



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

ORDER 137

Appeal 880348

Ministry of Skills Development



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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 under the Act to the Information and Privacy Commissioner.

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

1. On November 8, 1988, a request was made to the Ministry of Skills Development (the "institution") for the following information:

Copies of all documents, including Inspectors' Reports and Notices of Violation issued by the Enforcement Services of your Ministry:

1. by Enforcement Officer Arnett at the Toyota Plant in Cambridge Ontario with respect to Pro_Insul Limited on or about September 21, 1988; and
 2. by Enforcement Officer Sincennes at the Lennox Generating Station in Bath Ontario with respect to Dewar Insulation Inc. on or about October 6, 1988.
2. On December 2, 1988, the institution responded as follows:

Your request for access to the entire record is denied on the basis of ss. 14(1)(a) and (b) and

s. 14(2)(a) of the Freedom of Information and Protection of Privacy Act, 1987. The Apprenticeship Branch advises us that both matters are under investigation as a result of a complaint and are not the subject of routine investigations.

3. On December 22, 1988, the requester wrote to me appealing the head's decision, and I gave notice of the appeal to the institution.
4. The records were obtained and examined by the Appeals Officer assigned to the case, and efforts were made by the Appeals Officer to mediate a settlement.
5. During the course of mediation, the institution wrote to the Appeals Officer on May 2, 1989, offering to disclose part of each of the records to the appellant, with severances. However, the institution subsequently withdrew its offer. In the same May 2, 1989 letter, the institution stated that it was reserving its right to rely on sections 13, 17, 19 and 21 of the Act as additional grounds for exempting the records.
6. Also during mediation, the appellant agreed that the names of individual workers could be severed from the records. He further notified the Appeals Officer that he was withdrawing the portion of his request dealing with the Toyota Plant in Cambridge and Pro_Insul Limited, but wished to continue his appeal regarding the Lennox Generating Station and Dewer Insulation Inc.

7. Mediation efforts with respect to all other issues were not successful, and by letter dated October 31, 1989, I notified the institution and the appellant that I was conducting an inquiry to review the decision of the head. In accordance with my usual practice, the Notice of Inquiry was accompanied by a report prepared by the Appeals Officer. This Report is 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 appear to the Appeals Officer, or any of the parties, to be relevant to the appeal. The Appeals Officer's Report indicates that the parties, in making representations to the Commissioner, need not limit themselves to the questions set out in the Report.
8. I received representations from the institution and the appellant. In its representations, the institution withdrew its claim for exemption under sections 13 and 17 of the Act. The institution also agreed to provide the appellant with a copy of Form 1 of the Ministry of Consumer and Commercial Relations, on the basis that it was a public document.
9. I have considered the representations of both parties in reaching my decision in this appeal.

The following is a list of the records at issue in this appeal, which I have numbered for convenience in identifying individual records:

- #1. memorandum by and to an employee of the Apprenticeship Branch of the institution, dated January 27, 1989;
- #2. memorandum by and to the same people as Record #1, dated December 14, 1988;
- #3. memorandum by and to the same people as Record #1, dated December 12, 1988;
- #4. letter from the recipient of Record #1 to a named company, dated October 20, 1988;
- #5. Notice of Violation regarding a named company under the Apprenticeship and Tradesmen's Qualification Act, dated October 6, 1988.

The investigation file containing these five records also included other records which do not respond to the appellant's request and are not covered by the scope of this Order.

The issues arising in this appeal are as follows:

- A. Whether any of the records are properly exempt from disclosure pursuant to subsections 14(1)(a), 14(1)(b) or 14(2)(a) of the Act.
- B. Whether any of the records are properly exempt from disclosure pursuant to section 19 of the Act.
- C. Whether any of the records are properly exempt from disclosure pursuant to subsection 21(1) of the Act.

The purposes of the Act as set out in section 1 should be noted at the outset. 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 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 information about themselves held by institutions, and should provide individuals with a right of access to their own information.

Further, section 53 of the Act provides that the burden of proof that a record or part of a record falls within one of the specified exemptions lies upon the head.

ISSUE A: Whether any of the records are properly exempt from disclosure pursuant to subsections 14(1)(a), 14(1)(b) or 14(2)(a) of the Act.

The head has claimed subsections 14(1)(a), 14(1)(b) and 14(2)(a) of the Act as the basis for exempting all five records. However, no representations respecting the application of subsections 14(1)(a) or 14(1)(b) have been received from the institution, and I have assumed that any claim for exemption under these subsections has been abandoned by the institution.

Subsection 14(2)(a) reads as follows:

- (2) A head may refuse to disclose a record,
 - (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

...

"Law enforcement" as defined by subsection 2(1) of the Act means:

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b).

