



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

ORDER P-653

Appeal P-9300090

Pay Equity Commission



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ORDER

BACKGROUND:

The Pay Equity Commission (the Commission) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to information regarding the formulation and implementation of pay equity plans at all Ontario hospitals. The Commission denied access to the records pursuant to sections 14, 17 and 21 of the Act. The requester appealed the Commission's decision.

During mediation, it was agreed that the request would be limited to pay equity plans either completed or being formulated for the Ottawa Civic Hospital (the Hospital) only. The Commission granted access to a small number of responsive records and denied access to others claiming the application of sections 14(1)(a), (b), (d), and (g), 14(2)(a), 17(1)(a), (b), (c), and (d), and 21 of the Act, and indicated that certain records (collective agreements between the Hospital and unions representing its staff) were publicly available from the Ministry of Labour. Subsequently, the appellant advised that he was not pursuing access to the information contained in the records to which section 21 of the Act was applied, and the Commission provided the appellant with copies of the collective agreements which it earlier claimed were publicly available from the Ministry of Labour.

Further mediation was not possible, and notice that an inquiry was being conducted to review the Commission's decision was sent to the Commission, the appellant, the Hospital and the four bargaining agents representing employees who were involved in the implementation and formulation of pay equity plans at the Hospital. Representations were received from the Commission and the Hospital.

In its representations, the Commission chose not to address the application of section 14(1)(g) of the Act to the records. As this is a discretionary exemption in respect of which the burden of proof rests on the Commission, I will not consider its application in this order.

THE RECORDS:

The records at issue in this appeal may be described as follows:

1. Eight individual files created by the Review Officer appointed by the Pay Equity Commission, numbered 91.2453, 91.2046, 91.1469, 90.0539, 89.0337, 89.0063, 89.0064 and 89.0065, which contain various documents including:
 - (a) Review Officer's Final Report
 - (b) Application for Review Services

- (c) Correspondence between the Commission, the Bargaining Agent and the Employer
 - (d) Pay Equity Plans
 - (e) Memoranda of Agreement between the parties
 - (f) Submissions of the parties to the Review Officer
 - (g) Job Descriptions
 - (h) Review Officer Notes to File
 - (i) Review Officer's Orders
2. The record described as number 16 in the Commission's decision letter of March 24, 1993, which consists of the Job Evaluation System and Gender Neutral Comparison System as proposed by the parties.
3. The record described as number 17 in the Commission's March 24, 1993 letter, which consists of the Terms of Reference for the Pay Equity Committee.

PRELIMINARY MATTER:

Section 67(2) of the Act provides that section 32(4) of the Pay Equity Act is a confidentiality provision which prevails over this Act. Section 32(4) of the Pay Equity Act reads:

Where an employee or group of employees advises the Hearings Tribunal in writing that the employee or group of employees wishes to remain anonymous, the agent of the employee or group of employees shall be the party to the proceeding before the Hearings Tribunal or review officer and not the employee or group of employees.

The "Application for Review Services", which appears in each of the eight files, contains a space for employees or groups of employees to indicate whether their identity can be disclosed to the employer. In some cases, applicants have indicated "yes", in others "no", and the remainder have no response. Where an applicant has indicated that they wish to remain anonymous, I find that section 67(2) of the Act applies, and the identity of the applicant is not accessible under the Act.

ISSUES:

The issues arising in this appeal are:

- A. Whether the mandatory exemption provided by section 17(1)(d) of the Act applies.
- B. Whether the mandatory exemptions provided by sections 17(1)(a), (b) and (c) of the Act apply.
- C. Whether the discretionary exemption provided by section 14(2)(a) of the Act applies.
- D. Whether the discretionary exemptions provided by sections 14(1)(a) and (b) of the Act apply.
- E. Whether the discretionary exemption provided by section 14(1)(d) of the Act applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the mandatory exemption provided by section 17(1)(d) applies.

