



**Information and Privacy
Commissioner/Ontario**
**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER 26

Appeal 880036

Ministry of Labour



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O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987, (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) of the Act a right to appeal any decision of a head under the Act to the Commissioner.

The facts of this appeal are as follows:

1. On January 1, 1988, the appellant wrote to the Freedom of Information Co_ordinator with the Ministry of Labour (the "institution") to request access to "...all records filed with the minister in 1986 and 1987 under Section 86(2) of the Ontario Labour Relations Act. Pursuant to Section 24(2) of the Freedom of Information Act, I also ask that this request be made effective for the next two years".
2. On February 4, 1988, the institution wrote to the trust funds which had filed the requested information with the institution and advised that a request for the information had been received. The trust funds were invited to provide submissions respecting the issue of disclosure.
3. On March 8, 1988, the institution wrote to the appellant and advised that access was denied on the basis that "Section 86 of the Labour Relations Act implies that the information you have requested is confidential and can only

be disclosed to members of the relevant trade unions by fund administrators. The Minister is not given the authority to release the information obtained under that section.

Pursuant to section 67 of the Freedom of Information and Protection of Personal Privacy Act, (sic) confidentiality provisions in other Acts continue in force for a 2_year period. Accordingly, disclosure of the information is prohibited by section 86 of the Labour Relations Act, apart from any specific provisions in the Freedom of Information and Protection of Personal Privacy Act (sic) which might otherwise preclude or limit release of the information in any event".

4. On March 10, 1988, the appellant wrote to me appealing the decision of the institution and I gave notice of the appeal to the institution.
5. The Appeals Officer assigned to this case met with representatives of the institution to discuss the nature of the records at issue and the procedures employed by my office when an institution relies on a "confidentiality provision" to deny access to requested information. A sampling of the requested records was also reviewed by the Appeals Officer.
6. As a settlement could not be effected, notices of inquiry were issued to the appellant, the institution and the administrators of the trust funds as "affected persons". A copy of the Appeals Officer's Report was provided to all parties.

7. Because the institution had raised the application of section 86 of the Labour Relations Act as a bar to the application of the Freedom of Information and Protection of Privacy Act, 1987, the parties and affected persons were invited to submit representations on the following preliminary issues:

(A) Whether section 86 of the Labour Relations Act, R.S.O. 1980 Chapter 228, as amended, is a "confidentiality provision" for the purposes of section 67 of the Freedom of Information and Protection of Privacy Act, 1987.

(B) If section 86 is a "confidentiality provision" whether it operates to bar the application of the Freedom of Information and Protection of Privacy Act, 1987.

8. Representations were received from the appellant, the institution and many of the affected third parties (the trust funds).

Before considering the specific issues raised in this appeal, I think it is important for me to make some general comments regarding the question of "confidentiality provisions".

As Information and Privacy Commissioner, I am responsible for ensuring that the rights and obligations of the people of Ontario and government officials are respected and complied with, as they relate to this Act. In order to fulfill this obligation it is sometimes necessary for me to balance the two interests of access to information and protection of personal privacy which, by their very nature, are sometimes in conflict. However, where, as in this case, an institution relies upon a "confidentiality provision" that is contained in another act to remove itself from the ambit of the Freedom of Information and

Protection of Privacy Act, 1987, I do not engage in such a balancing act. My responsibility in these cases is to ascertain whether a "confidentiality provision" exists, whether it applies to the records at issue in the appeal, and the impact of the provision in the circumstances of the appeal.

I should also note that I do not accept the representations received from the appellant to the effect that "...even if section 86 is a 'confidentiality provision', the Commissioner has the power to order release of the records". In my opinion, I do not have the authority under the Act to order the release of records where it is found that a "confidentiality provision" exists which bars the application of the Act.

ISSUE A: Whether section 86 of the Labour Relations Act, R.S.O. 1980, Chapter 228, as amended, is a "confidentiality provision" for the purposes of section 67 of the Freedom of Information and Protection of Privacy Act, 1987?

The term "confidentiality provision" is not defined in the Freedom of Information and Protection of Privacy Act, 1987. Accordingly, I am given the opportunity to formulate a definition which will promote the policies promulgated in the Act. The enactment of the Freedom of Information and Protection of Privacy Act, 1987, has established a new regime whereby information is to be made available to the public subject to certain limited and specific exemptions. It would be contrary to the general intent of the legislation to narrow unnecessarily the circumstances in which the Act applies. Nor would such an approach be appropriate, due to the fact that the Act contains provisions which balance the right to access with certain statutory safeguards, including but not limited to the protection of personal privacy.

This approach to the interpretation of statutes is supported by section 10 of the Interpretation Act R.S.O. 1980 c.219 which reads as follows:

Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit. (Emphasis added.)

