



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

ORDER 161

Appeal 890164

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, as amended (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) or a request for access to personal information under subsection 48(1) a right to appeal any decision of a head under the Act to the Commissioner.

On January 5, 1990, Sidney B. Linden, Information and Privacy Commissioner/Ontario appointed the undersigned Assistant Commissioner and delegated to the undersigned, the power to conduct inquiries and make Orders under the Act.

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

1. On January 23, 1989, the requester wrote to the Ministry of Labour (the "institution") seeking access to:

Discussion papers/memos/reports/consultant reports that in 1988, 1989, help assist (sic) greater coverage of working women under the Pay Equity Act. Include options to consider and actions to take and any timetable re greater coverage.

2. On February 7, 1989, the appellant received written confirmation from the Freedom of Information and Privacy Co_ordinator (the "Co_ordinator") for the institution that the following understanding was reached with respect to his request:

This request concerns background material apart the (sic) nine commissioned reports which are mentioned in the "Report to Minister of Labour".

3. On May 16, 1989, the Co_ordinator responded to the request in the following manner:

Enclosed are copies of twenty_five (25) documents which are being provided to you. There will not be a fee for this information.

One of these documents is being disclosed in part. Several sections of one of the documents are being withheld pursuant to section 13(1) of the Freedom of Information and Protection of Privacy Act. An additional eleven (11) memos are being withheld in their entirety because they are also viewed as advice to government.

Notes taken by the Pay Equity Commission in "off_the_record" discussions with third parties are also being withheld pursuant to section 17(1)(b) of the Act. The head felt that there is good reason to believe that such information would not be supplied in the future if he were to disclose the contents of these discussions.

Finally, two large studies have been withheld pursuant to section 22(b) of the Act because it is believed that this information will be published shortly. These studies are in the custody of the Pay Equity Commission and I will have them notify me when the studies will be made public. In turn, I will convey this information to you.

4. On May 22, 1989, this office received an appeal from the decision of the institution in which the appellant stated:

I appeal Labour' (sic) Section 13 exemptions on pay equity (8900008). Severance is plausible and

the issue and studies are now in front of the public.

5. On June 5, 1989, notice of the appeal was given to the institution and the appellant.
6. The records were obtained and reviewed by the Appeals Officer.
7. On November 30, 1989, the Ministry advised the appellant as follows:

We have now re_examined the decisions that were made concerning the remaining eleven documents. It has been decided that three of these documents will be released in their entirety and two will be released with severances. With respect to the remaining six documents, our decisions on access remain the same; five of these were withheld in their entirety and the sixth was disclosed in part. However, an additional ground for non_disclosure is being raised with respect to the November 25, 1988 memo from S. Klein to N. Ignatieff. Apart from section 13(1), the final line of the memo is also being severed pursuant to s.21(1) because it contains the opinion of one individual about another individual.

8. During mediation of this appeal, additional records were disclosed to the appellant. However, mediation was not completely successful. The remaining records at issue in the appeal are eight internal memoranda which have been partially severed or withheld in their entirety pursuant to subsection 13(1) and section 21 of the Act. These records are listed below, utilizing the numbers assigned to them by the institution, for ease of reference.

- Record 1. Memorandum dated November 25, 1988 from Suzanne Klein, Manager, Policy Branch to Nick Ignatieff, Director, Policy Branch.
- Record 4. Memorandum dated December 6, 1988 at 9:42 a.m. from Cindy Morton, Executive Co_ordinator, Policy and Communication Branch to Suzanne Klein.
- Record 5. Memorandum dated December 6, 1988 at 12:21 p.m. from Cindy Morton to Suzanne Klein.
- Record 6. Memorandum dated December 19, 1988 from Suzanne Klein to Judith Wolfson, Director of Legal Services Branch.
- Record 7. Memorandum dated December 28, 1988 from Suzanne Klein to George Thompson, Deputy Minister of Labour.
- Record 8. Memorandum dated December 28, 1988 from Suzanne Klein to Ken B. Godevenos, Manager, Research Branch, Pay Equity Commission.
- Record 9. Memorandum dated January 12, 1989 from Suzanne Klein to Barbara Sulzenko, Executive Assistant to the Minister of Labour.
- Record 11. Memorandum dated October 17, 1988 from Mitchell Toker, Small Business Advocacy, Ministry of Industry Trade and Technology to Carol O'Donnell, Research Co_ordinator, Pay Equity Commission.
9. Notice that an inquiry was being conducted to review the decision of the head was sent to the appellant and the institution on February 8, 1990. Enclosed with each notice letter was a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets out questions which paraphrase those sections of the Act which appear to the Appeals Officer, or

any of the parties, to be relevant to the appeal. This report indicates that the parties, in making their representations to me, need not limit themselves to the questions set out in the report.