For a record to qualify for exemption under section 17(1)(d), the institution and/or the affected party must satisfy each part of the following test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
2. the information must have been supplied in confidence, either implicitly or explicitly; **and**
3. disclosure of the record could reasonably be expected to:
 - (a) reveal information of the type set out in (1) which was supplied to a conciliation officer, a mediator, a labour relations officer, or another person appointed to resolve a labour relations dispute;

OR

- (b) reveal the report of a conciliation officer, a mediator, a labour relations officer, or another person appointed to resolve a labour relations dispute.

Part One

In my view, the term "labour relations information" refers to information concerning the **collective** relationship between an employer and its employees. The information contained in the records was compiled in the course of the negotiation of pay equity plans which, when implemented, would effect the **collective** relationship between the employer and its employees. For this reason, I agree that this information may properly be characterized as "labour relations information", with the exception of some notes on the files which contain only meeting dates and the names and positions of the representatives of the employees, employer and bargaining agent, and the records entitled "Application for Review Services". These records, in my view, do not contain any of the types of information listed in part one of the test and, accordingly, section 17(1)(d) does not apply to them.

Part Two

In order to effect a settlement, parties to these types of disputes must provide the Review Officer with a substantial amount of information regarding the nature of the dispute and their respective positions on the issues. I find that the information contained in the eight files prepared by the Review Officer (with the exception of the Review Officer Final Report and certain administrative correspondence) was supplied by the parties to the negotiation of the pay equity plans. I also find that the information contained in Records 16 and 17, described in the Commission's decision letter as the Job Evaluation System and Gender Neutral Comparison System and Terms of Reference of the Pay Equity Committees respectively, was also supplied by the parties to the negotiations.

The second step in part two of the section 17(1)(d) test involves a determination of whether the information was supplied **in confidence**, either explicitly or implicitly. I have received no evidence from any of the parties that there existed an explicit understanding regarding the confidentiality of the information supplied. Nothing in the sections of the Pay Equity Act quoted by the Commission makes reference to the confidentiality of any information provided by the parties to the Commission or its Review Officer.

In a labour relations context such as this, however, it is normally the practice that where an impartial third party is performing services analogous to those of a mediator or conciliation officer, any information supplied by a party is not disclosed without the consent of the supplying party. I find that the circumstances surrounding the submission of most of the information contained in the records to be similar in nature to mediation or conciliation and that, logically, it follows that an expectation of confidentiality existed concerning the information supplied by the parties. Accordingly, I find that part two of the section 17(1)(d) test has been met for the majority of the information.

In certain of the files, the employer has provided a signed copy of the Pay Equity Plan subject to review which, by law, must be posted prominently in the workplace and would become part of the collective agreement between the parties. In my view, an expectation of confidentiality concerning these records is not reasonable, and part two of the test has not been met.

Part Three

The final part of the test concerns whether the information was supplied to "another person appointed to resolve a labour relations dispute". It is my opinion that section 17(1)(d) was intended to cover the information furnished to, and the reports prepared by conciliation officers, mediators and others who are appointed as **neutral third parties** to resolve labour relations disputes, and **only** those who are appointed under statutory schemes.

The Commission states:

The Director of Review Services, a branch of the Commission, assigned the eight files in question to the same review officer. A review officer performs functions which are analogous to those of conciliation officers, mediators and labour relations officers.

I agree, and find that a Review Officer appointed under section 34(1) of the Pay Equity Act is to be considered "another person appointed to resolve a labour relations dispute" within the meaning of section 17(1)(d) of the Act.

Accordingly, as all three parts of the section 17(1)(d) test have been met, I find that those records referred to as the eight Review Officer files (with the exception of the records excluded above), as well as Records 16 and 17 from the Commission's decision letter, are properly exempt under section 17(1)(d) of the Act.

ISSUE B: Whether the mandatory exemptions provided by sections 17(1)(a), (b) and (c) of the Act apply.

In Issue A, in addressing the application of section 17(1)(d) to the records, I found that the only records which did not qualify for exemption under section 17(1)(d) were those which did not meet parts one and two of the test. As similar requirements must be met for a record to be exempt under sections 17(1)(a), (b) and (c), I find that sections 17(1)(a), (b) and (c) do not apply to these records.

