



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

# **ORDER P-255**

**Appeal 900488**

**Ministry of the Solicitor General**



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## **ORDER**

On July 8, 1991, the undersigned was appointed Assistant Commissioner and received a delegation of the power and duty to conduct inquiries and make orders under the Freedom of Information and Protection of Privacy Act, 1987 (the "Act").

### **BACKGROUND :**

On September 17, 1990, the Ministry of the Solicitor General (the "institution") received a request for access to:

...any information regarding records of investigation or any criminal judgement of any Provincial court that has issued against [the appellant].

On September 25, 1990, in conversation with a representative of the institution, the requester agreed that the search for responsive records would be conducted in the following major investigative branches within the institution:

1. Criminal Investigations Branch
2. Intelligence Branch [reference was also made to a particular police sergeant]
3. Drug Enforcement Branch
4. Anti-Rackets Branch
5. Technical Support Branch

On October 11, 1990, the institution advised the requester that the existence of the record would neither be confirmed nor denied in accordance with sections 49(a) and 14(3) of the Act.

The requester appealed the institution's decision. Notice of the appeal was given to the institution and the appellant. An Appeals Officer was assigned to investigate the circumstances of the appeal and attempt to mediate a settlement.

During the course of mediation, the appellant withdrew his request for information regarding criminal judgements of the Provincial Court, narrowing the scope of the appeal to records relating to investigations conducted against the appellant.

Because further mediation was not possible, notice that an inquiry was being conducted to review the head's decision was sent to the appellant and the institution. An Appeals Officer's Report, which is intended to assist the parties in making any representations to the Commissioner concerning the subject matter of the appeal, accompanied the Notice of Inquiry.

Written representations were received from the appellant and the institution.

**ISSUES:**

The issues arising in this appeal are as follows:

- A. Whether a record of the nature requested, if it existed, would contain information that would qualify as "personal information" as defined in section 2(1) of the Act.
- B. Whether a record of the nature requested, if it existed, would qualify for exemption under either section 14(1) or (2) of the Act.
- C. If the answer to Issue B is yes, whether the head properly exercised his discretion under sections 14(3) and 49(a) of

the Act, to refuse to confirm or deny the existence of a record of the nature requested.

**SUBMISSIONS/CONCLUSIONS:**

**ISSUE A: Whether a record of the nature requested, if it existed, would contain information that would qualify as "personal information" as defined in section 2(1) of the Act.**

The introductory wording of the definition of "personal information" found in section 2(1) reads:

"personal information" means recorded information about an identifiable individual, ...

The appellant is seeking access to records concerning investigations which relate specifically to him. According to the institution's representations, a record of the nature requested, if it existed, would routinely contain recorded information about the appellant such as name, date of birth, address, marital status and criminal record (if any). Depending upon the nature of the investigation, the record, if it existed, would also contain information about the individual's activities in relation to the matter being investigated, financial records and information about the individual from other police agencies.

Accordingly, I am satisfied that the information requested, if it existed, would contain personal information about the appellant.

Section 47(1) of the Act gives individuals a general right of access to personal information about themselves, which is in the custody or under the control of an institution. However, this

right of access under section 47(1) is not absolute; section 49 provides a number of exemptions to this general right of access to personal information by the individual to whom it relates. In particular, section 49(a) provides that:

A head may refuse to disclose to the individual to whom the information relates personal information,

where section 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information; [emphasis added]

In this appeal, the institution has refused to confirm or deny the existence of a record that would respond to the appellant's request, pursuant to section 14(3) of the Act. Section 14(3) provides that:

A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) apply.

Before deciding whether the head has properly exercised his discretion under sections 14(3) and 49(a), I must determine whether a record of the nature requested, if it existed, would qualify for exemption pursuant to either section 14(1) or (2) of the Act.

**ISSUE B: Whether a record of the nature requested, if it existed, would qualify for exemption under either section 14(1) or (2) of the Act.**

The institution has relied on sections 14(1)(a), 14(1)(g) and 14(2)(a) of the Act in support of the section 14(3) exemption.

