



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

# ORDER P-225

Appeal 890403

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/Télééc: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## O R D E R

### INTRODUCTION:

On November 1, 1989, a request was submitted to the Ministry of the Attorney General (the "institution") under the Freedom of Information and Protection of Privacy Act, 1987, as amended (the "Act"). The requester sought access to:

Report of audit done by Jim Malcolm on management practices of former Ottawa-Carleton Sheriff [Named Individual]. The audit was conducted from on or about June 22, 1989 to Sept. 1, 1989, when report was submitted to the Attorney General.

1. Request copy of report [Institution's file 890183].
2. Request copies of documents obtained by Mr. Malcolm during audit [Institution's file 890184].
3. Request copies of any memorandums after Sept. 1, 1989 from Douglas Hunt, assistant deputy Minister [sic] for criminal law pertaining to report, including recommendations on action to be taken [Institution's file 890185].

By letters dated December 4, 1989, the institution responded to requests 890183 and 890184. In response to request 890183, the institution denied access to the entire record relying on subsections 13(1), 14(1)(a), and 14(1)(b) and section 21 of the Act. In response to request 890184, the institution denied access to the entire record relying on subsections 14(1)(a) and 14(1)(b) and section 21 of the Act.

On December 7, 1989, the requester appealed the decisions of the institution pursuant to subsection 50(1) of the Act. This section 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 of an institution to the Commissioner.

In his letter of appeal the appellant stated:

I respectfully request a review of the decision by the Ministry of the Attorney General dated 4 December 1989 refusing access request dated 1 November 1989.

The material sought was a copy of a report done on the management practices of the Ottawa-Carleton Sheriff [Named Individual] and documents obtained during the course of the audit.

The grounds cited in rejecting access request are that disclosure would interfere with possible law enforcement action, invade privacy of unnamed persons and disclose the advice given by a public servant.

To date, no charges have been laid in this case, although police were investigating. There is no evidence to suggest charges ever will be laid or that publication would interfere with law enforcement if such action was taken.

Privacy considerations are frequently dealt with by blacking out names or other information that might tend to identify innocent or uninvolved persons.

The public has a right to know exactly what advice was given to the government vis-a-vis a matter of obvious public importance.

On January 3, 1990, notice of the appeal was given to the institution and the appellant. In accordance with the usual practice, the appeal was assigned to an Appeals Officer who

contacted the institution's Freedom of Information and Privacy office in order to obtain a copy of the records, an index of exemptions claimed for the records and to discuss possible mediation of the appeal.

On February 2, 1990, the Appeals Officer contacted the appellant to inquire whether he had received a decision regarding his request 890185. The appellant advised the Appeals Officer that he had

received a letter dated December 4, 1989 from the institution, advising that "no record exists". The appellant appealed that decision and an appeal file was opened. However, this Order addresses only the appeal by the appellant from the institution's responses to requests 890183 and 890184.

On January 11, 1990, the institution forwarded the records to the Appeals Officer. On April 17, 1990, the institution forwarded indices outlining the exemptions it claimed for the records which responded to requests 890183 and 890184.

The record which responds to request 890183 consists of a title page, index, executive summary, recommendations, background on the investigation, summary of the OPSEU allegations and a separate discussion of and conclusions about each allegation. The record also contains the following nine appendices:

- I OPSEU Representative's notes
- II Sheriff's suspension letter
- III Mr. Malcolm's appointment letter
- IV List of individuals interviewed
- V Employee interview outline
- VI Sheriff interview outline

- VII List of individuals with a non-work relationship to the Sheriff prior to employment
- VIII Audit report to the OMB panel from the Ministry of the Attorney General, Audit Branch team
- IX Notes from Administrator, Provincial Court, Family Division, Ministry of the Attorney General and Regional Director, Eastern Region, Ministry of the Attorney General.

The record which responds to request 890184 consists of Appendices I, VIII and IX of the record which responds to request 890183. Accordingly, I will not deal with the record which responds to request 890184 separately.

As mediation was unsuccessful, the appeal proceeded to inquiry.

Notice that an inquiry was being conducted to review the decisions of the head was sent to the appellant and the institution. Enclosed with each notice letter was a report prepared by the Appeals Officer which is intended to assist the parties in making their representations concerning the subject matter of the appeals. 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. The Appeals Officer's Report indicates that the parties, in making representations, need not limit themselves to the questions set out in the Report.

On September 26, 1990, written representations were received from the institution in which it added subsections 14(1)(d), (f) and 14(2)(a) of the Act as a basis for not disclosing the requested record. The appellant did not provide any

representations in response to the Notice of Inquiry and Appeals Officer's Report.

On November 19, 1990, a letter was sent to the appellant asking two further questions and inviting him to provide representations in response. On December 10, 1990, the appellant advised the Appeals Officer by telephone that he would not be providing further representations.

I have considered the institution's representations, the record and correspondence in the appeal file in making this Order.

**BACKGROUND:**

On June 19, 1989, a representative of the Ontario Public Service Employees Union ("OPSEU") (Ottawa office), presented to the institution's Regional Director, Eastern Region, Courts Administration Division, and the Manager of Staff Relations, Human Resources Branch, allegations of impropriety concerning the conduct

of the Sheriff<sup>0</sup> of Ottawa-Carleton and his management of the office. The Sheriff was immediately suspended with pay, pursuant to subsection 22(1) of the Public Service Act pending an investigation of the allegations. By letter dated June 20, 1989, Ross Peebles, then Assistant Deputy Attorney General, Courts Administration, appointed Jim Malcolm, Secretary and Chief Administrative Officer, Ontario Municipal Board, to conduct an investigation into the allegations against the Sheriff. The investigation commenced June 22, 1989.

