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

ORDER 169

Appeal 890011

Ministry of Agriculture and Food

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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) or a request for access to personal information under subsection 48(1) a right to appeal any decision of a head under the Act to the 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. On October 6, 1988, the requester wrote to the Ministry of Agriculture and Food (the "institution") seeking access to:

> ...information on fifteen facilities, fourteen of which are on the CCAC [Canadian Council for Animal Care] list and one which is not, Standard Biologicals in Mississauga.
>
> Specifically, I am requesting the contents of the annual reports filed by the research facilities as required by Regulation 16, Section 4(1) and Section 1(2). This section as you know details the total number of every species of animal used for research and the names and particulars of the members of the animal care committees. I would like such information as filed for the past three years.

2. On November 29, 1988, the Freedom of Information and Privacy Co_ordinator (the "Co_ordinator") for the institution wrote to the 15 commercial research facilities referred to in the request (the "affected parties"), pursuant to section 28 of the Act, and advised the requester accordingly. The Co_ordinator's letter stated:

> You are being notified because disclosure of the information contained in the reports could affect the interests of your company as a third party under section 17.

3. On December 30, 1988, the Co_ordinator wrote to the requester, after considering the representations received from 10 of the affected parties, and advised that:

> 1) The names and particulars of Animal Care Committee members.
>
> Access is denied to the names and particulars of Animal Care Committee members under sections 20 and 21.
>
> Section 20
>
> Access is denied under Section 20 of the Act because disclosure of the information could reasonably be expected to seriously threaten the safety or health of the individuals named. The third parties presented substantial evidence that general availability of the information could have severe consequences. If the information were to be released, it would fall into the public domain and could result in harm or injury to those individuals named. This expectation is based on past acts and threats of violence against individuals in facilities where animals are used for research.
>
> Section 21

> The identification of the individuals as members of an Animal Care Committee is personal information as defined by section 2 of the Act. This definition includes an 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. Disclosure of the names is denied under section 21 of the Act which provides a mandatory exemption from disclosure of personal information.
>
> The provisions in section 21 that apply to the personal information you requested are [21(2)(e), (f), (h) and (i) and 21(3)(d)].
>
> ...
>
> 2) Annual Reports of the number of animals used in research.
>
> Access to the contents of annual reports of the total number of every species of animal used for research in commercial research facilities is denied under S.14(1)(e)and (i) and S. 20.
>
> ...
>
> These provisions apply because the type of information contained in the reports has been used by radical groups and individuals to target research facilities and their employees for acts of violence. We are concerned about the information becoming generally available and the potential for its use by other groups or individuals.

4. On January 26, 1989, this office received an appeal from the decision of the institution in which the appellant stated:

> Ms. McLaren has denied access to this information on the basis that the third parties had expressed concern that, should the [appellant's

> organization] become privy to this information, they or their institutions would somehow become endangered. No evidence of supposed threats was given.
>
> At this time, I am still requesting the information regarding the numbers and species of animals used by these facilities as well as access to the evidence presented to Ms. McLaren's office with regard to potential danger to individuals or institutions. While I would still appreciate the names of the animal care committee members, as I am anxious to open dialogue with them, I am prepared to surrender access on this point in a sincere attempt to allay their fears.
>
> I am particularly perplexed that our request for numbers of animals used was denied, considering that we obtained access to virtually identical information as it pertains to university research facilities, only a few months ago. Our [organization] had at that time requested to have access to the annual reports from a number of different facilities, and we met with no opposition. Given that we obtained access to the information at that time, I see no reason why the [organization] should be denied access today, especially if we are no longer seeking the names and particulars of the animal care committee members, a presumed source of contention.

5. The appellant is no longer interested in the names and particulars of members of the Animal Care Committees. Therefore, the annual reports filed by research facilities are the only records at issue in this appeal. The Appeals Officer obtained and reviewed the records at issue in this appeal, which consist of 49 pages withheld in their entirety.

6. As a settlement could not be effected, notice that an inquiry was being conducted to review the decision of the head was sent to the appellant, the institution and the

affected parties. Enclosed with each notice letter was 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. This report indicates that the parties, in making their representations, need not limit themselves to the questions set out in the report.

7. Written representations were received from the appellant, the institution and from 10 of the affected parties. While the institution no longer relied on the section 17 exemption, several of the affected parties maintained their reliance on this section. I have considered all of these representations in making this Order.

The issues arising in this appeal are as follows:

A. Whether the head properly applied the discretionary exemption provided by section 14 of the Act to the requested records.

B. Whether the mandatory exemption provided by section 17 of the Act applies to the requested records.

C. Whether the head properly applied the discretionary exemption provided by section 20 of the Act to the requested records.

D. Whether the requested records could reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under one of the exemptions.

In considering the specific issues arising in this appeal, I have been mindful 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 the record or part of the record falls within one of the specified exemptions of the Act lies upon the head. The affected parties resisting disclosure in this appeal have relied on sections 14, 17 and 20 to prohibit disclosure of the records pertaining to them. Therefore the affected parties and the institution share the onus of proving that the exemptions claimed apply to the records at issue in this appeal.

