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

ORDER 106

Appeal 880232

Ministry of the Solicitor General

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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) 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.

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

1. On June 16, 1988, the Ministry of the Solicitor General (the "institution") received a request from the appellant for access to all files on the appellant in the OPP Criminal Intelligence Records from 1967-1988 inclusive.

2. On June 21, 1988, the institution refused to confirm or deny the existence of a record that would answer the appellant's request, pursuant to subsection 14(3) of the Act, which provides that:

   "A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) apply".

   Broadly speaking, subsections 14(1) and (2) deal with records relating to law enforcement.

3. On July 19, 1988, the requester appealed the decision of the institution. I gave notice of the appeal to the institution.

4. Between July 19, 1988 and September 12, 1988, an Appeals Officer investigated the matter with a view to settlement, but in the circumstances of this appeal, no settlement was obtained.

5. On September 12, 1988, notice that I was conducting an inquiry to review the decision of the head was sent to the institution and the appellant. 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.

6. Written representations were received from the appellant and the institution.

The purposes of the Act as set out in section 1 should be noted at the outset. 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.

The issues arising in this appeal are as follows:

A. Could disclosure of a record, such as the one requested, be refused under the provisions of subsection 14(1) or (2)?

B. If the answer to Issue "A" is in the affirmative, whether the head has properly exercised his discretion under subsection 14(3) to refuse to confirm or deny the existence of the record requested.

C. Whether there has been any procedural or substantive error in the decision-making process.

Before dealing with the above-noted issues, it is important to emphasize at the outset that the appellant's request for record(s) is a narrow one and confined only to "all files on the appellant in the OPP Criminal Intelligence Records from 1967 - 1988 inclusive." The request does not extend to all records relating to the appellant in the custody or under the control of the institution. Thus, the institution's refusal to confirm or deny the existence of such a record relates only to the appellant's narrow request and does not extend to records, if

any, relating to the appellant which do not fall within the category of "OPP Criminal Intelligence Records."

Issue A: Could disclosure of a record, such as the one requested, be refused under the provisions of subsections 14(1) or (2)?

Subsections 14(1) and (2) read as follows:

> 14.-(1) 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;
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (d) 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;
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> (f) deprive a person of the right to a fair trial or impartial adjudication;
>
> (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
>
> (h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;

(i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

(j) facilitate the escape from custody of a person who is under lawful detention;

(k) jeopardize the security of a centre for lawful detention; or

(l) facilitate the commission of an unlawful act or hamper the control of crime.

(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;

(b) that is a law enforcement record where the disclosure would constitute an offence under an Act of Parliament;

(c) that is a law enforcement record where the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability; or

(d) that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority.

The "OPP Criminal Intelligence Records" are records relating specifically to police investigations. Disclosing the contents of such records could, for example, "interfere with a law enforcement matter", "interfere with an investigation", "reveal law enforcement intelligence information respecting

organizations or persons" or reveal the contents of a "report prepared in the course of law enforcement, inspections or investigations".

Based on the representations made by the institution regarding the nature and general content of such records, I am satisfied that if such a record relating to the appellant existed, access to the record could be refused by the head under either subsection 14(1) or (2) of the Act.

Accordingly, the answer to Issue "A" is in the affirmative.

Issue B: If the answer to Issue "A" is in the affirmative, whether the head has properly exercised his discretion under subsection 14(3) to refuse to confirm or deny the existence of the record requested.

Subsection 14(3) reads as follows:

> "A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) apply".

Subsection 14(3) provides the head with the discretion to refuse to confirm or deny the existence of a record, if it has been established that either subsection 14(1) or (2) apply to a record. In dealing with Issue "A", I found that disclosure of the record, if it existed, could be denied under either subsection 14(1) or 14(2).

In any case in which the head has exercised his/her discretion and refused to confirm or deny the existence of a record, I look very carefully at the manner in which the head has exercised this discretion. Provided that this discretion has been exercised in accordance with established legal principles, in my view, it should not be disturbed on appeal. The head has

provided me with sufficient information in his representations to satisfy me that, in the circumstances of this case, the discretion accorded to the head has been exercised in accordance with these principles and, therefore, the head's decision should not be disturbed.

My answer to the question posed in Issue "B" is also in the affirmative.

Issue C: Whether there has been any procedural or substantive error in the decision-making process.

The appellant, through his counsel, has raised a number of concerns relating to the manner in which the institution responded to his request and the conduct of this appeal. These concerns are set out below and I will deal with them in the order in which they appear:

1. The delegation of the head's authority.
2. The time within which the response to the original request was given.
3. The propriety of an inquiry concerning the application of the Act to a record when the appellant has not been informed whether or not a record exists.
4. The possible infringement of the appellant's rights under the Canadian Charter of Rights and Freedoms.

