Information and Privacy
Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER 158

Appeal 890266

Ministry of the Attorney 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 personal information under subsection 48(1) a right to appeal any decision of a head under the Act to the Information and Privacy Commissioner.

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

1. On June 27, 1989, the requester wrote to the Ministry of the Attorney General (the "institution") and requested access to:

> "All information, documents and correspondence related directly or indirectly to the case Regina v. [name of appellant] in the period of time from June 11, 1986 to May 31, 1989."

2. On July 26, 1989, the institution's Freedom of Information and Privacy Co-ordinator (the "Co-ordinator") responded to the requester by providing partial access to the requested records. Access to certain records was denied pursuant to subsections 14(2)(a), 15(a), 19 and 21 of the Act. At the same time, the Co-ordinator advised the requester that the interests of a third party might be affected by the request and that a decision respecting disclosure of this third party information would be forthcoming.

3. On August 22, 1989, the requester wrote to me appealing the institution's decision and I gave notice of the appeal to

the institution on August 24, 1989.

4. On August 23, 1989, the Co-ordinator wrote the requester to advise that access to the third party information was denied pursuant to subsections 17(1) and 18(2)(a) of the Act.

5. On September 21, 1989, the requester wrote to me to appeal the decision of August 23, 1989.

6. The Appeals Officer assigned to this case reviewed the institution's file and discussed with a representative of the institution the nature and application of the various exemptions cited by the institution to deny access. The Appeals Officer also spoke with the appellant and discussed his concerns. In the course of this telephone conversation, the appellant indicated that he was interested in viewing records respecting three specific concerns which he discussed with the Appeals Officer. The appellant indicated that he was not interested in viewing records outside the scope of these three concerns.

7. The Appeals Officer again attended at the institution to review the records and identified seven records which appeared to be responsive to the appellant's concerns. All of these records had been exempted from disclosure pursuant to section 19 of the Act.

8. In an effort to effect a settlement, the Appeals Officer asked an official of the institution to speak to her colleagues in order to determine whether the head might reconsider his decision in respect of the seven records, given the discretionary nature of section 19 of the Act.

As a result of this exercise, the official with the institution expressed the view that two of the seven records might be released to the appellant. However, upon contacting the Royal Canadian Mounted Police (the "RCMP") for the purposes of obtaining their consent to the disclosure of these records, it was determined that neither of the two records could be released. Moreover, it was determined that subsections 14(2)(a), 15(a) and 15(b) of the Act applied to exempt these two records from disclosure, in addition to section 19 of the Act. The appellant was advised by the institution of these additional grounds for exemptions.

9. As settlement of the issues arising in this appeal was not possible, I sent notices to the appellant and the institution that I was conducting an inquiry to review the decision of the head. Enclosed with these letters was a copy of 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. The Appeals Officer's Report indicates that the parties, in making their representations to the Commissioner, need not limit themselves to the questions set out in the report.

10. Representations were received from both parties and I have considered them in making my Order.

11. In his written representations, the appellant raised a number of additional concerns. One of these concerns related to an allegation of unauthorized disclosure of the appellant's personal information by the institution to a third party. This allegation is presently under investigation by the Compliance Branch of my Office and will be the subject of a future report. The allegation will not be addressed in this Order.

    Further, the appellant questioned whether other specific information or records, apart from the seven records which the Appeals Officer considered to be responsive to his previously raised concerns, might exist.

12. On January 9, 1990, the Appeals Officer attended at the institution to review the file containing the seven previously identified records. This review did not result in the identification of any additional records which might have contained the information sought by the appellant. Nevertheless, the Appeals Officer asked an official with the institution to speak with her colleagues with a view to determining whether anyone might have knowledge of the requested information and, if so, whether the institution would be prepared to produce a record or otherwise disclose the information to the appellant.

13. On January 29, 1990, the official with the institution advised the Appeals Officer that no one within the institution was able to provide the requested information.

