



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

ORDER 13

Joined Appeals Listed on Page 1

Ministry of Correctional Services



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O R D E R

These appeals were 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 to the Commissioner any decision of a head under the Act.

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

1. The Ministry of Correctional Services (the "institution") received a number of requests from correctional officers employed by the institution throughout Ontario for access to "a complete portfolio on how my and the employers contribution to the Public Service Superannuation Fund (PSSF) are actually invested".

2. The Freedom of Information Coordinator (the "Co_ordinator") for the institution replied to the appellants and advised that "neither the Ministry of Correctional Services nor the Ministry of Government Services has a record of a complete portfolio on how your and your employer's contributions to the Public Service Superannuation Fund are actually invested." However, the institution advised the appellants that it had contacted the Ministry of Treasury and Economics and obtained information about the PSSF which was forwarded to the appellant with the letter.
3. Each of the appellants sent a notice of appeal to me stating that: "I requested detailed information and a complete portfolio on my and the employers PSSF contribution. You (the institution) did not provide enough information to satisfy me."
4. Between April 23, 1988 and June 16, 1988 discussions were held between members of my staff and officials of the Ministry of Correctional Services, Management Board of Cabinet and the Ministry of Treasury and Economics to determine whether or not a record existed which might provide the information requested.
5. On July 8, 1988 I sent notice to the appellants and the institution stating that I was conducting an inquiry into this matter to review the decision of the head and requesting that written representations be made to me prior to July 28, 1988.

6. I received written submissions from the institution and from some of the appellants.

It should be noted, at the outset, that the purposes of the Act as defined in subsections 1 (a) and (b) are:

- (a) to provide 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, and,
- (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions.

In furtherance of these objectives, subsection 10(1) of the Act provides for access, subject to certain specific exemptions, to records "in the custody or under the control of an institution".

"Record" is defined in section 1 of the Act as follows:

"record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,

- (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and
- (b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any

other information storage equipment and technical expertise normally used by the institution;

The issues arising in this appeal are as follows:

- A. Whether it was necessary to reformulate the request in order to enable an experienced employee of the institution, upon a reasonable effort, to identify the record, if it exists.
- B. Whether all reasonable steps were taken by the institution to locate a record which might provide the information requested, either within the institution or in another government institution.

ISSUE A: Whether it was necessary to reformulate the request in order to enable an experienced employee of the institution, upon a reasonable effort, to identify the record, if it exists.

Subsection 24(1) of the Act requires a requester to provide sufficient detail of the record requested "to enable an experienced employee of the institution, upon a reasonable effort, to identify the record." Subsection 24(2) of the Act states that if the request does not sufficiently describe the record sought, the institution shall inform the requester of the defect and shall offer assistance in reformulating the request so as to comply with subsection 24(1).

In its representations to me, the institution states that the nature of the information sought in the request was clear (i.e., a portfolio or list of investments purchased with monies contributed to the Public Service Superannuation Fund) and the

Freedom of Information Co_ordinator for the institution saw no need to reformulate the request. I agree that it was not necessary to reformulate the request in order to identify the record, if it existed, in these circumstances.

ISSUE B: Whether all reasonable steps were taken by the institution to locate a record which might provide the information requested, either within the institution or in another government institution.

At my request, the institution provided an affidavit detailing the steps taken to locate a record to answer the appellants' request. In the affidavit the institution submits that its Co_ordinator has been employed for twelve years in "progressively responsible positions" within the institution and, as such, was able to recognize, upon receipt of the request, that the institution did not have a record containing the information requested by the appellant in its custody or control.

The institution's Co_ordinator contacted her counterparts in the Ministry of Government Services and Human Resources Secretariat to determine whether either of those institutions were in possession of the record being requested and was advised they did not. The Co_ordinator also contacted the Director of the Freedom of Information and Privacy Branch, Management Board of Cabinet to discuss the request.

The Co_ordinator states that during her discussions with various institutions she was referred to the Ministry of Treasury and Economics as the institution most likely to have the record, if

it did exist. She contacted this Ministry and was advised that a record containing the requested information did not exist.

The Co_ordinator also met with the Program Advisor of Management Services Branch of the Ministry of Treasury and Economics and the Director of the Freedom of Information and Privacy Branch of Management Board of Cabinet to discuss whether any information could be provided which would satisfy the appellants' request. Information was compiled by the Ministry of Treasury and Economics in an effort to create a record which might satisfy the requesters. This record was sent to the Co_ordinator, who forwarded a copy of it, together with a copy of an article which appeared in the February 12, 1988 edition of "Topical" (a weekly magazine distributed throughout the Ontario Government) explaining the Public Service Superannuation Fund and including part of the PSSF Board's annual report for 1986_87, to the requesters.

In my view, the institution's Co_ordinator in this case went to great lengths to attempt to satisfy the request for information received from the appellants. She knew that the Ministry of Correctional Services did not have a record that contained the information requested, but before she could transfer the request to another institution under the Act, she was required under section 25 of the Act to determine which institution, if any, did have custody or control of the record, and she had to do so within 15 days of receipt of the request.

