilton Airport. The report was prepared in the spring of 1988 and was referred to in a letter dated March 28, 1988 from L.F. Pitura (copy attached) and in a letter dated April 12, 1988, from Hon. Chris Ward (copy attached).

On July 18, 1989, the Freedom of Information and Privacy Co_ordinator for the institution (the "Co_ordinator") responded to your request in the following manner:

Access is available to the report requested by you, a copy of which is enclosed. The second last paragraph on page 2 has been severed under Sec. 13(1) of the Freedom of Information and Protection of Privacy Act, since disclosure of this information would reveal advice or recommendations of an employee.

On July 31, 1989, you wrote to my office appealing the institution's decision. Your letter of appeal stated that:

We wish to appeal [the] decision to delete portions of the document on the following basis:

- (a) the record contains a study on the performance or efficiency of the premises utilized by [your client's name];
- (b) it is a feasibility study relating to a government policy or project;
- (c) it is a report containing the results of field research undertaken before the formulation of policy;
- (d) it is the report of an interdepartmental task force established for the purposes of preparing a report;
- (e) it is a report prepared for the purposes of undertaking inquiries and making reports on recommendations.

On August 4, 1989, I gave notice of the appeal to you and the institution.

As you are aware, as soon as your appeal was received by my office, an Appeals Officer was assigned to investigate the circumstances of the appeal, and attempt to mediate a settlement.

The Appeals Officer obtained and reviewed the record in issue which can be described as a two page memo which outlines the

substance of a meeting between the author and your client. The meeting related to your client's request for authorization to sell duty free liquor at a specified location in Hamilton Airport. The second last paragraph on the second page has been severed in its entirety. The head's decision to sever this paragraph is the sole issue in the appeal.

Since the appeal could not be resolved through mediation, a Notice of Inquiry was sent to you and the institution on November 29, 1989. An Appeals Officer's Report accompanied the Notice of Inquiry to assist you and the institution in making representations concerning the subject matter of the appeal. The Report indicated that you and the institution need not limit yourselves to the questions set out in the report, in making representations.

I have considered your representations and those of the institution in making my Order.

Before beginning my discussion of the specific issues in this case, I think it would be useful to briefly outline the purposes of the Act as set out in section 1. Subsection 1(a) provides the right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. Subsection 1(b) sets out the counterbalancing privacy protection purpose of the Act. This subsection provides that the Act should protect the privacy of individuals with respect to personal information about themselves held by institutions and should provide individuals with a right of access to their own personal information.

Section 53 of the Act provides that the burden of proof that the record falls within one of the specified exemptions of this Act lies upon the head.

As previously indicated, the institution has cited subsection 13(1) as the basis for refusing to disclose the severed portion of the record. Subsection 13(1) of the Act provides that:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The general purpose of the section 13 exemption has been discussed in Order 94 (Appeal Number 890137) dated September 22, 1989. At page 5 I stated that:

...in my view, section 13 was not intended to exempt all communications between public servants despite the fact that many can be viewed, broadly speaking, as advice or recommendations. As noted above, section 1 of the Act stipulates that exemptions from the right of access should be limited and specific. Accordingly, I have taken a purposive approach to the interpretation of subsection 13(1) of the Act. In my opinion, this exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision_making and policy_making.

I addressed the section 13 exemption further in Order 118 (Appeal Number 890172) dated November 15, 1989. I stated at page 4 that:

In my view, "advice" pursuant to subsection 13(1) of the Act, must contain more than mere information. Generally speaking, advice pertains to the submission of a future course of action which will ultimately be accepted or rejected by its recipient during the deliberative process.

The institution's representations indicate that the record at issue in this appeal is a memo from Mr. W. Diamant, Director, Traffic and Customs Division to Mr. D. F. Wilcox, Vice President, Distribution Division. Both of these individuals are employees of the institution. The institution submits that the memo contains the advice or recommendations of Mr. Diamant to Mr. Wilcox with respect to whether or not your client should be permitted to sell duty free liquor at Hamilton Airport.

Having examined the record, it is clear to me that the severed portion of the record contains the advice or recommendations of a public servant. Further, the advice or recommendations relate to a suggested course of action which will ultimately be accepted or rejected during the deliberative process.

In light of the above, I find that the severed portion of the record at issue in this appeal falls within the purview of subsection 13(1) of the Act.

Having found that the information severed from the record satisfies the requirements for exemption under subsection 13(1), I must now determine whether any of the subsection 13(2) exceptions enumerated in your letter of appeal apply. If they do, then all or part of the severance must be disclosed. The relevant exceptions in subsection 13(2) of the Act you refer to, read as follows:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

(a) factual material;

...

(f) a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy;

(g) a feasibility study or other technical study, including a cost estimate, relating to a government policy or project;

(h) a report containing the results of field research undertaken before the formulation of a policy proposal;

...

(j) a report of an interdepartmental committee task force or similar body, or of a committee or task force within an institution, which has been established for the purpose of preparing a report on a particular topic, unless the report is to be submitted to the Executive Council or its committees;

(k) a report of a committee, council or other body which is attached to an institution, and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;

The institution submitted that there are two sentences in the severed portion of the record which contain factual material. However they state the sentences are:

...very much a part of the advice being given and do not form a coherent body of facts which can be separated from the advice and recommendations. As such I submit that there is no requirement to disclose these sentences under section 13(2) (a) of the Act.

I considered the question of what constitutes "factual material" in Order 24 (Appeal Number 880006) dated October 21, 1988. At page 7 of that Order I stated:

In my view the overwhelming majority of records providing advice or recommendations to government would inevitably contain some factual information. However, I feel that this is not sufficient to meet the requirements of subsection 13(2) (a). ... "factual material" does not refer to occasional assertions of fact, but rather contemplates a coherent body of facts separate and distinct from the advice and recommendations contained in the record.

With respect to subsection 13(2) (f) the institution submitted that the severance does not contain any information about an institution, since the Hamilton Airport is not an "institution" within the meaning of the Act. In addition, it does not contain a report or study of the performance or efficiency of an institution in general or in respect of a particular program or policy. According to the institution, the severance is simply a recommendation as to whether one particular authorization should or should not be given to one particular person for the purpose of selling duty free liquor in Hamilton Airport.

The institution submitted that subsections 13(2) (g) and 13(2) (h) do not apply as the elements described in these subsections are not present in the severed portion of the record. Rather it is a recommendation resulting from one meeting with a particular applicant.

Finally, the institution submits that subsections 13(2)(j) and 13(2)(k) do not apply to the circumstances of this appeal as the author of the severed paragraph is not an interdepartmental committee task force or similar body, or a committee or task force within an institution. Neither can it be said that Mr. Diamant is a committee, council or other body attached to an institution.

Having reviewed the record, your representations and those submitted by the institution, I find that the exceptions provided by subsection 13(2) of the Act are not available in the circumstances of your appeal.

Subsection 13(1) also provides the head with the discretion to release a record even if it meets the test of an exemption. I find nothing improper in the way in which the head has exercised his discretion and would not alter it on appeal.

Accordingly, I uphold the head's decision to exempt the severed portion of the record from disclosure pursuant to subsection 13(1) of the Act.

Yours truly,

Sidney B. Linden
Commissioner

cc: Mr. J. W. Ackroyd, Chairman,
Liquor Control Board of Ontario
Ms Sheetal Sharma, FOI Co_ordinator