The following records are at issue in this appeal.

- a "Continuation Report" from the RCMP to Crown Counsel dated March 18, 1988 (exemption claimed pursuant to subsections 14(2)(a), 15(a), 15(b) and 19 of the Act).

- a "Transit Slip" from the RCMP to Crown Counsel dated May 16, 1988 (exemption claimed pursuant to subsections 14(2)(a), 15(a), 15(b) and 19 of the Act).

- a memorandum to the Deputy Attorney General from the Deputy Director of Crown Attorneys dated June 15, 1987 (exemption claimed pursuant to section 19 of the Act).

- a memorandum to the Deputy Director of Crown Attorneys from Crown Counsel dated June 9, 1987 (exemption claimed pursuant to section 19 of the Act).

- a letter to Crown Counsel from the Deputy Crown Attorney dated May 25, 1987 (exemption claimed pursuant to section 19 of the Act).

- a letter to Crown Counsel from counsel representing the Appellant's former employer dated May 13, 1987 (exemption claimed pursuant to section 19 of the Act).

- a letter to the Director of the Crown Law Office, Criminal, from the RCMP dated April 6, 1987 (exemption claimed pursuant to section 19 of the Act).

The issues arising in this appeal are as follows:

A. Whether the information contained in the records qualifies as "personal information" as defined by subsection 2(1) of the Act.

B. Whether any of records would fall within the exemptions provided by sections 14, 15 and 19 of the Act.

C. If the answer to Issue B is in the affirmative, whether the exemption provided by subsection 49(a) of the Act applies, in the circumstances of the appeal.

D. Whether additional records exist in the custody or under the control of the institution which may be responsive to the request.

E. Whether subsection 29(1)(b)(ii) of the Act requires a head of an institution to do more than quote the section of the Act when giving reasons as to why a particular record is exempt from disclosure.

Before beginning my discussion of the issues arising in this appeal, I think it would be helpful to refer to the general principles contained in the Act, and to provide some background information regarding the creation of the records which are under discussion.

Subsection 1(a) of the Act 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 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.

It should also be noted that section 53 of the Act provides that the burden of proof that a record or part of a record falls within one of the specified exemptions lies upon the head.

By way of background, it is apparent from the file containing the records at issue in this appeal that the appellant had been charged with an offence under the Criminal Code of Canada. During the course of the criminal investigation leading up to the charge, a video tape and an audio tape of a transaction between the appellant and a third party was recorded by the RCMP.

At a preliminary inquiry in February, 1987, a Provincial Court Judge ruled that the video tape was inadmissible as evidence and, as a result, the charge against the appellant was dismissed. Subsequently, the Crown Attorney obtained the consent of the Attorney General to prefer an indictment. During the course of the ensuing prosecution, the appellant pleaded guilty to the offence and received a suspended sentence. As a result, there was no trial. According to the appellant, he was induced into pleading guilty to the offence upon the Crown's insistence that the video tape was admissible evidence.

In a telephone conversation with the Appeals Officer, the appellant expressed concerns about the accuracy of events reportedly recorded by the video and audio tapes. The appellant expressed an interest in viewing records respecting the following concerns:

1. Communications between the Attorney General and the appellant's former employer and/or the RCMP regarding the editing of the video tape.

2. Communications between the Attorney General and the appellant's former employer regarding the decision to prefer the second indictment, particularly in light of the Provincial Court Judge's earlier decision at the preliminary inquiry in February, 1987.

3. Communications between the Attorney General and the appellant's former employer regarding the testimony of witnesses.

The Appeals Officer identified the seven records listed above as being responsive to these concerns. However, it should be noted that none of the seven records appear to address the appellant's third concern.

ISSUE A: Whether the information contained in the records qualifies as "personal information" as defined by subsection 2(1) of the Act.