Sections 14(1)(a), 14(1)(g) and 14(2)(a) of the Act provide that:

- (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
  - (a) interfere with a law enforcement matter;
  - (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
- (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 five sources from which the information was sought, are branches of the Ontario Provincial Police. The request is for information relating to investigations conducted by these branches. I am satisfied that the requested records, if they existed, would contain law enforcement information.

With respect to the applicability of section 14(1)(a), the institution provided details as to how knowledge of an outstanding investigation and disclosure of information relating to an investigation, if it existed, could have the effect of hampering or impeding the carrying out of a law enforcement activity. The institution referred to the negative effects of disclosure on the collection of evidence, the possible manipulation of evidence by the individual being investigated, and the potential effect on undercover operators and confidential informants.

In his representations, the appellant raises questions about the institution's decision, including why the institution would refuse to confirm or deny the existence of any records; how the personal information of a law-abiding person could interfere with a law enforcement matter; and why, if no records exist, the head of an institution would refuse to confirm that fact.

Having considered the representations of both the appellant and the institution, in my view, disclosure of the contents of a record of the nature requested, if it existed, could reasonably be expected to "interfere with a law enforcement matter" and could, therefore, be refused by the head under section 14(1)(a). Because of my finding regarding section 14(1)(a), it is not necessary for me to consider the application of sections 14(1)(g) and 14(2)(a) of the Act.

**ISSUE C: If the answer to Issue B is yes, whether the head properly exercised his discretion under sections 14(3) and 49(a) of the Act, to refuse to confirm or deny the existence of a record of the nature requested.**

In Issue B I found that records of the nature requested, if they existed, would qualify for exemption under section 14(1)(a) of the Act. In my view, therefore, the head has the authority to invoke section 14(3) of the Act in the circumstances of this appeal.

In any case in which the head has exercised his/her discretion and refused to confirm or deny the existence of a record, I look very carefully at the manner in which discretion has been exercised. Provided that it been exercised in accordance with

established legal principles, in my view, it should not be disturbed on appeal.

The institution has provided detailed submissions regarding the exercise of discretion to refuse to confirm or deny the existence of a record of the nature requested. After reviewing these submissions, I am of the view that the head's decision should not be disturbed on appeal.

**ORDER:**

I uphold the decision of the head.

**POSTSCRIPT:**

I want to include a general comment regarding section 14(3), and for this reason I have decided to include a postscript to my Order. The comments in this postscript have no bearing on the outcome of this appeal.

Section 14(3) of the Act is unusual, in that it permits a head to refuse to confirm the existence or non-existence of a record, provided that the type of record sought by a requester would satisfy the requirements of the discretionary exemptions provided by sections 14(1) or 14(2).

By including section 14(3), the legislature has acknowledged that, in order to carry out their mandates, certain institutions involved with law enforcement activities must have the ability, in the appropriate circumstances, to be less than totally responsive in answering requests for access to government-held information. However, as the members of the Williams Commission pointed out in Volume II of their report entitled Public Government for Private People, The Report of the Commission on



Freedom of Information and Protection of Privacy/1980 at page 301, it would be a rare case in which the disclosure of the existence of a file would communicate information to the requester which may frustrate an ongoing investigation or intelligence-gathering activity.

A requester in a section 14(3) situation is in a very different position than other requesters who have been denied access under the Act. By invoking section 14(3), an institution is denying the requester the right to know whether a record exists, even when one does not. In my view, section 14(3) provides institutions with a significant discretionary power and it is extremely important that discretion under this section is carefully considered and properly exercised.

Whenever this office is faced with an appeal involving section 14(3), the head will be required to provide detailed and convincing reasons as to why this section was claimed, in order for the Commissioner/Assistant Commissioner to ensure that the head's decision was made in full appreciation of the facts of each case and upon proper application of the principles of law.

Original signed by: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

\_\_\_\_\_  
November 27, 1991  
Date