ISSUE C: Whether the discretionary exemption provided by section 14(2)(a) of the Act applies.

As a result of my determination in Issue A, the only records remaining at issue are the signed pay equity plans, notes listing meeting dates and names and positions of representatives of the parties, records entitled "Review Officer Final Report" and "Application for Review Services" and certain administrative correspondence.

Section 14(2)(a) of the Act states as follows:

A head may refuse to disclose a record,

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;

[IPC Order P-653/April 8, 1994]

In order to qualify for exemption under section 14(2)(a) of the Act, a record must satisfy each part of the following three-part test:

1. the record must be a report; **and**
2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

The word "report" is not defined in the Act. However, in order to qualify as a "report", a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact (Order 200).

The Commission takes the position that the definition of the word report extends to include:

... the notes taken by the review officer during the course of her investigation and any mediation attempts, any orders issued by the review officer, any minutes of settlement outlining the terms agreed to by the parties, any documents provided to the review officer during the course of investigation and final reports for any closed files.

The Commission also submits that "... notes taken during a telephone conversation or a meeting with either one or both of the parties amount to a formal statement or a report prepared as part of the actual investigation."

I do not agree that any of the remaining records may properly be characterized as a report for the purposes of section 14(2)(a) of the Act. The records entitled "Review Officer Final Report" are forms which each Review Officer is required to complete when concluding a file. They are used for record-keeping and statistical purposes and, in my view, do not include more than statements of fact.

ISSUE D: Whether the discretionary exemptions provided by sections 14(1)(a) and (b) of the Act apply.

Sections 14(1)(a) and (b) of the Act state:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (a) interfere with a law enforcement matter;

- (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

The Commission submits that disclosure of any information contained in the records could reasonably be expected to interfere with their enforcement of the Pay Equity Act. Specifically, the Commission outlines a fear of jeopardizing the confidentiality traditionally surrounding the negotiation process, which would interfere with the Commission's ability to enforce the Act through the achievement of a mediated settlement.

In disposing of Issue A, information supplied to the Review Officer by the parties to the dispute was found to be exempt from disclosure. I am not satisfied that the remaining information could reasonably be expected to result in the harm alleged in the Commission's submission.

The Commission also submits that disclosure could interfere with any further proceedings with respect to the particular file or any of the other files currently the subject of investigation or mediation by the Review Officer, or at issue either before the Hearings Tribunal or before the Divisional Court. The Commission has not, in my view, identified in sufficient detail the nature of this alleged interference, nor has it established a clear and direct linkage between the disclosure of the specific information remaining at issue and the harm alleged. Accordingly, I find that sections 14(1)(a) and (b) do not apply.

ISSUE E: Whether the discretionary exemption provided by section 14(1)(d) of the Act applies.

Section 14(1)(d) of the Act states:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

As a result of the application of section 67(2) and the appellant's revision of his request to exclude personal information, the identities of individuals who might qualify as confidential sources are no longer at issue in this appeal. Additionally, information furnished by these sources has been found exempt under section 17(1)(d). Accordingly, I find it is not necessary for me to consider section 14(1)(d) in respect of the remaining information.

ORDER:

1. I order the Commission to disclose the signed pay equity plans, notes which list meeting dates and the names and positions of the representatives of the parties, records entitled

"Review Officer Final Report" and "Application for Review Services", and the administrative correspondence prepared by the Commission (subject to the severance of personal information and the identity of the applicant(s) where an applicant(s) has indicated that they wish to remain anonymous) to the appellant within thirty-five (35) days of the date of this order and not earlier than the thirtieth (30th) day following the date of this order.

