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

ORDER 187

Appeal 890218

Ministry of Government Services

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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, as amended, (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) the right to appeal any decision of a head under the Act to the Information and Privacy Commissioner.

On January 5, 1990, the undersigned was appointed Assistant Commissioner and received a delegation of the power to conduct inquiries and make Orders under the Act.

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

1. By letter, dated June 5, 1989, the requester clarified and amended a previous request he had made to the Ministry of Government Services (the "institution") as follows:

> Please withdraw all but 3 requests for General Records and ammend (sic) the 3 remaining requests in order for them to read:
>
> 1) Request for Copies of 3 sets of Specifications for the New Replacement Windows in the [Name of facility]
>
> 2) Request for Copies of specifications for the Old existing windows in the [Name of facility]
>
> 3) Request for Copies of specifications for the Present Windows in the Visiting Complex in the [Name of facility]
>
> Please process each of these requests seperately (sic) and grant a continuation of all the

> requests for a 2 year period under Section 24(3) of the Act.
>
> The reason for these requests is compare (sic) the specifications to the building code to confirm or
>
> deny their compatibility with the Ventilation Provisions for Institutional Occupancies.

This amended request followed a letter, dated May 31, 1989, to the institution, from the requester, in which he had thanked the institution for already having provided him with these same records, but advised that they had been confiscated, a day after he had received them, by an official of [Name of facility].

2. On July 12, 1989, the Freedom of Information and Privacy Co_ordinator (the "Co-ordinator") for the institution responded to the requester as follows:

> After consultation with the Ministry of Health, it has been decided that documentation relating to tenders for replacement windows is restricted to qualified contractors involved in the project. Access is accordingly denied to all other persons due to the sensitive nature of the records.

On July 12, 1989, the Deputy Minister of the institution advised the requester that:

> After consultations with the Ministry of Health, it has been decided that documentation relating to tenders for replacement windows is restricted to qualified contractors involved in the project. Access is accordingly denied to all other persons due to the sensitive nature of the records pursuant to subsection 14 (1)(j)(k)(l) of the Act.

3. By letter dated July 19, 1989, the requester appealed the denial of access.

4. On July 27, 1989, notice of the appeal was given to the institution and the appellant.

5. In his letter of appeal regarding the denial of access, the appellant, in relation to the exemptions cited by the institution to deny him access to the records, stated that:

> Each of the exemptions primarily deal with jeopardizing the security of [Name of facility]/facilitating the escape from [Name of facility] and facilitating the commission of an unlawful act or hamper the control of crime.
>
> It is my contention that these 3 areas of concern were adequately addressed previously by a Minister of the Crown, The Hon. Richard Patten when on June 6th, 1989 at approx. 3:13 pm stated that:
>
> > 'In this particular instance, it was deemed that the information in no way could assist an individual to leave that institution.'
> >
> > In the article of the Midland Free Press, dated June 6th, 1989 (Document O), The Hon. Richard Patten made several comments which included statements that the material in question does not constitute a security risk, and does not constitute a breach of security.
> >
> > I feel that these 2 Documents illustrate the fact that the Hon. Richard Patten, Minister of Government Services agrees with me and contrary to

> his own Deputy Minister supports my contention that the records in question do not fall under the 3 exemptions which we exercised...

Further the appellant stated:

> I ask you to examine Document M and specifically the statements attributed to Mr. Rob Wooler, who is Special Assistant for Communications to the Minister of Government Services,

The comments attributed to Mr. Rob Wooler by the appellant are as follows:

> Wooler said 'the documents prepared for tenders on replacing windows at the hospital were available to the Public with or without a freedom of information application.'

My 3 points of appeal are as follows:

1) the records requested in my particular case as they relate me (sic) and with considerations given to the fact that they were previously released to me do not justify to (sic) usage of the exemption of Section 14, 1 j, k, l, and since the Minister of the Crown has concluded them not to constitute a Security risk.

2) The Ministry of Government Services was aware of who I was, and my legal status as well as place of residence when they released the records originally.

3) Mr. Rob Wooler has stated that the materials are of a purely public nature not falling under the Freedom of Information Act or not requiring a (sic) access request to the Act. In this case, Section 22 of the Act should have been used by the Tender Office and Mr. John D. Campbell in his letter to me dated July 12th, 1989 (Document B) should have

> followed normal Ministry procedure in releasing documents to the public.
>
> This procedure was previously demonstrated in Document E where Mr. John D. Campbell sent copies of the material free of charge.

6. The records at issue were obtained and reviewed by an Appeals Officer. No attempt was made to mediate as the appellant indicated that he was not prepared to participate in mediation.

7. By letter dated January 8, 1990, notice that an inquiry was being conducted was given to the institution and the appellant. Enclosed with the Notice of Inquiry 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 representations need not limit themselves to the questions set out in the Report.

