File Diary ... ZSS/A.P.Sherwood/2-5124/ern

~~ZSSV~~ ZSIR

PLEASE RETURN TO DS/PSS/NEC JS
AFTER SIGNATURE/RELEASE

ZSSV-269

45-13

CONFIDENTIAL

26 January, 1981.

Dear Mr. Shoemaker,

I am grateful for the opportunity to comment on your draft letter to Mr. Gordon Smith concerning the proposed amendment to the Canadian Human Rights Act. As you know, this matter has been discussed between security officials of our two Departments and I fully support your initiative in raising it with the Privy Council Office. I think the letter is an admirable statement of the problem and fully agree with the course of action you suggest.

I have one minor comment to make concerning the phrase "security screening", which is used throughout; to the uninitiated, it might suggest that the initial security screening on employment is all that is involved. As you know, many departments, External Affairs in particular, are required to revalidate and upgrade clearances continually and to assess existing clearances each time we receive adverse information. Hence, the proposed amendments would not only have an incalculable adverse affect on security screening but also on the ongoing administration of our personnel security program.

Yours sincerely,

E. P. BLACK

E. P. Black,
Deputy Under-Secretary.

Mr. J. Michael Shoemaker,
Senior Assistant Deputy Minister,
Police and Security Branch,
Solicitor General Canada,
O T T A W A.

A0053130_1-001722

AGC-4104

Solicitor General Canada
Solliciteur général Canada
Ottawa, K1A 0P8

January 20, 1981

CONFIDENTIAL
BY HAND

Mr. E.P. Black
Deputy Under Sec. of State
for Ext. Aff. for
Security Intelligence
Dept. of External Affairs
Tower 'A', 8th Floor
125 Sussex Drive
Ottawa, Ontario. K1A 0G2

Dear Mr. Black:

I have drafted the attached letter to convey to Mr. Gordon Smith our concerns over the potential consequences for security policy that would follow from the enactment of the amendments to the Canadian Human Rights Act which were recently proposed by the Department of Justice.

Before sending the letter, I would appreciate any comments you may have that would serve to highlight any particular concern or that would add to those already expressed. I would like to bring this matter to Gordon Smith's attention as soon as possible and I would be very grateful therefore if you could provide your comments to me by January 28, 1981, in order that necessary amendments can be made and the letter placed before him in the first week of February.

Yours sincerely,

J.M. Shoemaker

J. Michael Shoemaker
Senior Assistant Deputy Minister
Police and Security Branch
and
Chairman
Security Advisory Committee

Attach.

Solicitor General Canada
Solliciteur général Canada
Ottawa, K1A 0P8

CONFIDENTIAL

Mr. G.S. Smith
Associate Secretary
to the Cabinet
Privy Council Office
Room 328 - Langevin Block
Ottawa, Ontario
K1A 0A3

Dear Mr. Smith:

I am writing to you as the Chairman of the Security Advisory Committee(SAC) to point out some of the potential consequences for security policy which the Committee considers would follow from the enactment of the proposals to amend the Canadian Human Rights Act(Act) that were circulated recently by the Department of Justice. The proposed amendments would extend the prohibited grounds of discrimination in the federal sector, for employment and the delivery of goods and services, to include: political opinion, belief or creed; sexual orientation; criminal and penal conviction; handicap, (both mental and physical).

Without in any way wishing to detract from the goal of protecting Canadians from unreasonable discrimination, I feel it is important to maintain in balance the equally important requirement that every state establish certain standards for security screening, to protect national interests. The state's need to ensure that officials with access to its secrets are individuals of unquestioned reliability, loyalty and integrity, is one that I believe must remain unqualified even in the face of competing government objectives in the field of social policy.