2. I uphold the Commission's decision not to disclose the remaining records.
3. In order to verify compliance with this order, I order the Commission to provide me with a copy of the records disclosed to the appellant pursuant to Provision 1, **only** upon request.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ April 8, 1994

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FILE	RECORD	DESCRIPTION	DISPOSITION
91.2453	1	Review Officer Final Report	Disclose
	2	Application for Review Services	Disclose
	3	Correspondence between Bargaining Agent and Employee	17(1)(d)
	4	Correspondence between Commission and Employer, attaching signed Pay Equity Plan	Disclose
	5	Correspondence between Commission and Employee	Disclose
91.2046	1	Review Officer Final Report	Disclose
	2	Application for Review Services	Disclose
	3	Correspondence between Bargaining Agent and Employer	17(1)(d)
	4	Correspondence between Commission and Employer	17(1)(d)
	5	Review Officer's Draft Order	17(1)(d)
	6	Correspondence between Employer and Commission	Disclose
	7	Correspondence between Bargaining Agent and Commission	Disclose
	8	Review Officer's Order	17(1)(d)
	9	Bargaining Agent's submission to the Review Officer	17(1)(d)
	10	Summary of Order	Disclosed
	11	Job Evaluation Rating Record	17(1)(d)
	12	Interdepartmental memorandum provided by Employer with attached Pay Equity Plan	Disclose
	13	Review Officer's notes indicating name and position of representatives of Bargaining Agent and Employer	Disclose
	14	Bureau of Labour Information Canada Wage and Salary rates table	Disclosed
	15	Report to the Minister of Labour by the Commission	Disclosed
	16	Submission by the Equal Pay Coalition to the Commission	Disclosed
91.2046	17	Health Manpower in Ontario, 1986 [Ontario Ministry of Health]	Disclosed

FILE	RECORD	DESCRIPTION	DISPOSITION
	18	Correspondence between Bargaining Agent and Employer	17(1)(d)
	19	Notes indicating name and position of representatives of Bargaining Agent and Employer	Disclose
	20	Correspondence between Employer and Commission	Disclose
	21	Correspondence between Bargaining Agent and Commission	Disclose
	22	Notes indicating name and position of representatives of Bargaining Agent and Employer	Disclose
	23	Unsigned Pay Equity Plan	17(1)(d)
	24	Correspondence between Employer and Bargaining Agent	17(1)(d)
	25	Formula for allocating 1% of total employer payroll to multiple pay equity plans, with example and notes	17(1)(d)
	26	Correspondence between the Employer and Commission	Disclose
	27	Correspondence between the Bargaining Agent and Commission	Disclose
	28	Correspondence between the Commission and the Bargaining Agent, attaching Application for Review Services	Disclose
	29	Correspondence between the Commission and the Bargaining Agent, attaching Application for Review Services	Disclose
	30	Correspondence between the Commission and the Employer	17(1)(d)
	31	Review Officer's Order	17(1)(d)
	32	Review Officer's Order	17(1)(d)

91.2064	33	Correspondence between Employer and Commission	Disclose
	34	Correspondence between Bargaining Agent and Commission	Disclose
91.1469	1	Review Officer Final Report	Disclose
	2	Business card	Disclose
	3	Correspondence between Employee and Commission, with attached job description	17(1)(d)
	4	Notes of meeting with employees	17(1)(d)
	5	Correspondence between Commission and Employee, attaching correspondence from Employer	17(1)(d)
	6	Correspondence between Employer and Employees	17(1)(d)
	7	Notes of conversation between Employee and Commission	17(1)(d)
	8	Correspondence between Commission and Employee, attaching job description	17(1)(d)
	9	Application for Review Services	Disclose
	10	Job description	17(1)(d)
	11	Notes of meeting between Commission and Employees	17(1)(d)
	12	Application for Review Services	Disclose
	13	Review Officer's notes	17(1)(d)
	14	Correspondence between Commission and Employer, with attached job descriptions	17(1)(d)
	15	Correspondence between Commission and Employer	Disclose
	16	Notes of conversation between Commission and Employee	17(1)(d)
	17	Application for Review Services	Disclose

