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

ORDER 124

Appeal 880124

Ministry of the Attorney General

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

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) of the Act, a right to appeal any decision of a head 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 20, 1987, the requester filed a written request with the Ministry of the Attorney General (the "institution") for "[T]he O.P.P. report into allegations of illegal actions by Metro Toronto Police and the RCMP in the early seventies concerning the break-in at the Toronto offices of the then Praxis Corporation, a research organization."

2. After extending the time limit in order to conduct further consultations, the institution wrote to the requester on May 2, 1988, advising him that access to the records was denied for the following reasons:

   a) subsection 21(1),(3)(b), d, f, g and h, as disclosure would constitute an unjustified invasion of personal privacy;

   b) subsection 14(1)d and 14(1)g as disclosure would reveal the identity of a confidential source of information in respect of a law enforcement

matter and reveal law enforcement intelligence information respecting organizations or persons;

c) subsections 14(2)a as the record is a report prepared in the course of law enforcement;

d) subsection 22(a) as the information is currently available to the public.

3. By letter dated May 4, 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 reviewed by an Appeals Officer, and attempts were made to mediate a settlement between the parties. During mediation the institution raised subsections 13(1), 14(1)(c), 14(1)(e), 15(a) and 15(b) as additional exemptions being relied on to deny access.

5. Settlement efforts were unsuccessful, as both parties retained their respective positions.

6. By letter dated October 18, 1988, I advised the appellant and the institution that I was conducting an inquiry to review the decision of the head. Enclosed with this letter was a copy of an Appeals Officer's Report, 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. In this case, the Appeals Officer's Report also advised the appellant of the

additional exemptions raised by the institution during the mediation stage.

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. The report is sent to all persons affected by the subject matter of the appeal, in this case, the appellant and the institution.

7. On October 31, 1988, I wrote to both parties inviting them to provide me with written representations. I have received representations from both the institution and the appellant and have considered them in making my Order.

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 from the right of access should be limited and specific. Subsection 1(b) sets out the counterbalancing 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 the burden of proof that the record falls within one of the specified exemptions in this Act lies upon the head.

The records at issue in this appeal consist of the following:

Record #1 A report prepared by the Ontario Provincial Police concerning Praxis Corporation;

Record #2 The text of a speech made by the Solicitor General of Canada to the House of Commons in October 1977 (and covering memorandum);

Record #3 Excerpts from the RCMP regulations manual and the Report of the Royal Commission on Security; and

Record #4 The transcript of an interview conducted by the OPP with an RCMP officer concerning the availability of RCMP reports.

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)(c), (d), (e), (g) or 14(2)(a) of the Act.

B. Whether any of the records are properly exempt from disclosure pursuant to subsections 15(a) or (b) of the Act.

C. Whether any of the records are properly exempt from disclosure pursuant to subsection 22(a) of the Act.

D. Whether any of the records are properly exempt from disclosure pursuant to subsection 13(1) of the Act.

E. Whether any of the records at issue are properly exempt from disclosure pursuant to subsection 21(1) of the Act.

F. If any of Issues A, B, C, D or E are answered in the affirmative, whether any exempt records can reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under an exemption.

G. Whether there is a compelling public interest in disclosure of the records exempted under sections 13, 15 and 21 that clearly outweighs the purpose of the exemptions, as provided by section 23 of the Act.

Before dealing with the substantive issues raised in this appeal, I want to touch briefly on an objection raised by the appellant regarding the institution's introduction of additional exemptions during the course of the appeal. I have dealt with this matter in previous Orders and remain of the view that, in appropriate circumstances and with sufficient notice to the appellant, the Act does not preclude an institution from raising additional exemptions following the initiation of an appeal. In this case, the appellant was provided with notice of the additional exemptions and given an opportunity to address them in his representations. Although it is clearly preferable for all relevant exemptions to be identified by the institution and outlined in the section 26 notice to the appellant denying access, I am prepared to consider the possible application of the additional exemptions claimed by the institution in the circumstances of this appeal.