For the reasons noted above, in my view the definition of "confidentiality provision" should be more restrictive than that urged by both the institution and certain of the third parties in this appeal. A "confidentiality provision", as those words are used in section 67 of the Act, contemplates language

specifically providing for confidentiality and non_disclosure of information. Although I do not purport to define conclusively the words "confidentiality provision", it is my opinion that such a provision must include express language by which the disclosure of certain information is clearly prohibited.

Section 86 of the Labour Relations Act reads as follows:

86._(1) In this section, "administrator" means any trade union, trustee or person responsible for the control, management or disposition of moneys received or contributed to a vacation pay fund or a welfare benefit or pension plan or fund for the members of a trade union or their survivors or beneficiaries.

(2) Every administrator shall file annually with the Minister not later than the 1st day of June in each year or at such other time or times as the Minister may direct, a copy of the audited financial statement certified by a person licensed under the Public Accountancy Act or a firm whose partners are licensed under that Act of a vacation pay fund, or a welfare benefit or pension plan or fund setting out its financial condition for the preceding fiscal year and disclosing,

- (a) a description of the coverage provided by the fund or plan;
- (b) the amount contributed by each employer;
- (c) the amounts contributed by the members and the trade union, if any;
- (d) a statement of the assets, specifying the total amount of each type of asset;
- (e) a statement of liabilities, receipts and disbursements;
- (f) a statement of salaries, fees and commissions charged to the fund or plan, to whom paid, in what amount and for what purposes; and
- (g) such further information as the Minister may require.

(3) The administrator, upon the request in writing of any member of the trade union whose employer has made payments or contributions into the fund or plan, shall furnish to the member without charge a copy of the audited financial statement required to be filed by subsection (2).

(4) Where an administrator has failed to comply with subsection (2) or (3), upon a certificate of failure so to comply signed by the Minister or upon complaint by the member, the Board may direct the administrator to comply within such time as the Board may determine.

All parties and affected persons agree that the provision in question is not an express confidentiality provision. The institution and the legal representatives of the various affected persons have identified this provision as an implied confidentiality provision. The institution claims that an implied confidentiality provision "...occurs where an explicit right of access to information within the custody and control of an institution is given to a particular class of individuals. The inference to be drawn is that individuals not falling within that class have no right of access and ought not to be given it". Similarly, a legal representative for some of the affected persons submits that "...the fact that access (to the requested records) is limited to the beneficiaries of the funds means that they are confidential with respect to all other persons".

Section 86 creates a repository within the institution respecting certain audited financial statements. Subsection 86(3) establishes a method of providing access to the statements to "...any member of the trade union whose employer has made payments or contributions into the fund or plan..." while subsection 86(4) provides for a remedy when an administrator fails to comply with the access request. Nowhere in the provision is the Minister, as the head of the institution, directed to or precluded from taking any particular action with respect to the financial statements once they are filed. The provision in question is silent with respect to confidentiality. In fact, the section specifically provides for

a right of access to certain individuals who are free to disseminate the records in question to whomever they choose.

Accordingly, I find that section 86 of the Labour Relations Act is not a "confidentiality provision" for the purpose of section 67 of the Freedom of Information and Protection of Privacy Act, 1987.

Given my conclusion with respect to Issue A, it is not necessary for me to address Issue B.

The question of whether section 86 of the Labour Relations Act is a "confidentiality provision" within the meaning of section 67 of the Freedom of Information and Protection of Privacy Act, 1987 was a preliminary issue which had to be disposed of before the institution could consider how to deal with the requested record. Because I have concluded that section 86 does not qualify as a "confidentiality provision", it is now appropriate for me to remit the matter to the head so that he can consider the appellant's access request within the framework of the Act.

Ordinarily, in dealing with a request concerning a record of this nature, the institution would likely decide to consult with other persons who might have an interest in the record. In this case, I understand this consultation has already taken place, which should reduce the time required by the institution to deal with the request.

It is also possible that the institution could decide that the record contains personal information, triggering the requirement under section 28 of the Act to notify individuals named in the record. It is not clear to me whether the institution has already turned its mind to this issue. If the institution determines that the request does involve concerns regarding

personal information of affected persons, before sending out the required notices under subsection 28(1) of the Act, I would suggest that the institution ascertain from the appellant whether he wishes to receive this type of information. If he doesn't, the personal information can simply be severed, should the head consider that appropriate, thereby eliminating the need to involve any affected persons. This would further reduce the time required to deal with the request.

In any event, I order that the head make a decision in writing under the Freedom of Information and Protection of Privacy Act, 1987 concerning the record at issue in this appeal within thirty (30) days of the date of this Order. I further order that the head confirm to me within thirty five (35) days of the date of this Order that a decision has been made and provide me with a copy of the written decision.

Original signed by: _____
Sidney B. Linden
Commissioner

_____ November 2, 1988
Date