



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

ORDER 32

Appeal 880112

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) a right to appeal any decision of a head to the Commissioner.

The facts of this case and the procedures employed in making this Order are as follows:

1. On February 25, 1988, the Ministry of Labour (the "institution") received a request for "all pertinent reports and recommendations in respect to the collapsed dome belonging to Harvex Elevators in Oxford Township, Ontario."
2. By letter dated March 30, 1988, the institution denied access to the records in question for the reason that "...section 34(1)(a) of the Occupational Health and Safety Act prohibits disclosure. Pursuant to section 67 of the Freedom of Information and Protection of Privacy Act, confidentiality provisions in other acts continue in force for a two year period."
3. By letter dated May 2, 1988, the requester appealed the decision of the head. I gave notice of the appeal to the institution.
4. In the course of the mediation/investigation stage of the appeal, the Appeals Officer reviewed the records in question. A settlement of the matter was not effected.

5. By letter dated August 9, 1988, I sent notice to the appellant and the institution that I was conducting an inquiry to review the decision of the head. An Appeals Officer's Report was enclosed with the notice.
6. By letter dated September 1, 1988, I invited the appellant and the institution to submit written representations to me on the issues arising from the appeal.
7. Written representations were received from the appellant and the institution and I have considered these representations in making my Order.

The issues arising in this appeal are:

- A. Whether subsection 34 (1)(a) of the Occupational Health and Safety Act R.S.O. 1980, c.321, 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 the answer to Issue A is in the affirmative, whether the records in question fall within the scope of the "confidentiality provision" relied on.

ISSUE A: Whether subsection 34 (1)(a) of the Occupational Health and Safety Act R.S.O. 1980, c.321, as amended, is a "confidentiality provision" for the purposes of section 67 of the Freedom of Information and Protection of Privacy Act, 1987.

Section 67 of the Act reads as follows:

67._(1) The Standing Committee on the Legislative Assembly shall undertake a comprehensive review of all confidentiality provisions contained in Acts in existence on the day this Act comes into force and shall make recommendations to the Legislative Assembly regarding,

(a) the repeal of unnecessary or inconsistent provisions; and

(b) the amendment of provisions that are inconsistent with this Act.

(2) This Act prevails over a confidentiality provision in any other Act unless the other Act specifically provides otherwise.

(3) Subsection (2) shall not have effect until two years after this section comes into force.

As I have stated in previous orders on this issue, (see Orders in Appeals 880010, 880028, 880036) as Information and Privacy Commissioner, I am charged with the responsibility of ensuring that the rights and obligations set out in the Act are respected and complied with. Where, as in this case, an institution purports to remove itself from the ambit of the Act through the use of a "confidentiality provision" in another Act, it is my responsibility to scrutinize the provision of that other Act to ensure both the relevance and application of the provision.

The term "confidentiality provision" is not defined in the Act. As I stated at pages 4 and 5 of my Order in Appeal 880036 released November 2, 1988:

"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."

In denying access to the appellant the institution has relied on subsection 34(1) and in particular subsection 34(1)(a) of the Occupational Health and Safety Act R.S.O. 1980, c.321. Section 34 reads as follows:

34._(1) Except for the purpose of this Act and the regulations or as required by law,

- (a) an inspector, a person accompanying an inspector or a person who, at the request of an inspector, makes an examination, test or inquiry, shall not publish, disclose or communicate to any person any information, material, statement, report or result of any examination, test or inquiry acquired, furnished, obtained, made or received under the powers conferred under this Act or the regulations;
- (aa) no inspector or other person who receives directly or indirectly from the claims board designated under subsection 22e(7) information provided to the claims board by an employer shall disclose it; (subsection proclaimed in force October 31, 1988)
- (b) no person shall publish, disclose or communicate to any person any secret manufacturing process or trade secret acquired, furnished, obtained, made or received under the provisions of this Act or the regulations;
- (c) no person to whom information is communicated under this Act and the regulations shall divulge the name of the informant to any person; and
- (d) no person shall disclose any information obtained in any medical examination, test or x_ray of a worker made or taken under this Act except in a form calculated to prevent the information from being identified with a particular person or case.