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

The institution has raised section 14 as the basis for denying access to Records #1 and #4. Having reviewed these two records, in my view, Record #4 is more appropriately discussed in the context of section 15 of the Act, and I will restrict my discussion of Issue A to Record #1, the Ontario Provincial Police Report on Praxis Corporation.

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

> 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;

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

> 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.

I have examined Record #1 and, in my view, it fits squarely within the scope of subsection 14(2)(a). Consequently, it is properly exempted by the head in its entirety under the provisions of this subsection.

Having found that Record #1 meets the requirements for exemption under subsection 14(2)(a), it is not necessary for me to consider the possible application of subsections 14(1), (c), (d), (e) or (g).

ISSUE B: Whether any of the records are properly exempt from disclosure pursuant to subsections 15(a) or (b) of the Act.

The institution has relied on subsections 15(a) and (b) of the Act to exempt Record #4, the transcript of an interview of an RCMP officer conducted by OPP officers concerning the availability of RCMP reports.

Subsections 15(a) and (b) read as follows:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
>
> (b) reveal information received in confidence from another government or its agencies by an institution;
>
> ...

In its representations the institution submitted that the interview (and by necessary implication the transcript of that interview) was provided to the OPP with the expectation that the contents would remain confidential, and therefore meets the requirements for exemption under subsection 15(b). In support of this position the institution points out that certain conditions were imposed during the course of the interview in the interests of national security. The institution also raised the fact that Record #1, the OPP report, which was based in part on the interview provided by the RCMP officer, is clearly marked "secret and confidential", and argued that it is reasonable to conclude that the same expectation of confidentiality applies to Record #4.

The institution also submitted that the release of Record #4 would "prejudice future communications and dealings" between Ontario's Ministries of the Solicitor General and the Attorney General and the Federal Solicitor General, and therefore qualifies for exemption under subsection 15(a).

Having reviewed the contents of Record #4 and considered the representations of both parties, in my view, the requirements for exemption under subsection 15(a) have not been established by the institution. However, I am satisfied that this record is properly exempt under subsection 15(b), in that its disclosure "could reasonably be expected to reveal information received in confidence from another government or its agencies by an institution". Subject to the possible application of the severence provisions of subsection 10(2) of the Act discussed below, I uphold the head's decision to deny access to Record #4.

ISSUE C: Whether any of the records are properly exempt from disclosure pursuant to subsection 22(a) of the Act.

Subsection 22(a) has been raised by the institution as the basis for refusing to disclose Records #2 (the speech of the Solicitor General) and #3 (the excerpts from the RCMP manual and the Report of the Royal Commission on Security).

Subsection 22(a) reads as follows:

> A head may refuse to disclose a record where,
>
> (a) the record or the information contained in the record has been published or is currently available to the public;

...

Having reviewed the contents of Record #2 (the draft text of the Solicitor General's speech and the covering memorandum), in my view, it is unlikely that actual record itself was ever made available to the public. However, because the institution has claimed no other exemptions with respect to this record, I must assume that the head determined that the actual speech delivered by the Solicitor General in the House of Commons and the contents of Record #2 were sufficiently similar to be considered as the same record. In my view, the fact that "information contained in the record" has been published in Hansard is sufficient to meet the requirements for exemption under subsection 22(a).

The institution did not address Record #3 in its representations, however, in my view, it is clearly a record that "has been published" and therefore also qualifies for exemption under subsection 22(a).

Although I have found that subsection 22(a) applies to Records #2 and #3, I nevertheless find that the head's response to the appellant in this case was inadequate. Whenever an institution relies on subsection 22(a), the head has a duty to inform the requester of the specific location of the records or information in question. The head did not properly discharge his responsibility in this case, and, accordingly, I order the head to provide the appellant with information sufficient to identify the precise location of Records #2 and #3.