The proposed legislative amendments will have a direct and adverse impact on the implementation of almost any security screening policy, whether it is the present Cabinet Directive 35, or that suggested under the Security Policy Under Review(SPUR) proposals. For a table illustrating their effect on the current screening policy, see Appendix A, attached.

administration of personnel security

.../2

For example, it would be unacceptable on security grounds for officials who require a security clearance to hold, or be closely associated with others who hold, political beliefs inimical to the basic democratic system of this country and its institutions. While membership in an organization such as the Revolutionary Workers League is not illegal in Canada, to give the right of employment in sensitive positions in the Government to members of a group advocating the overthrow of the Government by unconstitutional means, would not only be illogical, but contrary to basic personnel security principles.

In the case of sexual orientation, the consequences of both certain heterosexual acts and homosexual activities are of concern in security screening. Notwithstanding increased public tolerance of such behaviour, individuals with such preferences, particularly if they are not overt, are liable through coercion, influence or pressure to act in ways which are contrary to the best interests of security. Problems have been encountered notably when officials have been sent abroad, due both to other countries' legal and social attitudes to homosexuality or adultery, and the practice of hostile intelligence services in targetting individuals with these propensities.

A criminal record is not per se a bar to a security clearance, depending on: the nature of the offence; the time that has elapsed; and the behaviour of the individual in the interim. However, due to the need to ensure the honesty, reliability and integrity of those with a security clearance, this must remain an area where the department concerned should retain the right to deny a clearance when, in its judgement, there exists sufficient doubt concerning the reliability of the individual concerned.

Finally, the proposition that a previous history of alcohol or drug dependence should be included in the definition of the "mental" part of handicap would raise very real screening problems. Apart from the question whether anyone can be "cured" of such a dependence, the right to make a judgement concerning the reliability of an alcoholic or addict should remain with the employing department. I therefore believe it is preferable to exclude alcohol and drug dependence from the definition of mental handicap. I should perhaps point out in this context that security screening for a previous history of mental instability or emotional disturbance (also to be included in the definition of mental handicap), has already proved to be a difficult enough problem for departments, since it has required the exercise of very delicate judgements on a case by case basis.

.../3

For the kind of reasons outlined above, I feel that it is essential to consider an exemption for all positions in the Public Service requiring a security clearance from the application of these amendments. The existing exemption in the Act, s. 14(a), requires that an employer must show "a bona fide occupational requirement" in order to exclude an individual from a position on any of the prohibited grounds of discrimination. The lack of redefinition of s. 14(a) and the necessarily subjective nature of its application, forces an impossible burden on security authorities who are faced with complex judgements in security screening. These weaknesses make it imperative to consider a comprehensive national security exemption for the Act.

One of the problems identified in the SPUR proposals is that there is no existing Act or administrative procedure which meets all the necessary requirements for appeals on security clearances, by either the employer or the employee. If these amendments are passed, a new situation will be created in which complaints or appeals concerning security screening decisions will be made under the Act, raising the important question of not only who deals with them, but also the primacy of such legislation over a Cabinet directive or administrative procedure. Since the Canadian Human Rights Commission(CHRC) has indicated it does not wish it or its Tribunals to become involved in the business of appeals on security grounds, there would appear to be both a need and an opportunity to create an independent review body to handle these matters, with a clear jurisdictional frontier between it and the CHRC.

Furthermore, since the McDonald Commission has taken an interest in security screening, it would seem sensible to wait for any recommendations it may make before proceeding any further with these amendments. If McDonald should recommend new security legislation, Ministers may wish to consider if such a statute might not be a more appropriate place to set up the criteria for security screening, plus an independent appeal mechanism, rather than to insert it into a Human Rights Act.

As you also know, the SPUR document contains a proposal for a second category of clearance, a "reliability clearance", in order to reduce the number of positions requiring a security clearance. Its purpose is to clear people who handle sensitive and valuable government assets which, while not defined as of "national interest", are still defined as being of "public interest." Individuals filling such positions need as one of the requirements of their jobs the trust and confidence of the public, and it

.../4

is possible that under the s. 14(a) exemption departments will be able to convince the CHRC, that for any of the proposed amendments which relate to "reliability", satisfactory standards can be maintained by showing that they are required for "bona fide occupational" reasons. For example, a criminal record for fraud, or a drug habit, would not be compatible with duties requiring the handling of money or drugs.