10. Written representations were received from the institution only. The Appeals Officer contacted the appellant to advise him that the institution had claimed section 19 as a new exemption, which applied to one of the records withheld in its entirety. The appellant advised the Appeals Officer that he did not intend to make any representations and that he was not interested in the information severed under section 21 of the Act. I have considered the institution's representations in making this Order.

The issues arising in this appeal are as follows:

- A. Whether the head properly applied the discretionary exemption provided by subsection 13(1) of the Act to the requested records.
- B. Whether the head properly applied the discretionary exemption provided by section 19 of the Act to one of the requested records.
- C. Whether the requested records could reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under one of the exemptions.

Before beginning my discussion of the specific issues in this case, I think it would be useful to outline briefly the purposes of the Act as set out in section 1. Subsection 1(a) provides a 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.

Further, section 53 of the Act provides that where a head refuses access to a record, the burden of proof that the record falls within one of the specified exemptions in this Act lies upon the head.

ISSUE A: Whether the head properly applied the discretionary exemption provided by subsection 13(1) of the Act to the requested records.

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). At page 5 of that Order the Commissioner stated:

...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.

The Commissioner addressed the term "advice" in Order 118 (Appeal Number 890172) dated November 15, 1989. At page 4 of that Order he stated:

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 suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process.

In its representations the institution submitted that:

Subsection 13(1) provides that a head may refuse to disclose a record which would reveal advice or recommendations of a public servant. The eight documents in this appeal which have been fully or partially withheld under this section clearly contain such advice or recommendations. Four of the five documents which were fully withheld and two of the three documents which were partially withheld originated at an upper level within the Ministry. These documents were prepared by S. Klein, a Manager with the Policy Branch of the Ministry of Labour. The Policy Branch is responsible for providing advice on the development and implementation of Pay Equity legislation and policy, and such advice is clearly directed to the Minister of Labour who is ultimately responsible for the administration of the legislation.

C. Morton, author of the fifth document completely which was withheld (sic), held a senior position with the Ministry of Labour, that of Executive Co_ordinator, Policy and Communications Branch. Likewise, R. McGinley of the Ministry of Treasury and Economics, and M. Toker of the Ministry of Industry, Trade and Technology are public servants responsible

for providing advice to government on issues including pay equity.

I will now discuss the application of subsection 13(1) to each of the eight records at issue.

Record 1. Memorandum dated November 25, 1988 from Suzanne Klein to Nick Ignatieff, Director, Policy Branch.

The third paragraph and the last sentence of the last paragraph, of this one page record, have been severed. Referring to this record, the institution submitted that:

It outlines concerns about pay equity research studies raised by a policy advisor for the Minister responsible for women's issues during a telephone conversation with S. Klein. (emphasis added)

I agree with the institution's submission that the severed portions of this record contain "concerns". However, I find that the "concerns" do not qualify as "advice or recommendations" pursuant to subsection 13(1) of the Act as they do not contain a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process.

I order the head to disclose the third paragraph of Record 1 to the appellant.

The institution also claimed that the last sentence of the last paragraph of Record 1 is exempt from disclosure pursuant to section 21 of the Act. Since the appellant indicated that he is not interested in disclosure of information severed under this subsection, I order that the last sentence of the last paragraph of Record 1 not be disclosed to the appellant.

**Record 4. Memorandum dated December 6, 1988 at 9:42 a.m. from
Cindy Morton to Suzanne Klein.**

This one page record contains the author's thoughts with respect to sector studies addressing pay equity issues and her advice or recommendations as to what these reports should or should not include. Therefore, I find that Record 4 falls within the subsection 13(1) exemption. Further, in my view, the record does not contain any of the types of information found in the subsection 13(2) exception.

The head has discretion under subsection 13(1) of the Act to disclose a record even if it meets the test of the exemption. With respect to the head's consideration of discretion, the institution submitted that:

The head has considered the discretion to disclose the requested records under section 13 but has determined not to do so because the documents withheld and the severances made contain candid and sensitive advice to the government regarding courses of action which have yet to be determined.

I find nothing improper in the way in which the head has exercised his discretion and would not alter it on appeal.

I uphold the head's decision not to disclose Record 4.