8. Three sets of representations have been received from the appellant and one set from the institution. I have considered all representations in making my Order.

9. As a preliminary matter I have considered a request from the appellant for an opportunity to present the oral testimony of himself and of witnesses. It appeared from

the appellant's letter in which he made his request, and was confirmed in a conversation between the appellant and the Appeals Officer, that the appellant wished to present evidence that would relate primarily to the issue of whether or not the copies of the records that are at issue in this appeal, and which he had initially obtained, had been "stolen" from him. As this is not an issue I find to be relevant to my decision in this appeal, it is my view that no useful purpose would be served by receiving such oral testimony, in this case.

The issues arising in this appeal are as follows:

A. Whether the institution responded to the request in accordance with the requirements of subsections 29(1)(b)(i), (ii), (iii) and (iv) of the Act.

B. Whether any of the records are properly exempt from disclosure pursuant to subsections 14(1)(j), 14(1)(k) or 14(1)(l) of the Act.

C. Whether subsection 63(2) of the Act is applicable to the records at issue in this appeal.

D. Whether subsection 11(1) of the Act is applicable to the records at issue in this appeal.

E. Whether the requested records could reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under an exemption.

In considering the specific issues arising in this appeal, I note that one of the purposes of the Act, as set out in subsection 1(a), is to provide a right of access to information under the control of institutions. The provision of this right is 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.

It should also be noted that section 53 of the Act provides that the burden of proof that a record falls within one of the specified exemptions in this Act lies with the head of the institution (the "head").

ISSUE A: Whether the institution responded to the request in accordance with the requirements of subsections 29(1)(b) (i), (ii), (iii) and (iv) of the Act.

In this appeal, the appellant has raised the issue of the adequacy of the institution's response to his request in relation to subsections 29(1)(b)(i), (ii), (iii), (iv) and 29(3)(a), (b), (c) and (d) of the Act. It is my view that subsection 29(3) refers to a refusal by the head to disclose a record in a situation where there is an affected party under section 28, rather than a situation, such as arises in this appeal, where the refusal is pursuant to section 26. As such, subsection 29(3) is not relevant in this case.

The relevant subsections of section 29 read as follows:

> 29.__(1) 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.

Regarding its response to the appellant's request, the institution in its representations stated that:

> ...the Head has reviewed the notice to the requester and feels that perhaps it was not clear that the decision had been made by the Deputy Minister to deny access. Ministry procedures have been adopted which will ensure that the contents of the notice of refusal are as described in the subsections listed.

I am of the view that while the letter from the Co-ordinator to the appellant dated July 12, 1989, was not in compliance with any of the subsections in issue, the letter from the Deputy Minister to the appellant failed to comply with only subsections 29(1)(b)(ii) and (iii).

In Order 158 (Appeal Number 890266), dated April 9, 1990, at page 16 Commissioner Sidney B. Linden addressed the issue of head's obligations under subsection 29(1)(b)(ii) of the Act as follows:

> 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 the 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'.

I concur with Commissioner Linden's interpretation and in my view, the notice of refusal from the Deputy Minister does not meet the requirements of subsection 29(1)(b)(ii) of the Act. However, in view of the fact that the request was a repetition of a request where access to the records had previously been granted to the appellant, it is understandable that a general description of the records was not provided by the institution.

I also find that the letter from the Deputy Minister does not comply with subsection 29(1)(b)(iii) in that the name and position of the person responsible for making the decision is not set out. This oversight has been acknowledged by the institution and I trust that this omission will not be repeated.

In conclusion, I agree with the appellant that the notice of refusal from the Deputy Minister was deficient in terms of the requirements of subsection 29(1)(b)(ii) and (iii) of the Act. However, in the circumstances, I feel that there is no purpose to be served by ordering the head to send a new notice to the appellant.

ISSUE B: Whether any of the records are properly exempt from disclosure pursuant to subsections 14(1) (j), 14(1) (k) or 14(1)(l) of the Act.

The institution has relied on subsections 14(1)(j), (k) and (l) of the Act to deny access to the records. These subsections read as follows:

> 14.--(1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (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.

In its representations the institution indicated, for the first time, that in addition to its reliance on the above-noted subsections, it was also relying on subsections 14(1) (e), (h) and (i) to exempt the records. My usual practice in this type of situation is to ensure that the appellant is notified of the additional provisions being relied upon by the institution. However, in this case, it was not necessary to do so as I have not considered the additional provisions which were cited by the institution in arriving at my decision.

In his representations the appellant did a thorough job of recounting the series of events which led up to the filing of this appeal. He has pointed out that he was granted access to the records in issue in the present appeal in response to his initial request to the institution. He showed the records that he received from the institution to an attendant at the maximum

security facility in which he resides and the records were subsequently seized from him. There was media coverage relating to the disclosure of the records to the appellant as well as questions in the Legislative Assembly of Ontario concerning the incident. In response to one of the questions the then Minister for the institution stated that he was in the process of,

> asking my officials to review this total process in the event that in some instances there may be information that might have something to do with security. In this particular instance, it was deemed that the information in no way could assist an individual to leave that institution.

