



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

ORDER 38

Appeal 880106

Ministry of the Solicitor 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 a record under subsection 24(1) or a request for personal information under subsection 48(1) of the Act a right to appeal any decision of a head to the Commissioner.

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

1. On April 11, 1988, the Ministry of the Solicitor General (the "institution") received two requests for access from the requester. One request dealt exclusively with information that, if it existed, would be in the custody of the Metropolitan Toronto Police Force and, while not the subject of this appeal, it is mentioned because it is relevant to one of the issues arising in this appeal. The other request, the subject of this appeal, was for "any information or record" about the requester or [a named individual] "kept by Metropolitan Toronto Police Force and the Ontario Provincial Police".
2. By letter to the requester dated May 2, 1988, the institution indicated that "access is granted to information about you. Access is denied to other information under section 14(2) and 21(1) of the Act".

3. By letter to me dated May 5, 1988, the requester appealed the decision of the head. I gave notice of the appeal to the institution.
4. The records at issue in this appeal were examined by the Appeals Officer. In the course of mediation efforts by the Appeals Officer, the appellant indicated that he had been advised verbally by the Freedom of Information Co_ordinator that no record existed for the [a named individual]. The appellant stated that the basis for this appeal was the severances from his personal information and the fact that he does not believe a record does not exist for the [a named individual].
5. By letter dated August 9, 1988, I sent notice to the appellant and the institution that I was conducting an inquiry to review the decision of the head. An Appeals Officer's Report was enclosed with the notice.
6. By letter dated August 19, 1988, I invited the appellant and the institution to make written representations to me.
7. Written representations were received from both the appellant and the institution and I have considered these representations in making my Order.

The issues arising in this appeal are as follows:

- A. Whether the record that contains personal information about the appellant falls within the exemption set out in subsection 49(a) of the Act.

- B. Whether the institution has made reasonable efforts to locate a record, requested by the appellant, pertaining to another individual.

- C. Whether the institution's notice of refusal complies with the requirements set out in section 29 of the Act.

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,
 - (i) information should be available to the public,
 - (ii) 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 and to provide individuals with a right of access to that 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.

ISSUE A: Whether the record that contains personal information about the appellant falls within the exemption set out in subsection 49(a) of the Act.

Having reviewed the record at issue, it is clear that the record contains personal information about the appellant.

In dealing with a request for information about the requester, the head must make his or her decision in the light of the provisions of sections 47, 48 and 49 of the Act. Section 48 sets out the procedures for dealing with such requests. Section 49 provides for exceptions to the general rule, set out in subsection 47(1), that a requester has a right of access to his or her own personal information in the custody or under the control of the institution. Among other exceptions, section 49 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;

The head's position is that subsection 14(2)(a) would apply to the disclosure of the personal information at issue.

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;

My office has reviewed the records and found that the personal information in question is contained in the following:

- _ security information
- _ an occurrence report.

_ a memorandum.

On examination of these records, it is clear that each record in question fits the description of "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".

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. In this case, in exercising discretion to disclose some of the personal information with severances, the head has complied with the spirit of the Act. Since each report containing the personal information requested could have been exempted in its entirety under subsection 14(2)(a), it is not necessary for me to consider the individual severances. I am satisfied that the appellant benefited from the head's exercise of discretion in releasing some of the record requested.

ISSUE B: Whether the institution has made reasonable efforts to locate a record, requested by the appellant, pertaining to another individual.

As I have previously outlined in my Order in Appeal No. 880053 released December 28, 1988, both requesters and institutions have certain obligations with respect to access requests under the Act. These obligations are set out in section 48, in respect of personal information pertaining to the requester, and in section 24 in respect of all other information.

In this Order "Issue A" involved a request for personal information; that is, that part of the appellant's request that involved information relating to him. The provisions governing requests for access to personal information are set out in section 48 of the Act. On the other hand, "Issue B" addresses that part of the appellant's request that is a request for access to information that is not about him. The provisions of the Act that govern this type of request are set out in section 24. While this part of the appellant's request is clearly for personal information about another individual, and

is likely retrievable by that individual's name, for the purposes of the Act it is not classified as a request for personal information under section 47 because it is not a request for information pertaining to the requester.

Section 24 reads as follows:

(1) A person seeking access to a record shall make a request therefor in writing to the institution that the person believes has custody or control of the record and shall provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record.

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

In its submissions, the institution outlines the circumstances of the request and the steps taken to locate the record pertaining to the other named individual.

