



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

ORDER P-217

Appeals 890371, 890372, 890373, 890374, 890375, 890376, 890377,
890378, 890380, 890386, 890387, 890388, 890389, 890390, 890391,
890392, 890393, 890394, 890395, 900141, 900142, 900143, 900144,
900145, 900146 and 900147

Ministry of Government Services



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

ORDER

INTRODUCTION:

On October 20, 1989, the Ministry of Government Services (the "institution") received 19 requests under the Freedom of Information and Protection of Privacy Act, 1987, as amended (the "Act"). A further 7 requests were received by the institution on February 15, 1990. The requester sought access to drawings and specifications for:

1. The office of the Supervisor, Central Drawing Files, Ministry of Government Services, 3B-1, Macdonald Block [890371]
2. The office of the Executive Director, Design and Construction Division, Ministry of Government Services [890372]
3. The office of the Deputy Minister of Government Services [890373]
4. The office of the Director, Mental Health Facilities Branch, Ministry of Health [890374]
5. The office of the Minister of Labour [890375]
6. The office of the Minister of Community and Social Services [890376]
7. The office of the Freedom of Information and Privacy Co-ordinator, Ministry of Government Services [890377]
8. The office of the Minister of Health [890378]
9. The office of the Custodian of Drawings and Specifications, Ministry of Government Services [890380]
10. The office of the Minister of Government Services [890386]

11. The office of the Executive Director of Finance and Administrative Services Division, Ministry of Government Services [890387]
12. The office of the Program Officer, Freedom of Information and Privacy, Ministry of Government Services [890388]
13. The office of the Manager, of Public Tenders Office, Ministry of Government Services [890389]
14. The office of the Assistant Deputy Minister, Supply and Services Division, Ministry of Government Services [890390]
15. The office of the Director, Purchasing Services Branch, Ministry of Government Services [890391]
16. The office of the Manager, Supplier Information Service, Ministry of Government Services [890392]
17. The office of the Coordinator, Client Services Branch, Ministry of Government Services [890393]
18. The office of the Manager, Collective Purchasing, Ministry of Government Services [890394]
19. The office of the Manager, Division Office, Supply and Services Division, Ministry of Government Services [890395]
20. The office of the Commissioner, Information and Privacy Commission/Ontario [900141]
21. Room MI-73, Macdonald Block [900142]

22. Room MI-51, Macdonald Block [900143]
23. Room MI-52, Macdonald Block [900144]
24. Room 2B-18, Macdonald Block [900145]
25. Room 3B-9, Macdonald Block [900146]
26. Room MI-43A, Macdonald Block [900147]

The numbers which appear at the end of the description of each record requested are the corresponding appeal file numbers. For ease of reference, I have categorized the 1989 appeals as "Group 1", and the 1990 appeals as "Group 2".

On November 27, 1989 (Group 1) and March 12, 1990 (Group 2) the institution's Freedom of Information and Privacy Co-ordinator advised the requester that access was being denied to all records in their entirety pursuant to subsection 14(1)(i) of the Act.

On December 5, 1989 (Group 1), and March 23, 1990 (Group 2), the requester appealed the head's decision to withhold the records in their entirety. Subsection 50(1) of the Act gives a person who has made a request for access to a record under subsection 24(1) a right to appeal any decision of a head of an institution to the Commissioner. Notice of these appeals was given to the appellant and the institution.

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.

During the course of mediation, it became apparent that the institution's decisions had not been based on a review of the records in issue. In fact, the institution made its decisions without ascertaining whether the requested records existed. Ultimately, the institution searched for and retrieved the records responsive to the requests with the exception of drawings for five

appeals (890377; 890388; 890390; 890395; 900141) and specifications for one appeal (900141) which the institution claims do not exist. The institution states it also ascertained the existence of a record(s) which responds to appeal 890374 but that the record(s) is in the custody or control of the Ministry of Health and hence states that the request should be transferred to that ministry.

The Appeals Officer obtained and reviewed all identified records in the custody of the institution. At this time, the institution amended its position and indicated it was also relying on subsections 14(1)(e) and 14(1)(l) to exempt the records at issue in these appeals. Despite claiming the section 14 exemptions, the institution also stated that all records were "too broad to respond to the requests".