In Order 37 (Appeal Number 880074) dated January 16, 1989, I stated that in all cases where the request involves access to personal information it is my responsibility, before deciding whether the exemption claimed by the institution applies, to ensure that the information in question falls within the definition of "personal information" in subsection 2(1) of the Act, and to determine whether this information relates to the appellant, another individual or both.

Subsection 2(1) of the Act states:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

In my view, the information contained in each of the records at issue in this appeal falls within the definition of personal information under subsection 2(1). I find that the information contained in the records is properly considered personal information either about the appellant or about both the appellant and another individual.

Subsection 47(1) of the Act gives individuals a general right of access to:

> (a) any personal information about the individual contained in a personal information bank in the custody or under the control of an institution; and
>
> (b) any other personal information about the individual in the custody or under the control of an institution with respect to which the individual is able to provide sufficiently specific information to render it reasonably retrievable by the institution.

However, this right of access under subsection 47(1) is not absolute. Section 49 provides a number of exceptions to this general right of disclosure of personal information to the person to whom it relates.

Subsection 49(a) of the Act provides that:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> (a) where section 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information;

In this appeal the institution has claimed that sections 14, 15 and 19 of the Act apply to the records and I will consider the application of these exemptions. Although the head's letters denying access to the requested records did not refer to subsection 49(a) of the Act, the head is taken to have intended on exempting the requested records pursuant to this provision.

ISSUE B: Whether any of records would fall within the exemptions provided by sections 14, 15 and 19 of the Act.

Because each of the records at issue in this appeal have been exempted from disclosure pursuant to section 19 of the Act, I will address this exemption first.

Section 19 of the Act reads as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

In Order 49 (Appeal Numbers 880017 and 880048), dated April 10, 1989, I addressed the proper interpretation of section 19 and found as follows:

> This section provides an institution with a discretionary exemption covering two possible situations: (1) a head may refuse to disclose a record that is subject to the common law solicitor-client

> privilege; or (2) a head may refuse disclosure if a record was prepared by or for Crown counsel for use in litigation. A record can be exempt under the second part of section 19 regardless of whether the common law criteria relating to the first part of the exemption are satisfied.

In this case, the institution has relied upon the second part of section 19 in respect of each of the seven records.

In Order 57 (Appeal Number 880237), dated May 4, 1989, I stated the following:

> To meet the requirements of the second part of the section 19 exemption, the institution must establish that the record in question:
>
> (a) was prepared by or for Crown counsel; and
>
> (b) was prepared (i) for use in giving legal advice; or (ii) in contemplation of litigation; or (iii) for use in litigation.

Having reviewed the seven records at issue in this appeal, it is clear that each meets the requirements for exemption under section 19. As the general description of the records suggests, each of the records was prepared by or for Crown counsel. Further, each of the records was prepared for use in litigation which, at the time of the records' creation, had already commenced.

Accordingly, I find that the seven records at issue in this appeal would qualify for exemption pursuant to section 19 of the Act.

ISSUE C: If the answer to Issue B is in the affirmative, whether the exemption provided by subsection 49(a) of the Act applies in the circumstances of the appeal.

Subsection 49(a) of the Act provides that:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> (a) where section 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information;

I have found under Issue A that the contents of the records at issue in this appeal qualify as "personal information" about the appellant. In Issue B, I found that the records at issue in this appeal meet the criteria for exemption under section 19. The exemption provided by subsection 49(a) therefore applies and gives the head discretion to refuse disclosure.

In Order 58 (Appeal Number 880162), dated May 16, 1989, I addressed the issue of a head's exercise of discretion and my responsibility as Commissioner:

> In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the Act. While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as administrative decision-maker to ensure that the concepts of fairness and natural justice are followed.

In the circumstances of this appeal, it should be noted that the appellant has been provided with access to a large volume of records contained in the institution's file although many could

have been exempted from disclosure under section 19, if not other provisions in the Act.