1. The delegation of the head's authority.

In his submissions, the appellant objected to the fact that the decision to refuse to confirm or deny the existence of the record was not made by a "head" as defined in

subsection 2(1) of the Act, but by another individual. The appellant stated that "(T)here is no provision for the delegation of such a position to anyone else under the Act".

Subsection 62(1) of the Act reads as follows:

> "A head may in writing delegate a power or duty granted or vested in the head to an officer or officers of the institution subject to such limitations, restrictions, conditions and requirements as the head may set out in the delegation."

The appellant has provided no argument or evidence to indicate why the provisions of subsection 62(1) do not apply in this case. I have reviewed the written delegation of authority from the head to the individual who made the decision, and I see nothing improper or inadequate in that delegation.

2. The time within which the response to the original request was given.

The appellant submits that the institution did not respond to the original request in the time authorized by the Act, because the decision was not made by a "head" as defined in subsection 2(1). As I have stated above, the Co-ordinator (the individual who made the decision) was duly authorized to make the decision.

The request giving rise to this appeal was received by the institution on June 16, 1988 (although the request was

dated May 17, 1988). The institution's response was dated June 21, 1988, and I find that this response constituted a notice of decision well within the thirty day limit imposed by section 26 of the Act.

3. The propriety of an inquiry concerning the application of the Act to a record when the appellant has not been informed whether or not a record exists.

The appellant raises a number of objections concerning the conduct of an inquiry in circumstances in which the subject of the inquiry is a record the very existence of which will not be confirmed or denied to the appellant. The appellant questions how I could be satisfied that a record "the existence of which won't even be confirmed or denied by the Ministry falls within one of the specified exemptions". He goes on to suggest that the situation offends the principle of the right to be heard, and that the legislation is "inadequate".

I do not find any merit in these objections. In the circumstances of this appeal and indeed, all appeals under the Act, the subject matter of the dispute -- i.e., the record or, as in this case, whether or not a record exists -- cannot be revealed to the appellant without rendering the appeal moot. In cases in which the existence of a record is neither confirmed or denied, my authority to conduct an inquiry is nonetheless valid. The head has still to satisfy me as to whether or not a record exists and whether or not it, or a record like it if the requested record doesn't exist, falls within the exemption cited. If

the head chooses to refuse to confirm or deny the existence of the record to the appellant under either subsections 14(3) or 21(5) the head must satisfy me that he/she has properly exercised the discretion granted by subsection 14(3) or 21(5). If a record, such as the one requested, does not exist, examples of the type of record sought are examined and considered by my office in order that the application of subsection 14(3) or 21(5) of the Act, to that type of record, may be evaluated.

Obviously, in this appeal, the appellant cannot be told whether or not the record he is seeking exists but, in my view, this does not hamper his ability to argue on appeal that the type of record he is seeking should be released.

4. The possible infringement of the appellant's rights under the Canadian Charter of Rights and Freedoms.

The appellant submits that his rights under sections 7, 8 and 15 of the Canadian Charter of Rights and Freedoms have been infringed.

The appellant further submits that the very refusal to confirm
or deny the existence of a record constitutes a denial of his right to privacy under sections 7 and 8 of the Charter, in that, it prevents him from ascertaining whether any breach of his right to privacy has occurred. In effect, this submission challenges the constitutionality of the statutory provision on which the refusal was based, by reason of the application of the Charter.

I have reviewed several court decisions that address the issue of the jurisdiction of an administrative tribunal to determine constitutional issues. These decisions reach different conclusions (see for example, Cuddy Chicks Limited v. Ontario Labour Relations Board et al, (unreported decision, September 8, 1989, Ontario Court of Appeal) and Guy Poirier v. Minister of Veterans Affairs, Federal Court of Appeal, (unreported decision, March 29, 1989, document number A-659-88)).

In my view, even if I were to conclude that I have the jurisdiction to hear and determine a Charter challenge to the validity of provisions of the Act, I would have to be convinced by a clear and compelling argument that the section the appellant seeks to impugn is, in fact, inconsistent with the Charter.

The section that the appellant seeks to challenge is part of a comprehensive statutory scheme. Given the unique nature of the subject matter addressed by the Act, the role of an independent Commissioner is an integral part of this scheme. It is an important part of the role of the Commissioner to ensure that the potential abuses the appellant has referred to do not occur. To that end, the Commissioner has the statutory authority to make a binding Order in an appeal and has other significant powers with respect to the conduct of an inquiry under section 52 of the Act. These powers include the ability to require production and examination of any record in the custody or control of an institution and the right to enter the premises of an institution.

I have considered the appellant's submissions with respect to the applicability of the Charter, and I am not convinced that the ability of a head to refuse to confirm or deny the existence of a record pursuant to subsection 14(3) is in conflict with any Charter provision.

In conclusion, I uphold the head's decision to refuse to confirm or deny the existence of a record.

Original signed by: October, 24, 1989

Sidney B. Linden Date
Commissioner