The appellant raised the application of subsection 63(2) of the Act to the requested records. He stated that the requested records were customarily available to the public until recently.

As settlement of these appeals was not possible the appeals proceeded to inquiry.

On September 20, 1990, notice was sent to the appellant and the institution that an inquiry was being conducted to review the decisions of the head. (Groups 1 and 2). Enclosed with the notice was a report prepared by the Appeals Officer. This report was prepared in order to assist the parties in making their representations concerning the subject matter of the appeals. The Appeals Officer's Report outlines the facts of the appeals 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, need not limit themselves to the questions set out in the report.

Representations were received from the institution and the appellant. In its representations, the institution indicated that it was also relying on section 20 to exempt the records. I have reviewed and considered these representations in making this Order.

RECORDS IN ISSUE:

The records which are relevant to these appeals consist of drawings and specifications. Generally, the drawings, in addition to showing the details of a particular office, show the lay-out of the entire floor on which the given office/room is located. Some specifications are contained on the drawings themselves, while others have been categorized in two volumes.

PRELIMINARY MATTER:

In his representations, the appellant contends that the institution:

- (a) issued decisions without identifying what records they had which responded to the requests;
- (b) issued decisions without reviewing the records which applied to the requests; and,
- (c) issued decisions without even having records which responded to the requests.

In Order 81 (Appeal Numbers 880117, 880118, 880119, 880120 and 880121), dated July 26, 1989, former Commissioner Sidney B. Linden

outlined the procedures to be followed by institutions in dealing with requests under the Act. In addressing the situation in the context of a fee appeal, Commissioner Linden stated:

...the institution must retrieve and review all of the requested records for the purposes of determining whether access can be given. [emphasis added]

As noted above, during the course of mediation it became clear that the institution had not retrieved or reviewed all of the records responsive to the requests prior to issuing a decision on access. Ultimately, the institution did follow the proper procedures and issued an amended decision with respect to each request. It is my understanding that the institution has now revised

its practices to comply with the requirements of the Act. Given this, and the fact that I am now able to proceed to make a determination of the issues arising in these appeals, there is no remedial order for me to make in connection with this preliminary matter.

ISSUES/DISCUSSION:

The issues arising in this appeal are as follows:

- A. Whether the institution has taken all reasonable steps to locate the records that respond to the appellant's requests.
- B. Whether the exemptions provided by subsections 14(1)(e), (i) and (l) of the Act apply to the requested records.
- C. Whether the exemption provided by section 20 of the Act applies to the requested records.
- D. Whether subsection 63(2) 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.

ISSUE A: **Whether the institution has taken all reasonable steps to locate the records that respond to the appellant's requests.**

As stated earlier, the institution claims that it has no drawings responsive to the requests that resulted in Appeals 890377, 890388, 890390, 890395 and 900141. Further it states that it does not have any specifications which respond to the request which resulted in Appeal 900141. In support of such claims, the institution has submitted four affidavits. Three of the affidavits are signed by Managers and the fourth is signed by a Contract Inspector. Each affidavit outlines the nature of the search performed and all affidavits state that the institution has produced to the Information and Privacy Commissioner all drawings and specifications in the possession of the institution which relate to the appeal files.

In the circumstances, I am satisfied that there are no drawings in the institution's possession which respond to the requests which resulted in Appeals 890377, 890388, 890390, 890395 and 900141. I further accept that the institution has no specifications which relate to Appeal 900141.

With respect to Appeal 890374, the institution submitted that it contacted the Ministry of Health to determine whether it had any drawings or specifications which responded to the request. The institution states that the Ministry of Health advised it that Health does have a drawing(s) for the given location, which appears to include specifications.

Subsection 25(1) of the Act provides:

Where an institution receives a request for access to a record that the institution does not have in its custody or under its control, the head shall make all necessary inquiries to determine whether another institution had

custody or control of the record, and where the head determines that another institution has custody or control of the record, the head shall within 15 days after the request is received,

- (a) forward the request to the other institution; and
- (b) give written notice to the person who made the request that it has been forwarded to the other institution.