In a three_day period, the institution received two separate requests from the appellant, as mentioned on pages one and two of this Order. While the first request regarding the Metro Toronto Police Force is not under appeal, it has a bearing on the search undertaken by the institution for the record of the other named individual. The first request detailed the appellant's filing of 12 reports with Metro Toronto Police regarding certain activities by the other named individual involving the appellant. The second request, the request at issue in this appeal, was for information about the appellant and the other named individual kept by Metro Toronto Police and the OPP.

The appellant did not supply any information as to where the records might be located. Because the appellant lives in Toronto and due to the nature of the subject matter, the Freedom of Information Co_ordinator determined that he would send the

request regarding the other named individual to the four branches of the OPP where he believed the record might be held if it existed: The Anti_rackets Branch, Security Branch, Intelligence Branch and Technical Support Branch (the same branches from which he sought the appellant's personal information). None of the branches had any records relating to the other named individual. The institution further submits that when the appellant picked up his personal information he was advised verbally that a record did not exist for the other

named individual. At no time did the appellant suggest a further search, or question the area of search.

In his representations, the appellant states that the reason he believes a record exists for the other named individual is that "an occurrence report is on file at 23 Division and [a named individual] had moved to [named location] at that point in time."

It appears that the appellant did not inform the Freedom of Information Co_ordinator that he believed the other named individual had moved to another area. However, he had provided some detail at the time of his request and in my view, he had provided sufficient detail to give rise to an obligation on the part of the institution. I discussed the nature of this obligation as it related to broadly worded requests in my Order in Appeal No. 880053 released on December 28, 1988.

In my view, an institution that receives a broadly worded request has three choices in making its response. It can choose to respond literally to the request, which may involve an institution wide search for the records requested. It may request further information from the requester so that it may narrow its area of search. Finally, it may narrow a records search unilaterally, but if it does so, it must outline the limits of the search to the appellant.

In this case, the institution, upon finding no record, neither requested further information from the requester nor informed the requester as to the extent of its search. In my view, this response was not in accordance with the institution's obligations under the Act.

The institution submits that even if a record for the other named individual exists, the appellant would not be entitled to it in light of section 21 of the Act. That is certainly a possibility, but such a judgment is impossible to make with certainty in the absence of the record.

The appellant has now been advised of the limits of the search for the record of the other named individual. Should the appellant wish the search extended to the district headquarters and/or the local detachment of the OPP he should notify the Freedom of Information Co_ordinator within 30 days of the date of this Order. The Co_ordinator can then proceed with the search for the requested record.

ISSUE C: Whether the institution's notice of refusal complies with the requirements set out in section 29 of the Act.

Subsection 29(1) reads as follows:

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

- (a) where there is no such record, that there is no such record; or
- (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.

The institution's response to the appellant's combined request for personal information and a general record reads as follows:

"Access is granted to information about you. Access is denied to other information under section 14(2) and 21(1) of the Act. These sections apply because the information forms parts of a law enforcement report or would be an unjustified invasion of another person's privacy."

In fact, access was not granted to all of the information about the appellant (his personal information). A part of the record, namely three pages of personal information about the appellant, was withheld from him. The reference to access being denied to "other information" could, I believe, lead the appellant to assume that it was not personal information that was being denied. Further, the letter could be read to mean that "other information" being denied pursuant to subsections 14(2) and 21(1) refers to the record of the other named individual, rather than to severances made from the appellant's own personal information. In addition, there is no mention of the record relating to the other named individual in the letter, though both parties agree that the appellant was advised verbally that no record existed for the other named individual.

One could argue that, with the exception of any direct response to the request for the other named individual's record, the institution has complied with the letter of the law; a provision is cited for refusal of access, a reason is given, the decision_maker's name is provided and the appellant is advised of his right of appeal. However, in my view, the institution's

response is somewhat misleading and contrary to the spirit of the Act.

The requester is at a disadvantage in these matters, rarely knowing, in the first instance, even what the recorded information might consist of. To provide a response in the manner that the institution has in this case further complicates the matter. The institution did not refuse to confirm or deny the existence of a record; therefore, there could have been a clear indication in its response that only partial access had been granted to the appellant's own personal information. Because I have already found that the three pages of personal information withheld from the appellant fall within subsection 14(2)(a) through the subsection 49(a) exemption, there is no appropriate remedial order to make in this case. However, I urge the institution to take steps to ensure that notices to requesters accurately reflect the head's decisions.

Original signed by:
Sidney B. Linden
Commissioner

February 9, 1989
Date