Having determined in my discussion of Issues A, B and C that all records at issue in this appeal are exempt in their entirety there is no need for me to consider Issues D and E.

ISSUE F: If any of Issues A, B, C, D or E are answered in the affirmative, whether any exempt records can reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under an exemption.

The only record subject to consideration of the severability provisions of subsection 10(2) is Record #4, the interview transcript, found to be exempt under subsection 15(b).

Subsection 10(2) provides:

> Where an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

In my Order 24 (Appeal Number 880006), dated October 21, 1988, I established the approach which should be taken when considering the severability provisions of subsection 10(2). At page 13 of that Order I state:

> ...it is not reasonable to require a head to sever information from a record if the end result is simply a series of disconnected words or phrases with no coherent meaning or value. A valid subsection 10(2) severance must provide the requester with information that is in any way responsive to the request, while at the same time protecting the confidentiality of the portions of the record covered by the exemption.

I have reviewed the contents of Record #4 and, in my view, no information that is in any way responsive to the appellant's request could be severed from the document and provided to the appellant without disclosing "information received in confidence from another government or its agencies by an institution", as outlined in the subsection 15(b) exemption.

ISSUE G: Whether there is a compelling public interest in disclosure of the records exempted under sections 13, 15 and 21 that clearly outweighs the purpose of the exemptions, as provided by section 23 of the Act.

As in Issue F, above, Record #4 which I have found to be exempt under subsection 15(a), is the only record subject to consideration under section 23 of the Act.

The appellant submitted that Record #1, which was exempted by the institution under subsection 14(2)(a), should also be considered in the context of section 23. He argued that "the section 23 test should not be ruled out for exemptions 12/14/16/19 because they are not explicitly ruled out...". I do not agree with the appellant's submission. In my view, a plain reading of section 23 leaves no doubt that sections 12, 14, 16 and 19 are not included within the ambit of this section.

Section 23 of the Act reads as follows:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

I considered the proper interpretation of section 23 in my Order 61 (Appeal Number 880166), dated May 26, 1989, and found that two requirements must be satisfied in order to invoke the application of the so-called "public interest override". As stated at page 11 of that Order:

> ...there must be a compelling public interest in disclosure and this compelling public interest must clearly outweigh the purpose of the exemption, as distinct from the value of disclosure of the particular record in question (emphasis added).

Although the Act is silent as to who bears the burden of proof in respect of section 23, as I have stated in a number of orders, in my view it is a general principle that a party that is asserting a right or a duty has the onus of proving its case, and therefore the burden of establishing that section 23 applies is on the appellant.

As far the records at issue in this appeal are concerned, the institution submitted that no compelling public interest has been demonstrated and that section 23 should not apply.

The appellant submitted that section 23 adds to the detailed balancing of public versus private interests as set out in the Act and, because an "out of court settlement [in this case] put matters beyond the public's right to know", there is a compelling public interest in disclosure.

Having reviewed the contents of Record #4 and considered the submissions of the appellant, I have reached the conclusion that the circumstances of this case are not sufficient to invoke the application of section 23.

All records requested by the appellant in this appeal relate to the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, headed by Mr. Justice D.C. McDonald. This Commission held extensive public hearings and presented a detailed report to the House of Commons. A great deal of information about the conduct of RCMP affairs was released to the public during the course of the Royal Commission's investigation and, in my view, the public's interest in the subject matter of the Commission's review has been adequately and properly served without the release of Record #4 in this appeal.

In summary, my Order is as follows:

1. I uphold the decision of the head to exempt Records #1, #2, #3 and #4 from disclosure.

2. I Order the head to provide the appellant with sufficient information to identify the precise location of Records #2 and #3, or the information contained in these records, within twenty (20) days of the date of this order. The institution is further ordered to advise me in writing, within five (5) days of the date of notification, of the date upon which this information has been conveyed to the appellant.

Original signed by:
Sidney B. Linden
Commissioner

November 24, 1989
Date