Given that the Ministry of Health has advised the institution that it does have a record responding to the request which resulted in Appeal 890374, and given that the institution has failed to forward the request pursuant to subsection 25(1) to the Ministry of Health, I order the institution to do so within five days of the date of issuance of this Order.

ISSUE B: Whether the exemptions provided by subsections 14(1)(e), (i) and (l) of the Act apply to the requested records.

As indicated, the institution claimed that all records are "too broad" to respond to the requests, as well as citing subsections 14(1)(e), (i) and (l) as reasons why the records have been withheld.

With respect to the institution's claim that all records are "too broad" to respond to the requests, I have reviewed the records at issue and do not accept this argument. Accordingly, I will deal with the exemptions claimed under section 14, as put forth by the institution.

Subsections 14(1)(e), (i) and (l) of the Act read as follows:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (e) endanger the life or physical safety of a law enforcement officer or any other person;
- (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
- (l) facilitate the commission of an unlawful act or hamper the control of crime.

I will first address the application of subsection 14(1)(i) of the Act to the records.

The institution indicated grave concerns that disclosure of the records could reasonably be expected to seriously compromise the security of government buildings. These concerns are both immediate and future and relate to building security, sabotage, terrorism, theft of moveable property, and vandalism to sensitive facilities including computers, communications installations, and hydro equipment.

In support of this position, the institution's representations also included a copy of correspondence from the Ontario Government Protection Service, a special unit of the Ontario Provincial Police known as Queen's Park Services. The letter concludes that, in their view, the release of the records would be "most useful in planning the commission of crimes against the government and/or the persons attending on public business".

The appellant submitted that the fact that "the offices in questions are government owned or leased ... is not a sufficient reason" to exempt the records pursuant to subsection 14(1)(i).

I have previously considered the meaning of the words "could reasonably be expected to" and found that the expectation must not be fanciful, imaginary or contrived, but rather one that is based on reason. I also found that an institution relying on the subsection 14(1) exemption bears the onus of providing sufficient evidence to substantiate the reasonableness of the expected harms by virtue of section 53 of the Act [see Order 188 (Appeal Number 890265), dated July 19, 1990].

I have examined the records at issue in this appeal along with the representations of the appellant and the institution. In my view, the institution has established the application of subsection 14(1)(i) to the records.

Subsection 14(1) also provides the head with the discretion to release a record even if it meets the test of an exemption. I find nothing improper in the way in which the head has exercised his discretion and would not alter it on appeal.

As I have found that the records at issue in this appeal are properly exempt pursuant to subsection 14(1)(i) of the Act it is not necessary for me to address the application of subsections 14(1)(e), 14(1)(l), or Issue C.

ISSUE D: 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:

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.

I addressed the application of subsection 63(2) of the Act in Order 187 (Appeal Number 890218), dated July 13, 1990. At page 11, I stated:

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.

In its representations, the institution states that, as its experience with the Act has developed, records such as those at issue in these appeals are now released in a limited manner to qualified contractors who are bidding on or involved in a project to which the records pertain. It further states that such records have not been given, in the past, to an individual who did not justify the reason the individual was seeking access. I am satisfied that subsection 63(2) of the Act does not apply in the circumstances of these appeals.

ISSUE 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.

While I have upheld the head's decision to withhold the records at issue in this appeal, I have also reviewed the records with a view to determining whether severance can reasonably be made pursuant to subsection 10(2) of the Act.

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.

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

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

I adopt Commissioner Linden's view of subsection 10(2) of the Act. Following a review of the requested records, I find that no information that is in any way responsive to the requests could be severed from the requested records and disclosed to the appellant without disclosing information that legitimately falls within subsection 14(1) of the Act.

ORDER:

1. I order the head to forward, pursuant to subsection 25(1) of the Act, the request at issue in Appeal 890374 to the Ministry of Health within five (5) days of the date of issuance of this Order. The Ministry of Health shall have twenty (20) days from the date of receipt of the transferred request to respond to it.
2. I order the head to advise me in writing within ten (10) days of the date of this Order that the request has been forwarded to the Ministry of Health. The said notice should be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.
3. I uphold the head's decision not to disclose all records which are at issue in these appeals and are in the custody or control of the institution.

Original signed by: _____ January 28, 1991
Tom A. Wright Date
Assistant Commissioner