Following the seizure of the records the appellant again requested and was denied access to copies of the records which had previously been provided to him. This denial of access by the institution was subsequent to and in accordance with comments received by the institution from the Ministry of Health. The Ministry of Health has the responsibility for managing the maximum security facility in which the appellant resides and, hitherto, the institution had not consulted with the Ministry of Health about the access request.

Having reviewed the records in issue, it is my view that subsection 14(1) (j) of the Act applies to them. While it is true that the records do not constitute extremely detailed plans of the maximum security facility, they do set out construction plans, including drawings, for new windows in the facility, existing and proposed types of materials to be used in construction, such as various types of locks and bars, a listing of construction work to be done in the order in which it should be done, a general description of the facility's grounds and surrounding area etc.

I feel that disclosure of these types of records, when they relate to a maximum security facility, could reasonably be expected to result in the harm contemplated by subsection 14(1) (j). In this regard, the word "facilitate" is defined in the **Black's Law Dictionary** as follows:

> Facilitate. To free from difficulty or impediment...To make easier or less difficult; free more or less completely from obstruction or hinderance; lessen the labour of...

With the types of plans and specifications in issue in this appeal, that is relating to a maximum security facility, it is my view that an appropriate meaning to ascribe to the word "facilitate" as it is used in subsection 14(1)(j), is "to make easier or less difficult".

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

As I have found that the exemption provided by subsection 14(1)(j) applies, it is unnecessary for me to consider any of the other exemptions relied upon by the institution.

ISSUE C: Whether subsection 63(2) of the Act is applicable to the records at issue in this appeal.

Subsection 63(2) of the Act reads as follows:

> (2) This Act shall not be applied to preclude access to information that is not personal information and to which access by the public was available by custom or practice immediately before this Act comes into force.

It is apparent from the sequence of events in this case and from the various statements and submissions of officials of the institution that information similar to that in issue in this appeal, and which was not personal information, was customarily available to the public prior to this Act coming into force. However, I am of the view that this is not determinative of the issue. The law of Ontario in existence at the time the Act came into force did not treat either the public right to know or the privacy rights of individuals in a systematic or comprehensive fashion. I think that one of the major long term benefits of the Act will be the overall improvement of information practices within government.

In general, the thrust of the Act is to promote open government; however, in cases where prior access practices were perhaps not as well thought out as they should have been, I do not believe that subsection 63(2) of the Act should be invoked in order to perpetuate such practices.

The appellant's request brought to light a situation where access to plans and specifications relating to a secure facility could be obtained with relative ease by anyone. In reaching my decision that subsection 63(2) does not apply in the circumstances of this appeal, I have taken into consideration the fact that the institution has introduced procedures to limit access to these types of records to qualified contractors who are bidding or who are involved in projects in which the records are relevant.

ISSUE D: Whether subsection 11(1) of the Act is applicable to the records at issue in this appeal.

Subsection 11(1) of the Act reads as follows:

> Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.

Section 11 is a mandatory provision which requires the head to disclose records in certain circumstances. Commissioner Sidney B. Linden in Order 65, (Appeal Number 880151), dated June 27, 1989, found that the duties and responsibilities set out in section 11 of the Act belong to the head alone. I concur with Commissioner Linden's interpretation of section 11 and adopt it in this appeal. As a result it is my view that the Information and Privacy Commissioner or his delegate do not have the power to make an Order pursuant to section 11 of the Act.

ISSUE E: Whether the requested record could reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under the exemption.

Subsection 10(2) of the Act states that:

> 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.

I note that, in the package received by this office, included with the specifications that the appellant requested, were blank standard form contracts, instructions to contractors on how to tender and various other forms to be filled out in relation to work to be done. These documents do not necessarily relate to the work or site in which the appellant has expressed an

interest. As these types of documents, while coming with the specification packages,
do not have anything to do with actual specifications for the windows and, in my view, are not responsive to the appellant's request, I have not considered them, in this Order.

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

> A valid subsection 10(2) severance must provide the requester with information that is in any way responsive to the request, at the same time protecting the confidentiality of the record covered by the exemption.

I have considered the records and, in my view, no information that is in any way responsive to the appellant's request i.e. that relates to the windows and construction work at [name of facility] could be provided to the appellant without disclosing information properly withheld from disclosure under subsection 14(1)(j) of the Act.

Accordingly, I uphold the head's decision to exempt the records from disclosure pursuant to subsection 14(1)(j) of the Act.

Original signed by: July 13, 1990
Tom A. Wright Date
Assistant Commissioner