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

ORDER P-262

Appeal P-910028

Ministry of the Attorney General

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I N T E R I M O R D E R

BACKGROUND:

On November 19, 1990, the Ministry of the Attorney General (the "institution") received a request for access to information regarding "Wiretap Applications". The requester wrote that the law requires notification of persons who have been wiretapped, and sought any such information that might apply to him. He also inquired about the existence of any renewals of wiretap applications.

On December 18, 1990, the institution advised the requester that "the Ministry will neither confirm nor deny the existence of a record" pursuant to subsection 14(3) of the Freedom of Information and Protection of Privacy Act, 1987 (the "Act").

On January 9, 1991, the requester appealed the decision of the institution.

The Appeals Officer investigated the circumstances of the appeal and concluded that mediation was not possible. Consequently, 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 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" of the appellant, 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 14(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" of the appellant, as defined in section 2(1) of the Act.

Section 2(1) of the Act states:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except where they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

It is clear from the appellant's request that he was seeking access to an authorization (and any associated renewals) to intercept his private communication at his residences. Wiretap authorizations may be granted as a result of an application to intercept a person's private communication.

Commissioner Wright previously dealt with the same issue in Order 195, dated August 30, 1990, involving the same institution, but a different appellant. At page 6 of that Order, he stated: "I . . . have no difficulty in concluding that if an authorization for interceptions of the appellant's private communications existed, it would contain personal information about him". He also noted that

the institution had identified "Wiretap Applications" in the Directory of Records for 1990, as a type of personal information bank it maintained. The 1991 Directory of Records identifies the nature of the personal information that would be maintained in a wiretap application personal information bank as including name, address, employment, nature of suspected offence, and the authorization for the wiretap.

It is my view that a record of the nature requested, if it existed, would contain "personal information" of the appellant, as the term is defined in section 2(1) of the Act.

Section 47(1)(a) of the Act gives individuals a general right of access to:

> any personal information about the individual contained in a personal information bank in the custody or under the control of an institution;

However, this right of access under section 47(1)(a) is not absolute. Section 49 provides a number of exceptions to this general right of disclosure of personal information to the person to whom it relates. In particular, section 49(a) states:

> 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; [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) states:

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

Therefore, before deciding whether the head has properly exercised his discretion to refuse to confirm or deny the existence of a record pursuant to sections 14(3) and 49(a), I must determine whether a record of the nature requested, if it existed, would qualify for exemption under 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 14(2) of the Act.

Section 14(1) of the Act states:

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

(a) interfere with a law enforcement matter;

(b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

(c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

(d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

(e) endanger the life or physical safety of a law enforcement officer or any other person;

(f) deprive a person of the right to a fair trial or impartial adjudication;

(g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

(h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;

> (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;
>
> (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.

At pages 9 and 10 of Order 195, Commissioner Wright stated that:

> It is apparent that wiretap authorization records relate specifically to police investigations. It is my view that disclosing the contents of such records could reasonably be expected to "interfere with a law enforcement matter" or "interfere with an investigation".

After reviewing the institution's representations in that matter Commissioner Wright stated, "I am satisfied that disclosure of a record of the nature requested, if it existed, could be refused by the head under either subsection 14(1) or (2) of the Act."

I have reviewed all the representations in this appeal and I am satisfied that a record of the nature requested, if it existed, would qualify for exemption under section 14(1) 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 a record of the nature requested, if it existed, would qualify for exemption under section 14(1) of the Act. Therefore, I conclude that the head has discretion under sections 14(3) and 49(a) of the Act to refuse disclosure.

In any case in which the head has exercised his or her discretion and refused to confirm or deny the existence of a record, I look very carefully at the manner in which the head has exercised this discretion. Provided that this discretion has been exercised in accordance with established legal principles, in my view, it should not be disturbed on appeal.

In this appeal, the head's representations regarding the exercise of discretion do not refer to the particular circumstances of the appellant's situation. At most, they set out general concerns about the type of record at issue. The head has not explained why, in this case, the appellant's rights and interests are outweighed by these general concerns.

In Order P-255, dated November 27, 1991, I outlined some general comments about section 14(3). At page 7 of that Order, I stated:

> 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.
>
> . . . 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.

In addressing the issue of the exercise of discretion under sections 14(3) and 49(a), I must be provided with detailed and convincing reasons as to why this section was claimed, so that I can ensure that the head's decision was made in full appreciation of the facts of each case. In my view, I have not been provided with sufficient information in this appeal to make a proper determination.

I recognize that the institution's representations in this appeal were submitted prior to the issuance of Order P-255. Nevertheless, I find that the head has not properly exercised his discretion, and I order him to reconsider the question of discretion, in accordance with the requirements outlined above.

INTERIM ORDER:

1. I find that a record of the nature requested, if it existed, would qualify for exemption under section 14(1) of the Act.

2. I order the head to reconsider the exercise of his discretion pursuant to sections 14(3) and 49(a) of the Act within twenty (20) days of the date of this Interim Order. I further order the head to provide me with written representations as to the factors considered in the exercise of discretion within twenty-five (25) days of the date of this Interim Order.

I remain seized of this matter.

Original signed by: January 16, 1992
Tom Mitchinson Date
Assistant Commissioner