(2) An inspector or a person who, at the request of an inspector, accompanies an inspector, or a person who makes an examination, test, inquiry or takes samples at the request of an inspector is not a compellable witness in a civil suit or any proceeding, except an inquest under the Coroners Act respecting any information, material, statement or test acquired, furnished, obtained, made or received under this Act or the regulations.

(3) A Director may communicate or allow to be communicated or disclosed information, material, statements or the result of a test acquired, furnished, obtained, made or received under this Act or the regulations.

(4) Subsection (1) does not apply so as to prevent any person from providing any information in the possession of the person, including confidential business information, in a medical emergency for the purpose of diagnosis or treatment. (Subsection proclaimed in force October 31, 1988.)

The institution argues that the intention of section 34 of the Occupational Health and Safety Act is to enable an inspector to carry out an investigation and to make informed recommendations. As such, section 34 "identifies information that might be provided or obtained during the course of an investigation carried out pursuant to the Occupational Health and Safety Act and restricts the circulation of this information" and as such constitutes a "confidentiality provision". The institution also submits that subsection 34(1)(a) forbids a person from releasing any information which he/she has gathered in the course of an investigation.

In deciding whether a statutory provision constitutes a "confidentiality provision" my first duty is to assess the language of the clause at issue. Neither the nature of the record(s) nor the reasons for requesting the record(s) are

relevant to this analysis. If the provision employs express mandatory language by which disclosure of information is prohibited, then it is a "confidentiality provision" as contemplated by section 67 of the Act.

Clearly, subsection 34(1)(a) employs mandatory language by which the disclosure of certain information is prohibited. Accordingly, I find that subsection 34(1)(a) of the Occupational Health and Safety Act is a "confidentiality provision" for the purposes of section 67 of the Freedom of Information and Protection of Privacy Act, 1987.

ISSUE B: If the answer to Issue A is in the affirmative, whether the records in question fall within the scope of the "confidentiality provision" relied on.

The records were reviewed and found to consist of reports by various ministry officials and employees and memoranda.

I am satisfied that the records at issue are "... information, material, statement[s], report[s] or result[s] of [an] examination, test or inquiry ...". Accordingly, I find that the records fall within the scope of the "confidentiality provision" relied on by the institution.

It is noteworthy that subsection 29(6) of the Occupational Health and Safety Act requires the "owner, constructor, employer or person in charge of the work place" to post at the work place, a copy of an inspector's written order or a report of his inspection and, therefore, part of the record in question would have been posted in compliance with this section of that Act.

Having found that the records in issue fall within the scope of the "confidentiality provision" relied on by the institution, I

note that subsection 34(3) of the Occupational Health and Safety Act grants a discretionary power to a Director, authorizing him or her to disclose "information, material, statements or the result of a test acquired, furnished, obtained, made or received under this Act or the regulations".

In the circumstances of this appeal, it is not clear whether a Director has in fact exercised the discretion provided under subsection 34(3) of the Occupational Health and Safety Act.

Accordingly, my Order is that a Director reconsider the request of the appellant in the context of subsection 34(3) of the Occupational Health and Safety Act and exercise the discretion which that subsection of that Act provides.

In summary, I find that subsection 34(1)(a) of the Occupational Health and Safety Act is a "confidentiality provision" for the purposes of section 67 of the Freedom of Information and Protection of Privacy Act, 1987. I also find that the information requested falls within the scope of the aforesaid "confidentiality provision". Further, my Order is that this request be reconsidered by a Director appointed under the Occupational Health and Safety Act within twenty (20) days of the date of this Order and that I be notified in writing of the Director's decision following the exercise of his discretion within five (5) days of the date of the decision.

Original signed by: _____
Sidney B. Linden
Commissioner

December 21, 1988
Date