In its written representations, the institution noted:

> The discretionary exemption was claimed only in the few instances where, it was determined, after consultation between Crown Counsel, that in the particular facts of this case, the requestor's general "right to know" did not override the valid policy and practical reasons for preserving confidentiality of privileged information.

In his written representations, the appellant stated "...my reputation was damaged beyond repair and my life and the life of the members of my family negatively affected to the extreme".

Having considered the written representations of the parties, I can find no basis on which to interfere with the head's exercise of discretion in the circumstances of this appeal. Accordingly, I uphold the head's decision to exempt from disclosure the seven records at issue in this appeal.

Before leaving this point, I want to make it clear that nothing in this Order is intended to affect or interfere with the procedures that exist regarding disclosure by the Crown to an accused person before the courts in a criminal matter.

ISSUE D: Whether additional records exist in the custody or under the control of the institution which may be responsive to the request.

As noted previously, the appellant raised a number of additional concerns in his written representations. Specifically, the appellant stated:

> I would like to obtain information as follows:
>
> 1) The date when the Crown Counsel received a copy of the transcript of the videotaped meeting from the R.C.M.P.
>
> 2) If there is any record of discussion between the R.C.M.P. and the Crown Counsel regarding the fact that the transcript was not available for more than 3 months since the time of the meeting.
>
> . . .
>
> I would also like to receive a copy of the letter from [a named individual] to the R.C.M.P. of April 1, 1987.

Following receipt of the appellant's representations, the Appeals Officer again attended at the institution to review its records with a view to determining if records containing this information exist. The Appeals Officer reviewed both the records to which access had been denied as well as the records to which the appellant was given access. (Upon receipt of the appellant's request, the institution provided him with the opportunity to review the non-exempted records and provided him with photocopies of those which the appellant selected.)

A copy of the transcript of the videotaped meeting is on file (and was reviewed by the appellant) but it does not denote the date on which it was received by the institution from the RCMP. Neither a date stamp nor a covering letter of transmittal was affixed to the record. The Appeals Officer was unable to discern any other record which referred to the date of receipt of the transcript. As noted previously, no one within the institution was able to provide the Appeals Officer with any knowledge as to the relevant date. Given that the date of receipt of the transcript could not be determined, the

institution was unable to confirm that "the transcript was not available for more than 3 months since the time of the meeting".

Further, the Appeals Officer was unable to identify a letter from [a named individual] to the RCMP dated April 1, 1987 or, for that matter, any other date. The Appeals Officer was advised by an official with the institution that, if such a record did exist, it would have been retained in the file from which the records at issue in this appeal were culled.

In light of the specificity of the appellant's description of this letter, I am troubled that a copy of the record does not appear to exist. However, given the fact that the Appeals Officer has now reviewed the records on three separate occasions, I am reluctantly drawn to this conclusion. The appellant has indicated that he will request the record from federal Freedom of Information authorities and I would encourage him to do so.

In my view, no additional records exist within the institution's custody or control that may be responsive to the appellant's request.

ISSUE E: Whether subsection 29(1)(b)(ii) of the Act requires a head of an institution to do more than quote the section of the Act when giving reasons as to why a particular record is exempt from disclosure.

Subsection 29(1)(b) of the Act reads as follows:

> Notice of refusal to give access to a record or a part thereof under section 26 shall set out,
>
> ...

> (b) where there is such a record,
>
> (i) the specific provision of this Act under which access is refused,
>
> (ii) the reason the provision applies to the record,
>
> (iii) the name and position of the person responsible for making the decision, and
>
> (iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

In his letter of appeal, the appellant made the following statement:

> The notice of July 25, 1989 (sic) does not comply with section (29)(1)(b)(ii) of the Act. Quoting various sections of the Act does not amount to giving "the reason the provision applies to the record".
>
> The specific provision of the Act under which access is refused was not given in the notice of July 26, 1989.