In the case of political opinion, belief or creed, even assuming an exemption is made for all positions requiring a security clearance, there will still be many sensitive positions in the public service which such an amendment would now statutorily open to those who hold extreme political views, subject only to any action possible under s. 14(a). Therefore, although this is more properly a management than a security consideration, Ministers should perhaps be asked to take a second look at any proposal that might stop a department like Indian and Northern Affairs, or departments dealing in important federal-provincial issues, from excluding or dismissing a member of a militant native group, or a separatist, from a sensitive position.

In conclusion, I would recommend that Justice be requested to wait for any recommendations from McDonald before completing that part of the Discussion Paper dealing with national security. I then believe that the SAC should review the draft prior to its being submitted to the Minister of Justice for signature, in order to ensure that all the consequences for national security have been identified and laid out for ministerial consideration.

Yours sincerely,

J. Michael Shoemaker
Senior Assistant Deputy Minister
Police and Security Branch
and
Chairman
Security Advisory Committee

Attach.

actor Considered in ecurity Screening	Current Rationale for Rejection	Likely Effects if Prohibited as Grounds for Discrimination, in the Security Screening Process
olitical belief, opinion r creed	A security clearance would not be granted if the individual's loyalty to Canada and its system of government is diluted by loyalty to any foreign government or organization, or to any Communist, Fascist or other legal or illegal political organization whose purposes are inimical to the processes of parliamentary democracy as understood in Canada.	The inability of the government to make a clear determination of the loyalty of its employees to the Canadian democratic process would create a situation where there would be no reasonable assurance that the advice it was receiving was not being seriously influenced by persons whose beliefs run contrary to overall Canadian interests. Also, government programs may be prejudiced if handled or administered by such people. There would be an added danger that the incidence of unauthorized release of sensitive government information would increase because of ideological conflict within such persons handling this information.
exual Orientation	Homosexuality or sexual deviation is not in itself a bar to a security clearance. Each case is considered to determine if the particular activity is overt or covert, with a view to assessing the degree of pressure which could be brought to bear on the individual under threat of disclosure.	Unless the government is permitted to make these subjective judgements in the security screening process, intolerable pressures might be brought to bear on certain persons which could result in the unauthorized disclosure of classified information or the subversion of critical advice or programs.
riminal Record	Like sexual orientation, a criminal record is not necessarily a bar to a security clearance. However, recent criminal activity, or a history of such acts indicating a personal level of unreliability judged to be unacceptable, would result in the denial of a security clearance, because of the danger that the individual's handling of classified information would also be unreliable.	The question of a criminal record in the determination of individual reliability is an extremely important one. First there is the general issue of public confidence in the reliability and integrity of all government employees. More significant in the security screening process, however, is that a criminal record, or lack of one, can be the only indicator in the checking process that can be substantiated to support opinions regarding the individual's reliability in handling sensitive information or programs.

A0053130_7-001728

ɛctor Considered in ɛcurity Screening	Current Rationale for Rejection	Likely Effects if Prohibited as Grounds for Discrimination, in the Security Screening Process
ental Handicap	In certain cases, where there was a history of mental handicap involving irrational or unstable behaviour, the suitability of a person for handling classified information would be seriously questioned and a clearance might not be issued. This would be particularly true if there was evidence of repeated abnormal behaviour after treatment had been discontinued. This same criteria would apply if there was a history of drug or alcohol dependence or serious abuse. The individual's reliability would have to be questioned in such cases unless it could be shown over a considerable period of time that the handicap had been overcome.	It is inconceivable that the government could justify to its allies or to the public the entrusting of its secrets to mentally unstable or irrational persons, or to persons with a serious history of drug or alcohol abuse. Unless the government is able to discriminate on these grounds, serious embarrassment and harm could result.