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<sup>0</sup> For purposes of clarity, the Sheriff referred to in this Order is the Sheriff who occupied that office on June 19, 1989.

During the investigation, 45 persons were interviewed including members of the Sheriff's permanent staff, former employees of the Sheriff's office, individuals from other court offices, and others. As a result of the investigation, a report was prepared by Mr. Malcolm entitled "Report on the Conduct of [Named Individual] Sheriff for the Judicial District of Ottawa-Carleton".

The Report is based on interviews conducted by a panel from the OMB, an audit report prepared by the institution's Audit Branch and a memorandum prepared by senior personnel of the institution containing both observations and comments on the Sheriff's office. The Report was submitted to the then Deputy Attorney General on August 31, 1989.

**PURPOSES OF THE ACT/BURDEN OF PROOF:**

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.

Further, section 53 of the Act provides that the burden of proof that a record, or part thereof, falls within one of the specified exemptions in the Act lies with the head of the institution.

**ISSUES/DISCUSSION:**

The issues arising in this appeal are as follows:

- A. Whether the head properly applied the discretionary exemption provided in section 14 of the Act.
- B. Whether the head properly applied the discretionary exemption provided in subsection 13(1) of the Act.
- C. Whether the information contained in the record qualifies as "personal information" as defined by subsection 2(1) of the Act.
- D. If the answer to Issue C is in the affirmative, whether the exemption provided by section 21 of the Act applies.
- E. Whether the record could reasonably be severed pursuant to subsection 10(2) of the Act without disclosing the information that falls under an exemption.

**ISSUE A: Whether the head properly applied the discretionary exemption provided in section 14 of the Act.**

The head claimed subsections 14(1)(a), (b), (d), (f) and 14(2)(a) of the Act as the basis for denying access to the entire record. These subsections read as follows:

- (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;
  - (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;

- (f) deprive a person of the right to a fair trial or impartial adjudication;

(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;

The words "law enforcement" are defined in subsection 2(1) of the Act as follows:

In this Act,

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b);

In its representations, the institution stated that as a result of allegations made against the Sheriff the then Assistant Deputy Attorney General requested that Mr. Malcolm of the Ontario Municipal Board conduct an investigation and prepare a

report. The results of that investigation are contained in the record.

The institution advised the Appeals Officer that in October of 1989, the Report of Mr. Malcolm was given to the Ontario Provincial Police which began its own investigation. In its representations, the institution stated that on August 22, 1990, the Sheriff was charged pursuant to section 122 of the Criminal Code. The institution further stated that the Sheriff "will be tried for this offence in due course and this trial constitutes a 'law enforcement' matter or proceeding."

It is clear that upon a finding of guilt under section 122 of the Criminal Code a penalty or sanction is levied. Accordingly, I am satisfied based on a plain reading of the definition of "law enforcement" cited above, that the circumstances surrounding the creation of the record, including the OMB investigation, the Ontario Provincial Police investigation and the laying of charges, can be described as a "law enforcement" matter or proceeding. Further, in my view, the definitional threshold of "law enforcement" in subsections 14(1)(a), (b) and (d) protecting "law enforcement matters", "law enforcement proceedings" and "confidential sources of information in respect of law enforcement matters" respectively, has been satisfied.

I must now decide whether the disclosure of the record at issue in this appeal, could reasonably be expected to result in one of the harms specified in subsection 14(1)(a), (b), (d) or (f) of the Act, as claimed by the institution.

The institution in its representations stated that:

The Report consists of an in-depth examination and analysis of the very matters that are the subject of the charge laid against [Named Individual]. Evidence about each allegation is collected, analyzed and a conclusion is reached. Considerable detail about the allegations of misconduct can be found in the Report....

A good deal of the evidence that may be presented at trial can be found in the Report and its Appendices... This could result in influencing the testimony of witnesses at the trial and, if the information were widely disseminated, could even make the selection of a jury more difficult.

Further, the institution stated that the record contains the identities and statements of individuals who may have benefitted by the Sheriff's misconduct and accordingly are potential witnesses at trial. As well, the institution submitted that the release of the Report may affect the Sheriff's "constitutionally-protected right to make full answer and defence at a fair trial."

At page 11 of Order 188 (Appeal Number 890265), dated July 19, 1990, I stated:

It is my view that section 14 of the Ontario Act similarly requires that the expectation of one of the enumerated harms coming to pass, should a record be disclosed, not be fanciful, imaginary or contrived, but rather one that is based on reason. An institution relying on the section 14 exemption, bears the onus of providing sufficient evidence to substantiate the reasonableness of the expected harm(s) by virtue of section 53 of the Act.

In my opinion, the institution in this case has provided sufficient evidence to establish that the disclosure of the record could reasonably be expected to interfere with a law enforcement matter pursuant to subsection 14(1)(a) of the Act.

It is clear that this matter will be prepared for trial which necessarily includes making

use of the record at issue in this appeal, conducting further investigations and interviewing all potential witnesses listed in the record. In my view, a premature disclosure of the record could reasonably be expected to interfere with the preparation of this matter for trial.

Section 14 of the Act provides the head with the discretion to disclose a record even if it meets the test for an exemption. In the circumstances of this appeal I find nothing improper in the way in which the head has exercised his discretion.

As an aside, it is worthwhile noting that information which has already been filed with the court is a matter of public record.

Because I have found that the exemption provided by subsection 14(1)(a) applies to the record at issue in this appeal, it is not necessary for me to consider the application of the other exemptions that were raised by the institution.

**ORDER:**

I uphold the head's decision to withhold the record at issue in this appeal.

Original signed by: \_\_\_\_\_  
Tom A. Wright  
Assistant Commissioner

March 18, 1991  
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Date