91.1469	18	Correspondence between Commission and Employee, attaching correspondence between Employee and Employer and job description	17(1)(d)
	19	Review Officer's notes	Disclose
	20	Notes indicating name and position of Employees	Disclose
	21	Phone message slip	Disclose
	22	Correspondence between Employer and Employees	17(1)(d)
	23	Review Officer's notes	17(1)(d)
	24	Job Description	17(1)(d)
	25	Correspondence between employee and Employer	17(1)(d)
	26	Correspondence between employee and Employer	17(1)(d)
	27	Correspondence between employee and Employer	17(1)(d)
	28	Review Officer's notes	17(1)(d)
	29	Application for Review Services	Disclose
	30	Correspondence between Employee and Commission	Disclose
	31	Review Officer's notes	Disclose
	32	Application for Review Services	Disclose
	33	Correspondence between Commission and Employee	17(1)(d)
	34	Correspondence between Employee and Commission	Disclose
	35	Review Officer's notes	17(1)(d)
	36	Application for Review Services	Disclose
	37	Job description	17(1)(d)
	38	Correspondence between Employee and Commission	17(1)(d)
	39	Review Officer's notes	17(1)(d)
	40	Correspondence between Employees and Employer	17(1)(d)
	41	Review Officer's notes	17(1)(d)

91.1469	42	Application for Review Services	Disclose
	43	Phone message	Disclose
	44	Review Officer's notes	17(1)(d)
	45	Application for Review Services	Disclose
	46	Correspondence between five individual employees and Commission	Disclose
	47	Review Officer's notes	17(1)(d)
	48	Correspondence between Commission and Employees	17(1)(d)
	49	Application for Review Services	Disclose
	50	Correspondence between Commission and Employer	17(1)(d)
	51	Review Officer's notes	17(1)(d)
	52	Application for Review Services	Disclose
	53	Internal memo to Review Officer	17(1)(d)
	54	Correspondence between Employee and Commission	Disclose
	55	Facsimile cover page with attached pay equity plan with handwritten comments	17(1)(d)
	56	Review Officer Work Docket	Disclose
	57	Correspondence between Employee and Commission	Disclose
	58	Correspondence between Commission and Employees	17(1)(d)
	59	Review Officer Final Report	Disclose
	60	Signed Pay Equity Plan	Disclose
	61	Correspondence between Commission and Employer attaching job descriptions	17(1)(d)
90.0539	1	Application for Review Services	Disclose
	2	Review Officer Final Report	Disclose

90.0539	3	Pay Equity Hearings Tribunal Decision	Disclosed
	4	Memo from Commission to Pay Equity Hearings Tribunal	Disclose
	5	Correspondence between Commission and Pay Equity Hearings Tribunal	Disclose
	6	Correspondence between Employer and Commission	Disclose
	7	Correspondence between bargaining agent and Commission	Disclose
	8	Review Officer's Order	17(1)(d)
	9	Memo from Commission to Pay Equity Hearings Tribunal	Disclose
	10	Correspondence between Commission and Pay Equity Hearings Tribunal	Disclose
	11	Correspondence between employer and Commission	Disclose
	12	Review Officer's Order	17(1)(d)
	13	Correspondence between bargaining agent and Commission	Disclose
	14	Page 3 of Review Officer's Order	17(1)(d)
	15	Correspondence between employer and Commission	Disclose
	16	Facsimile cover sheet attaching correspondence between Commission and employer, with attached summary of bargaining history between employer and bargaining agent	17(1)(d)
89.0337	1	Application for Review Services	Disclose
	2	Internal memo	Disclose
	3	Review Officer Final Report	Disclose
	4	Bring Forward note with respect to compliance with Review Officer Order.	Disclose
	5	Pay Equity Hearings Tribunal Decision	Disclosed
89.0337	6	Memo to Pay Equity Hearings Tribunal from Commission	Disclose
	7	Correspondence between Commission and Pay Equity Hearings Tribunal	Disclose
	8	Correspondence between bargaining agent and Commission	Disclose