I considered the proper application of subsection 14(2)(a) of the Act in my Order 38 (Appeal Number 880106), dated February 9, 1989. At page 4 of that Order I stated:

Subsection 14(2)(a) is unusual in the context of the Freedom of Information and Protection of Privacy Act, 1987, in that it exempts a type of document, a report. The exemption does not require that the report meet additional criteria such as a reasonable expectation of some harm resulting from the disclosure of the report, or specifications about the contents thereof.

Under subsection 14(2)(a) the head may exercise his or her discretion to deny access to an entire report.

In order to qualify for exemption under subsection 14(2)(a), the record at issue must first qualify as a "report". If this requirement is satisfied, the institution must then demonstrate that the report was "prepared in the course of law enforcement,

inspections or investigations" and that the body preparing the report is "an agency which has the function of enforcing and regulating compliance with a law".

I have reviewed all five records at issue in this appeal and, in my view, only Records #1 and #3 can accurately be described as "reports". The remaining records fail to satisfy this requirement and, therefore, do not qualify for exemption under subsection 14(2)(a).

I must now determine whether Records #1 and #3 satisfy the remaining requirements of the subsection 14(2)(a) exemption.

Section 6 of the Apprenticeship and Tradesmen's Qualification Act, R.S.O. 1980, c. 24, gives the Director of Apprenticeship the duty of administering and enforcing this Act. His powers under section 7 of that Act include the right to undertake inspections with a view to ensuring compliance with the Act. Violation of the Act can lead to prosecution and the imposition of sanctions or penalties by a court. In my view, the powers and duties enumerated in this Act demonstrate that the Director of Apprenticeship is an "agency which has the function of enforcing and regulating compliance with a law", the Apprenticeship and Tradesmen's Qualification Act. Further, I find that Records #1 and #3 were prepared "in the course of law enforcement, inspections or investigations" by staff of the institution, and that these two records satisfy the requirements for exemption under subsection 14(2)(a).

In his representations the appellant submitted that the exception provided by subsection 14(4) of the Act should apply in the circumstances of this case.

Subsection 14(4) reads as follows:

(4) Despite clause (2), a head shall disclose a record that is a report prepared in the course of routine inspections by an agency where that agency is authorized to enforce and regulate compliance with a particular statute of Ontario.

In my Order 136, (Appeal Number 880347), dated December 28, 1989, involving the same appellant and institution, I discussed the distinction between "geographic area" inspections and "complaint driven" inspections made under the Apprenticeship and Tradesmen's Qualification Act, as they related to the question of what constitutes a "routine inspection" under subsection 14(4). At page 8 of Order 136 I found that:

...only "geographic area" inspections might qualify as "routine inspections", as the phrase is used in subsection 14(4). Whether or not a violation of the Apprenticeship and Tradesmen's Qualification Act is discovered during a "geographic area" inspection is not, in my view, determinative of whether the inspection was "routine"; it is the nature of the inspection itself which should be considered in deciding whether it falls within the scope of subsection 14(4). As far as "complaint driven" inspections (such as the one that generated the records at issue in this appeal) are concerned, the components of these types of inspections would necessarily vary depending on the nature of the information supplied by the complainant, and, in my view, they could not be said to be "routine".

The inspection which generated the records at issue in this appeal was conducted in response to a complaint lodged by the appellant. As such, it falls into the category of "complaint driven" inspections which, in my view, fall outside the scope of

the exception provided by subsection 14(4) of the Act. Therefore, I uphold the decision of the head to exempt Records #1 and #3 under subsection 14(2) (a).

ISSUE B: Whether any of the records are properly exempt from disclosure pursuant to to section 19 of the Act.

The institution has claimed section 19 as one of the grounds for refusing to release all five records.

Because I have found Records #1 and #3 to be exempt under subsection 14(2) (a), I will restrict my discussion of Issue B to Records #2, #4 and #5.

Section 19 of the Act provides as follows:

A head may refuse to disclose a record that is subject to solicitor_client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

I considered the proper interpretation of section 19 of the Act in my Order 49 (Appeal Numbers 880017 and 880048), dated April 10, 1989. At page 12 of that Order I stated:

This section provides an institution with a discretionary exemption covering two possible situations:

- (1) a head may refuse to disclose a record that is subject to the common law solicitor_client privilege; or
- (2) a head may refuse disclosure if a record was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for

use in litigation. A record can be exempt under the second part of section 19 regardless of whether the common law criteria relating to the first part of the exemption are satisfied.