Accordingly, the parties were asked in the Appeals Officer's Report to comment on the nature of an institution's obligations under subsection 29(1)(b)(ii) of the Act. The appellant did not further address this issue in his written representations. The institution provided me with the following submission:

> It is the position of the Ministry that subsection 29(1)(b)(ii) requires that the Head must indicate the specific provision of the Act under which access is refused. For example, all of the records at issue in the appeal are refused under Section 19. Section 19 exempts a record that is subject to solicitor-client privilege or that was prepared by or for Crown Counsel for use in giving legal advice or in contemplation of or for use in litigation. Under subsection 29(1)(b)(ii), the head is required to indicate by

> which of those reasons under Section 19 the record is exempt.
>
> ...
>
> It is the position of the Ministry that the obligation imposed upon the head by subsection 29(1)(b)(ii) is to specify which of the reasons under the provision applies. In this regard, the Ministry has complied with this provision.

The Concise Oxford Dictionary, 7th edition, defines "reason" as:

> (fact adduced or serving as) motive, cause or justification.

The institution's submissions on the subject of the head's obligation to provide reasons are more appropriately applied to subsection 29(1)(b)(i) and the obligation of the institution to cite a specific provision of the Act when refusing access to a record. I find the institution's position inadequate with respect to the issue at hand; while specifying which part of a provision applies to a record is, in my view, a requirement of subsection 29(1)(b)(i), it is not the equivalent of providing the reason a provision applies to a record, as required by subsection 29(1)(b)(ii).

To a large extent, subsection 29(1)(b) of the Act reflects recommendations made by the Williams Commission in a Report entitled Public Government for Private People, The Report of the Commission on Freedom of Information and Protection of Privacy,/1980. The Commission's recommendations regarding the content of a notice of refusal when access to a record has been denied are set out in Volume 2, of the Report at p. 268:

> 1. the statutory provision under which access is refused;

2. an explanation of the basis for the conclusion that the information sought is covered by an exempting provision; (emphasis added)

3. the availability of further review and how it can be pursued;

4. the name and office of the person.

The Williams Commission went on to state at p. 268 that:

> Although the obligation to provide reasons for denials may appear to be burdensome, we believe it will be instrumental in encouraging careful determinations of decisions to deny access.

In my view, a head is required to provide a requester with information about the circumstances which form the basis for the head's decision to deny access. The degree of particularity used in describing the record at issue will impact on the amount of detail required in giving reasons, and vice versa. For example, if a record is described not in general terms, but rather as a memo to and from particular individuals on a particular date about a particular topic, then the reason the provision applies to the record could be given in less detail than would be required if the record were described only as a memo. The end result of either approach is that the requester is in a position to make a reasonably informed decision as to whether to seek a review of the head's decision.

It has been the experience of this office that the more information a requester possesses about the basis for a head's decision, the more likely a mediated settlement of the appeal can be attained. This experience reflects a comment that appears on p. 268 of the Report of the Williams Commission that "... conscientious explanations of the basis for refusal may

reduce the number of situations in which the exercise of appeal rights will be thought to be necessary".

In my view, the notice of refusal of the institution in this appeal does not meet the requirements of subsection 29(1)(b)(ii) of the Act. However, as I have dealt with the application of the exemptions to the records in issue in this appeal, I do not see any purpose that would be served by ordering the head to send a new notice of refusal to the appellant. The appellant has raised an issue of general importance to the operation of the Act and I have accepted his position with respect to the obligations of the institution under subsection 29(1)(b)(ii) of the Act.

In summary, my Order is as follows:

1. I uphold the head's decision to exempt from disclosure the seven records at issue in this appeal pursuant to section 19 of the Act.

2. I uphold the head's exercise of discretion pursuant to subsection 49(a) of the Act.

3. I find that no additional records exist within the institution's custody or control that are responsive to the appellant's request.

Original signed by: April 9, 1990
Sidney B. Linden Date
Commissioner