9	Correspondence between employer and Commission	Disclose
10	Review Officer's Order	17(1)(d)
11	Facsimile Cover Sheets (3)	Disclose
12	Memo to Pay Equity Hearings Tribunal from Commission	Disclose
13	Correspondence between Commission and Pay Equity Hearings Tribunal	Disclose
14	Correspondence between employer and Commission	Disclose
15	Correspondence between bargaining agent and Commission	Disclose
16	Facsimile cover sheets (4)	Disclose
17	Review Officer's Order	17(1)(d)
18	Correspondence between bargaining agent and Commission	Disclose
19	Facsimile cover sheets (2)	Disclose
20	Correspondence between employer and Commission	Disclose
21	Facsimile cover sheet	Disclose
22	Correspondence between Commission and employer	17(1)(d)
23	Correspondence between bargaining agent and Commission	Disclose
24	Correspondence between Commission and bargaining agent	17(1)(d)

89.0063	1	Application for Review Services	Disclose
	2	Action Requests to Case Management (2)	Disclose
	3	Collective Agreement between employer and bargaining agent	Disclose
	4	Review Officer Final Report	Disclose
	5	Memorandum of Agreement	17(1)(d)
	6	Correspondence between employer and Commission	Disclose
	7	Correspondence between bargaining agent and Commission	Disclose
	8	Correspondence between employer and Commission	Disclose
	9	Correspondence between bargaining agent and Commission	Disclose
	10	Correspondence between employer and Commission	Disclose
89.0064	1	Application for Review Services	Disclose
	2	Business cards for representatives of employer and bargaining agent	Disclose
	3	Telephone message slip	Disclose
	4	Review Officer Final Report	Disclose
	5	Correspondence between Commission and bargaining agent	17(1)(d)
	6	Correspondence between bargaining agent and employer	17(1)(d)
	7	Correspondence between employer and bargaining agent	17(1)(d)
	8	Bring forward notes regarding compliance with a Review Officer's order (2)	Disclose
	9	Review Officer's Order with attachment	17(1)(d)
	10	Review Officer's Order	17(1)(d)
89.0064	11	Correspondence between bargaining agent and Commission	Disclose
	12	Correspondence between employer and Commission	Disclose
	13	Correspondence between employer and Commission	Disclose
	14	Correspondence between bargaining agent and Commission	Disclose

	15	Correspondence between bargaining agent and Commission	Disclose
	16	Correspondence between employer and Commission	Disclose
	17	Correspondence between employer and Commission	Disclose
	18	Correspondence between employer and bargaining agent	17(1)(d)
89.0065	1	Applications for Review Services (3)	Disclose
	2	Action Request to Case Management	Disclose
	3	Review Officer Final Report	Disclose
	4	Correspondence between employer and Commission	Disclose
	5	Correspondence between bargaining agent and Commission	Disclose
	6	Correspondence between bargaining agent and Commission	Disclose
	7	Facsimile cover sheet (2)	Disclose
	8	Review Officer's order with attachment	17(1)(d)
	9	Bring forward note regarding compliance with Review Officer order	Disclose
	10	Internal Commission memorandum with attached draft letter from Review Officer	Disclose
	11	Notes indicating name and position of employer and bargaining agent representatives (5 pages)	Disclose
	12	Hotel catering contract	Disclose
89.0065	13	Correspondence between employer, bargaining agents and Commission	Disclose
	14	Hearing Officer's order	17(1)(d)
	15	Correspondence between bargaining agent and Commission	Disclose
	16	Correspondence between employer and Commission	Disclose
	17	Correspondence between bargaining agent and Commission	Disclose
	18	Correspondence between employer and Commission	Disclose
	19	Correspondence between employer and Commission	Disclose
	20	Correspondence between bargaining agent and Commission	Disclose

	21	Correspondence between employer and Commission	Disclose
"Record 16"		Job Evaluation System and Gender Neutral Comparison System as drafted by both the employer and the bargaining agent	17(1)(d)
"Record 17"		Terms of Reference for the Pay Equity Committees	17(1)(d)