**Record 5. Memorandum dated December 6, 1988 at 12:21 p.m. from
Cindy Morton to Suzanne Klein.**

According to the institution's representations, this one page record outlines "the author's view of the potential efficacy of

the Pay Equity legislation (Bill 154)". In my view, disclosure of this record 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. Therefore, I find that Record 5 falls within subsection 13(1). Further, in my view, the record does not contain any of the types of information found in the subsection 13(2) exception.

I find nothing improper in the way in which the head has exercised his discretion and would not alter it on appeal.

I uphold the head's decision not to disclose Record 5.

Record 6. Memorandum dated December 19, 1988 from Suzanne Klein to Judith Wolfson, Director of Legal Services Branch.

This two page record outlines the author's view of recommendations by Nan Weiner, Pay Equity Commission with respect to pilot studies for all female establishments. I uphold the head's decision not to disclose Record 6 for the same reasons enumerated with respect to Record 5.

Record 7. Memorandum dated December 28, 1988 from Suzanne Klein to George Thompson, Deputy Minister of Labour.

Record 8. Memorandum dated December 28, 1988 from Suzanne Klein to Ken B. Godevenos, Manager, Research Branch, Pay Equity Commission.

Records 7 and 8 are both two page memoranda which consist of the author's review of some of the recommended approaches outlined in the Pay Equity Commission Report. The records also contain

the author's advice or recommendations with respect to the contents of the report which were reviewed.

I uphold the head's decision not to disclose Records 7 and 8 for the same reasons enumerated with respect to Record 5.

Record 9. Memorandum dated January 12, 1989 from Suzanne Klein to Barbara Sulzenko, Executive Assistant to the Minister of Labour.

Record 11. Memorandum dated October 17, 1988 from Mitchell Toker, Small Business Advocacy, Ministry of Industry Trade and Technology to Carol O'Donnell, Research Co_ordinator, Pay Equity Commission.

Record 9 is a two page record which has been disclosed to the appellant with the exception of one sentence.

Record 11 is a three page record which has been disclosed to the appellant with the exception of the last two paragraphs on page 2 and the first four paragraphs on page 3. According to the institution's representations, Record 11 "contains the author's comments on completed sector studies of predominantly female establishments and his views on the approach to be taken in further studies of systemic gender discrimination."

Having reviewed these records, I uphold the head's decision not to disclose the severance in Record 9 and those in Record 11 for the same reasons mentioned with respect to Record 5.

ISSUE B: Whether the head properly applied the discretionary exemption provided by section 19 of the Act to one of the requested records.

In its representations the institution stated that:

Record #6 was also withheld pursuant to section 19 as it contained information subject to solicitor_client privilege. This document was prepared by S. Klein, a public servant, for the Director of the Legal Services Branch, Ministry of Labour.

As I have found that this record has properly been withheld from disclosure under section 13 of the Act, it is not necessary for me to address this issue.

ISSUE C: Whether the requested records could reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under one of the exemptions.

While I have upheld the head's decision to withhold or sever information in Records 4, 5, 6, 7, 8, 9 and 11, I have also reviewed these records with a view to determining whether further severances can reasonably be made pursuant to subsection 10(2) of the Act.

Subsection 10(2) of the Act states that:

Where an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

In Order 24 (Appeal Number 880006) dated October 21, 1988, the Commissioner established the approach which should be taken when considering the severability provisions of subsection 10(2). At page 13 of that Order he stated:

A valid subsection 10(2) severance must provide the requester with information that is in any way responsive to the request, at the same time protecting the confidentiality of the record covered by the exemption.

With respect to subsection 10(2) of the Act the institution submitted that:

Five of the documents in question (records #4, 5, 6, 7, and 8) were withheld in their entirety. The Minister of Labour has considered the section 10(2) obligation and has done so to the greatest extent possible. With respect to those records withheld in their entirety, the head felt it was not possible to sever the records without revealing advice that he felt should be exempted.

The requester states in his appeal that "...the issue and studies are now in front of the public". However, as stated previously, the course of action to be taken by the government with regard to pay equity issues has still to be determined.

Following a review of the requested records, I find that no information that is in any way responsive to the request could be severed from the requested records and disclosed to the appellant without disclosing information that legitimately falls within subsection 13(1) of the Act.

In summary, my Order is as follows:

1. I order the head to disclose the third paragraph of Record 1 to the appellant.
2. I order the head not to disclose the last sentence of the last paragraph of Record 1 to the appellant.

3. I uphold the head's decision not to disclose Records 4, 5, 6, 7, 8, or the severances in Records 9 and 11.

4. I order the head to release the third paragraph of Record 1 to the appellant 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 date on which disclosure was made.

Original signed by: _____ April 24, 1990
Tom Wright Date
Assistant Commissioner