



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

ORDER P-859

Appeal P_9400621

Ontario Human Rights Commission



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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The requester, who is a social policy consultant, asked the Ontario Human Rights Commission (the OHRC) for records relating to its evaluation of Bill 79, the Employment Equity Act (the EEA). In particular, the requester sought the OHRC's views on how the EEA would affect (1) the OHRC's recruitment, promotion and staffing policies, (2) similar policies developed for other public and private sector employers in the province and (3) the OHRC's role in administering the Ontario Human Rights Code.

The OHRC identified a total of 10 records that were responsive to the request. The OHRC decided to disclose one of these documents to the requester in its entirety and to withhold the remaining nine records under one or more of the following exemptions contained in the Act:

- Cabinet records - section 12(1)
- advice or recommendations - section 13(1)
- relations with other governments - section 15(a)

The requester appealed this decision to the Commissioner's office.

During the mediation stage of the appeal, the requester agreed to limit his request to an eight_page memorandum. This document was prepared by the Acting Director of the Policy and Research Unit of the OHRC for transmittal to the OHRC's Executive Director.

A Notice of Inquiry was provided to the requester/appellant and the OHRC. Representations were received from both parties.

DISCUSSION:

CABINET RECORDS

The OHRC claims that the policy memorandum is exempt from disclosure under section 12(1)(d) of the Act. In order for this provision to apply, the OHRC must establish that the document:

- (a) reflects consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy; or
- (b) was used for the making of government decisions or the formulation of government policy.

In its representations, the OHRC states that the recommendations contained in the policy memorandum may be brought forward before the Legislative Assembly for future deliberations. The OHRC has failed to establish, however, that the record in question was ever circulated to ministers of the Crown or that it was used for making government decisions or to formulate government policy. The result is that the section 12(1)(d) exemption is not available to exempt this memorandum from disclosure.

RELATIONS WITH OTHER GOVERNMENTS

The OHRC also contends that the memorandum qualifies for exemption under section 15(a) of the Act. In order for this provision to apply to a record, the OHRC must demonstrate that:

- (1) the disclosure of the record could give rise to an expectation of prejudice to the conduct of intergovernmental relations; **and**
- (2) the relations in question must be intergovernmental, that is relations between the institution and another government or its agencies; **and**
- (3) the expectation that prejudice could arise as a result of disclosure must be reasonable.

In its representations, the OHRC indicates that the release of the memorandum may jeopardize its relations with another provincial government agency. For the section 15(a) exemption to apply, however, the relations in question must be intergovernmental (that is between various levels of government) rather than between agencies of the same government. For this reason, I find that section 15(a) has no application to the facts of this case.

ADVICE OR RECOMMENDATIONS

The OHRC also claims that the advice or recommendations exemption found in section 13(1) of the Act applies to the memorandum in question. This provision states 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.

It has been established in many previous orders that advice and recommendations for the purpose of section 13(1) must contain more than just information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

In its submissions, the OHRC indicates that the contents of the memorandum were prepared for deliberations at the highest level of the OHRC and fully qualify as advice or recommendations. The OHRC further points out that OHRC decision makers must have the benefit of staff advice which is candid, direct and to the point and that memoranda of this nature will be less forthcoming if they are subject to public disclosure.

I have carefully reviewed the representations of the parties in conjunction with the record at issue. I find that certain portions of this document contain background information or the author's analysis of issues. These passages do not qualify as advice and recommendations for the purposes of the Act. I find, however, that other parts of the record outline specific courses of action which the Executive Director was free to accept or reject as part of the OHRC's decision

and policy-making processes. On this basis, these latter portions of the record constitute advice or recommendations under section 13(1) of the Act and may be withheld from the appellant.

I have highlighted the parts of the memorandum which qualify as advice or recommendations (which appear on pages 2, 3, 5, 6, 7 and 8) in yellow on the copy of the record to be provided to the OHRC's Freedom of Information and Privacy Co-ordinator with a copy of this order.

ORDER:

1. I order the OHRC to disclose the non-highlighted portions of the memorandum which I have provided to the OHRC's Freedom of Information and Privacy Co-ordinator to the appellant within fifteen (15) days of the date of this order.
2. In order to verify compliance with the provisions of this order, I reserve the right to require that the OHRC provide me with a copy of the memorandum which is disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Irwin Glasberg
Assistant Commissioner

February 8, 1995