



**Information and Privacy
Commissioner/Ontario**

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

ORDER 118

Appeal 890172

Ministry of Transportation



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November 15, 1989

VIA PRIORITY POST

The Honourable William Wrye
Minister of Transportation
3rd Floor, Ferguson Block
77 Wellesley Street West
Toronto, Ontario
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Dear Mr. Wrye:

Re: Order 118
Appeal Number 890172

This letter constitutes my Order in the appeal by [the Appellant] (the "appellant") from a decision by the Ministry of Transportation (the "institution"), regarding the appellant's request for records under the Freedom of Information and Protection of Privacy Act, 1987 (the "Act").

On May 4, 1989, the institution received a request from the appellant for access to the following information:

Ministry memos etc. regarding a portion of Highway 9 (known as Broadway) which passes through the town of Orangeville. Time span - last 18 months.

Any external correspondence regarding the same over the last 18 months.

On June 5, 1989, the Freedom of Information and Privacy Co-ordinator for the institution (the "Co-ordinator") responded to the request in the following manner:

[IPC Order 118/November 15, 1989]

We have enclosed copies of the information you requested, however, please note that a portion of the documents was severed in compliance with Section 13 of the Freedom of Information Act (sic)...

On June 7, 1989, the appellant wrote to my office appealing the institution's decision. On June 14, 1989, I gave notice of the appeal to both the institution and the appellant.

Upon receipt of the appeal, 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 four page memo to "file" regarding "reconstruction of Broadway, Town of Orangeville, Meeting of September 23, 1988" written by R. van Veen, District Municipal Engineer. Two other employees have been "carbon copied" on the final page of the memo. The seventh paragraph on the fourth 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, an Appeals Officer's Report was prepared and sent to both parties together with a Notice of Inquiry on August 31, 1989. The parties were asked to make representations to me concerning the subject matter of the appeal.

I have considered the representations of both parties in making my Order.

The purposes of the Act as set out in section 1 should be noted. 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 counter-balancing 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.

Subsection 13(1) of the Act provides that:

13.--(1) 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.

In its representations the institution submits that:

The disclosure of the part of the record [in question] **would** reveal advice of a public servant.

The advice was given subsequent to a meeting at which the Ministry of Transportation was represented by Mr. Robert van Veen, District Municipal Engineer.

Because provincial funding was an issue under consideration, the overall intent of the comment was to alert management of the current political climate within the community. This type of advice by Regional and Municipal engineers is not uncommon, given the large geographic area which this Ministry serves. When required, such employees are expected to use professional judgement to alert management to relevant information on issues which would otherwise be unknown within the head office setting.

The appellant submits that:

The paragraph preceding the severance deals with the opinions of an Orangeville Councillor [a named individual]. It would not appear to make sense to then suddenly render advice or recommendations. Frankly the context suggests to me that the document continues to discuss either [a named individual] or [that individual's] opinions. I would suggest that grounds to exempt such discussion does not exist.

I am asking the Commissioner to consider whether the severance is in fact advice or recommendations of a civil servant or something quite different such as an opinion or observation. In other words, has Section 13 of the Act been properly applied in this case?

The general purpose of the section 13 exemption has been discussed in Order 94 (Appeal Number 890137) released on 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.

It is clearly stated in the institution's representations that "the overall intent of the comment was to alert management of the current political climate within the community." It is further stated that "...employees are expected to use professional judgement to alert management to relevant information on issues which would otherwise be unknown within the head office setting." I also note that the memo in question was forwarded to the Minister's Special Assistant by the author, with a covering memo which reads, "I have attached for your information copies of minutes and newspaper clippings which may be of interest to you." emphasis added)

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

My interpretation of "advice" would appear to be consistent with the way in which the word has been defined by the Quebec Commission d'accès à l'information (the "Commission") when interpreting a similar provision in its legislation entitled, An Act respecting Access to documents held by public bodies and the protection of personal information, R.S.Q. Chapter A-2.1. According to an analysis by Dussault and Borgeat in Administrative Law, A Treatise, 2nd Edition, Vol. 3, Carswell, 1989 at page 347 the Commission defined "advice" in its decision in the case of J. v. Commission scolaire Jacques-Cartier (1985) 1 C.A.I. 82 as follows:

... advice is "an opinion expressed during debate", the action of debating being the fact of "studying in view of a decision to be made". Advice is thus not an opinion "that a person is made aware of to keep him informed", but rather "to invite that person to do or not to do a certain thing". Considering therefore, that advice implies a decision-making process in progress, the Commission concluded "advice is counsel or a suggestion as to a line of conduct to adopt during the process. Logically, it takes place after research and examination into the facts, i.e. study, has taken place"[Tr.].

In light of the above, I find that the information severed from the record at issue in this appeal does not qualify as "advice" pursuant to subsection 13(1) of the Act.

I therefore order that the institution disclose to the appellant the record in question in its entirety within twenty (20) days of the date of this Order. The institution is further ordered to advise me in writing within five (5) days of the date of disclosure of the record, of the date on which disclosure was made.

Yours truly,

Sidney B. Linden
Commissioner

cc: Ms Marilyn Sharma, FOI Co-ordinator
Appellant