The Co_ordinator was unable to identify an institution that had custody or control of such a record and, instead of simply advising the requesters that such a record did not exist, she tried to obtain information about the PSSF to send to them. The Co_ordinator was not obligated to "create" a record to answer

the appellants' request under the Act, but did so anyway, with the assistance of the Ministry of Treasury and Economics. The task was complicated by the fact that there were several hundred identical requests for information submitted by correctional officers working at correctional institutions throughout the Province.

The record the institution created and forwarded to the appellants in this case is a one_page document that identifies who has responsibilities related to the PSSF and the nature of those responsibilities. It also contains an explanation of what is done with the money contributed to the PSSF. In particular, this document states:

"PSSF funds are deposited into the Consolidated Revenue Fund. At the end of each fiscal year, interest is credited on these deposits. The rate is for a 25_year term, and is decided by Cabinet on the recommendation of the Treasurer; for example, the rate for 1986_87 is 10.380 percent; for 1985_86, 11.550 percent; and for 1984_85, 13.330 percent.

"The total of PSSF deposits is shown as a net balance in the Fund in Ontario's Public Accounts published each year. As a result of this deposit arrangement for PSSF monies, **there is no portfolio of marketable investments.**" (emphasis added)

The document goes on to state:

"A recent study by the Task Force on the Investment of Public Sector Pension Funds explains the operation of the PSSF and recommends changes to the current practice of 25_year loans to the Province. Copies are available from the Ontario Government Bookstore."

The full text of this document is attached as Appendix "A" to this Order.

The appellants were asked to set out the reasons for believing that the record requested (a complete portfolio showing how the PSSF is invested) actually exists. Their written submissions to me did not address this question. Instead, the appellants reiterated their belief in their right to know how their money is invested, where it is invested and what kind of return they are getting on their invested funds.

Following my investigation and inquiry, I am satisfied that there is no record in existence which specifically answers the questions asked by the appellants. Further, although the appellants are not satisfied with the answers contained in the document, which was expressly prepared for them by the institution's Co_ordinator in conjunction with the Ministry of Treasury and Economics, in my view the document does answer the question asked.

The document shows that the appellants' pension contributions, together with the contributions of every other public servant in the Province, is deposited in the Consolidated Revenue Fund; interest on the deposits made to the Consolidated Revenue Fund is paid at a rate determined by the Cabinet on the recommendation of the Treasurer; notice of the rate of interest is published annually in the Public Accounts as well as in the reports of the Public Service Superannuation Board and in articles in "Topical" every year; benefits are paid to employees out of the Fund based on their contributions, which are recorded with the Employee Benefits and Data Services Branch of the Ministry of Government Services. (Each Ministry's

Personnel/Human Resources Branch also maintains records on individual employee contributions to the Fund.)

Apparently, not everyone agrees that lending money to the Province is the best way to invest pension funds and, that perhaps, a better return could be obtained through other investments. (The Task Force on the Investment of Public Sector Pension Funds, which I have examined, did recommend changes.) However, I have no mandate under the Act to address the issue of how pension funds are invested. An appeal was made to me because a request for "detailed information and a complete portfolio" of pension fund investments was not answered to the satisfaction of the requesters. I have conducted an investigation and an inquiry and I am satisfied that a record, such as that requested by the appellants, showing a "portfolio" of marketable investments such as stocks, bonds and mortgages, does not exist because that is not how the Public Service Superannuation Fund is invested.

I am satisfied that the Co_ordinator for the institution took all reasonable steps to locate a record which might provide the information requested, and as such the institution is in compliance with the requirements of the Freedom of Information and Protection of Privacy Act, 1987.

Original signed by: _____
Sidney B. Linden
Commissioner

August 17, 1988
Date

APPENDIX "A"

PUBLIC SERVICE SUPERANNUATION FUND (PSSF)

The various responsibilities related to the PSSF are divided among a number of activities as follows:

- The Chairman of Management Board administers the Public Service Superannuation Act.
- The Public Service Superannuation Board makes recommendations to the Chairman of Management Board on pension matters affecting the Fund. It also publishes an annual report that describes the operation of the PSSF. This report is available through the Ontario Government Bookstore.
- The Employee Benefits and Data Services Branch within the Ministry of Government Services administers pension and benefit plans for employees and maintains pension contribution data.
- The Treasurer of Ontario is the custodian of the Fund and maintains aggregated figures only.
- Each Ministry Personnel/Human Resources Branch maintains records on individual employee contributions to the PSSF.

PSSF funds are deposited into the Consolidated Revenue Fund. At the end of each fiscal year, interest is credited on these deposits. The rate is for a 25-year term, and is decided by Cabinet on the recommendation of the Treasurer; for example, the rate for 1986-87 is 10.380 percent; for 1985-86, 11.550 percent; and for 1984-85, 13.330 percent.

The total of PSSF deposits is shown as a net balance in the Fund in Ontario's Public Accounts

published each year. As a result of this deposit arrangement for PSSF monies, there is no portfolio of marketable investments.

A recent study by the Task Force on the Investment of Public Sector Pension Funds explains the operation of the PSSF and recommends changes to the current practice of 25-year loans to the Province. Copies are available from the Ontario Government Bookstore.

In the February 12, 1988 issue of "Topical", there was a two-page explanation of the PSSF, including part of the Public Service Superannuation Board Annual Report for 1986-87. The interest rate paid by the Province is stated in this regular report for employees.

Ministry of Treasury and Economics
March 1988