As far as the common law solicitor_client privilege is concerned, the case of Susan Hosiery Limited v. Minister of National Revenue [1969] 2 Ex. C.R. 27, identifies what appear to be two branches of this privilege. They are:

1. all communications, verbal or written, of a confidential character, between a client and a legal adviser directly related to the seeking, formulating or giving of legal advice or legal assistance (including the legal adviser's working papers directly related thereto) are privileged; and
2. papers and materials created or obtained especially for the lawyer's brief for litigation, whether existing or contemplated are privileged. ("litigation privilege")

The first branch of the common law solicitor_client privilege applies to confidential communications between the client and his/her solicitor, and exists any time a client seeks advice from the solicitor, whether or not litigation is involved. The rationale for this first branch is to protect communications between client and solicitor from disclosure in the interest of providing all citizens with full and ready access to legal advice.

In order for a record to be covered by the first branch of common law solicitor_client privilege, the four criteria outlined at page 14 of my Order 49 must be satisfied. They are:

1. there must be a written or oral communication;

2. the communication must be of a confidential nature;
3. the communication must be between a client (or his agent) and a legal advisor;
4. the communication must be directly related to seeking, formulating or giving legal advice.

Failure to meet any one of these criteria means that a particular record will not qualify for the common law solicitor_client privilege.

I have examined the contents of Records #2, #4 and #5, and, in my view, none satisfy the third criteria of the above test; i.e. none of the records represent a communication between a client and a legal advisor. Therefore, I find that the common law solicitor_client privilege does not attach to these records.

Turning now to the second branch of the section 19 exemption as it relates to these three records, the institution must satisfy the following two requirements in order for a record to qualify for exemption:

1. the record must have been prepared by or for Crown counsel; and
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

Having examined Records #2, #4 and #5, it is clear that none were prepared by or for an employee of the institution who could qualify as a Crown counsel, nor do the records contain or request legal advice.

As to whether or not any of these records was prepared in "contemplation of litigation", it is important to bear in mind that the following two_fold test must be satisfied in order to fall within the scope of this phrase:

1. the dominant purpose for the preparation of the document must be contemplation of litigation; and
2. there must be a reasonable prospect of such litigation at the time of the preparation of the document.

The institution has provided evidence that it is prosecuting the company which is the subject of some of the requested records. However, it is clear from an examination of the records that the dominant purpose in the preparation of Records #2 and #4 was to request or provide information, and in Record #5 was to notify a company of a violation under the Apprenticeship and Tradesmen's Qualification Act. The dominant purpose for the preparation of any of Records #2, #4 and #5 was not the contemplation of litigation, and therefore, I find that none qualify for exemption.

In summary, I find that Records #2, #4 and #5 do not qualify for exemption under section section 19 and, subject to my discussion of Issue C, should be released to the appellant.

ISSUE C: Whether any of the records are properly exempt from disclosure pursuant to subsection 21(1) of the Act.

Again, as with Issue B, I will restrict my discussion of Issue C to those records not found to be exempt under subsection 14(2) (a); i.e. Records #2, #4 and #5.

In all cases where a request may involve access to access to personal information, it is my responsibility, before deciding whether the exemption provided by section 21 applies, to ensure that the information contained in the records falls within the definition of "personal information" in subsection 2(1) of the Act.

I have examined Records #2, #4 and #5, and, in my view, only Record #5, the Notice of Violation, which contains the names of individual employees, includes information which qualifies as "personal information" under the Act. The remaining two records fail to satisfy the requirements of the definition and, therefore, are not eligible for consideration under section 21, and should be released to the appellant. Record #2 contains the names of companies other than the one which is the subject of the records at issue in this appeal and, because these companies are not the subject of the appellant's request, their names should be severed from Record #2 prior to release.

As far as Record #5 is concerned, the appellant has indicated that he is not interested in receiving the names of individual employees, and these names, therefore, are not the subject of this appeal.

Therefore, as far as Issue C is concerned, I find that Records #2 and #4 are not eligible for consideration under subsection 21(1) of the Act, and should be released to the appellant, with appropriate severances to Record #2. Record #5 should also be

released to the appellant with the names of individual employees severed.

In summary, my order in this appeal is as follows:

1. I find that Records #1 and #3 qualify for exemption under subsection 14(2)(a) of the Act, and I uphold the head's decision not to release them;
2. I find that Records #2, #4 and #5 do not qualify for exemption under any of sections 14, 19 or 21 of the Act, and I order the head to disclose them to the appellant, with appropriate severances to Records #2 and #5. I further order that this disclosure be made within 20 days of the date of this Order, and that the head notify me within five (5) days of the disclosure, of the date on which disclosure was made.
3. I order the head to disclose to the appellant all records which it has characterized as "public documents", within 20 days of the date of this Order, and to notify me within five (5) days of the disclosure, of the date on which disclosure was made.

Original signed by: _____
Sidney B. Linden
Commissioner

December 28, 1989
Date