As previously mentioned, the appellant is requesting the contents of the annual reports filed by research facilities as required by subsection 4(1) of Regulation 16, made under the Animals for Research Act, R.S.O 1980, C.22. Subsection 4(1) of the Regulation states:

> The operator of every research facility shall, prior to the first day of March in every year, submit to the Director an annual report in respect of the preceding calendar year and the report shall contain,
>
> (a) the total number of every species of animal used for research in the research facility in the year;
>
> (b) the total number of dogs and the total number of cats purchased or otherwise acquired from,

(i) other research facilities,

(ii) pounds,

(iii) supply facilities, and

(iv) other sources; and

(c) the total number of dogs and the total number of cats that in any experiment or surgical procedure did not recover from anaesthesia.

The records contain two different methods of reporting. Some affected parties submitted their statistics on a standard form created by the institution. There are 35 pages of such records.

Other affected parties chose to submit the same information to the institution on their company letterhead. There are 14 pages of such records.

ISSUE A: Whether the head properly applied the discretionary exemption provided by section 14 of the Act to the requested records.

The institution cited subsections 14(1)(e) and (i) as reasons why the records have been withheld.

Subsections 14(1)(e) and (i) 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;
>
> ...

Prior to reviewing the submissions of the parties with respect to the above cited exemptions, there is a preliminary matter which I must address. As previously mentioned, the appellant indicated that she could not understand why access to the requested records was denied, when her organization had previously obtained virtually the identical information with respect to animal research facilities associated with universities. The previous request was limited to research facilities that obtain cats and dogs from pounds.

The head acknowledged that the institution had indeed provided access to the records mentioned above. However, the institution also indicated that it did not give notice to the universities and the hospitals who may have been affected by such disclosure. The head stated that the Freedom of Information and Protection of Privacy Act, 1987 was in its early stage when the previous request was received. As with other institutions, they had little experience with requests involving affected parties. In addition, the institution states that at the time that the earlier request was received, there was little available in the way of interpretation of the Act. The institution submitted that it was believed at that time that the records provided by the hospitals and the universities did not appear to trigger the application of any exemptions. However, the head submitted that it is often difficult to anticipate the consequences that disclosure may have on an affected party or individual. Finally,

the head submitted that "One instance of inappropriate disclosure should not warrant continued disclosure of similar records."

The appellant's confusion with respect to the institution's apparent inconsistency in applying the Act is certainly understandable. However, I am of the view that the previous disclosure of similar records to the appellant does not forever enjoin the institution from relying on applicable exemptions when responding to her subsequent request.

It is important to note that when notifying the parties that may be affected by the disclosure of the records which are at issue in this appeal, the institution advised of its intention to disclose the records. After considering the representations received from the affected parties objecting to disclosure, the institution was convinced that it was appropriate to deny access. With the passage of time between the two requests, the institution has benefited from additional experience in working with the Act as well as further interpretation of the Act contained in Orders issued by this office. Therefore, without making a determination as to the applicability of the exemptions claimed, I find nothing improper with the manner in which the head has responded to this request.

I will now review the applicability of subsections 14(1)(e) and (i) of the Act to the records at issue in this appeal.

The affected parties and the institution indicated serious concerns that disclosure of the records could reasonably be expected to result in threats to employees and the security of their facilities from extremists in the animal rights movement.

These concerns were both immediate and future and related to building security, theft of property, theft of privileged/ confidential information, violent occupation of buildings and vandalism of buildings, their contents and computer installations among other things.

In support of this position, their representations also included copies of newspaper and magazine articles, including those written by animal rights organizations. The articles contain quotes from members of animal rights groups, claiming responsibility for and advocating acts of violence ranging from vandalism at fur stores to break_ins and property damage at research laboratories.

The appellant submitted that:

> It is unreasonable to suggest that 14(e) release of the above mentioned information would endanger the life or physical safety of any person or 14(i) the security of a building or vehicle considering the following facts:
>
> a) The [appellant's organization] has been in possession of animal usage data pertaining to other Ontario facilities for approximately one year now and no person or facility has either been threatened, endangered or harmed. It is reasonable to expect that the status quo would not be altered should additional information be released.
>
> b) The [appellant's organization] has never engaged in an act of violence against either an individual affiliated with a research facility or against the facility and its vehicles. Indeed no violence against an individual has ever occurred in the province of Ontario (or Canada for that matter) to the best of my knowledge, by someone associated with the animal protection movement. Allegations of potential violence are

> unwarranted, inappropriate and harmful. We request once again that any evidence of such allegations be substantiated and made available to us.

I have examined the records at issue in this appeal along with the representations of the appellant, the institution and the affected parties. Having carefully considered all of the above, I am satisfied that disclosure of the records at issue in this appeal could reasonably be expected to endanger the security of a building where animal research is being conducted. Therefore, I uphold the head's decision to deny access to the records pursuant to the exemption in subsection 14(1)(i) of the Act.

I share the concerns of the institution and the affected parties that should the records be disclosed they would be in the public domain and therefore available to all of the individuals and groups who are involved in the animal rights movement, including those who may elect to utilize acts of vandalism and property damage to promote their cause.

The appellant submitted that:

> As animal advocates, I can assure you of the legitimate purpose of our request; our mandate requires us to keep abreast of all animal issues, including the maintenance of accurate records and to respond accordingly in a legal and moral fashion. It would not be in our best interest, in the interest of the animals nor in the best interest of our supporters to do otherwise.

I would like to make it clear that my conclusion is not based upon the identity of the appellant's organization or the activities it undertakes to fulfill its mandate, but rather on

the principle that disclosure of the record to the appellant's organization must be viewed as disclosure to the public generally.

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 her 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 section 17 and 20.

ISSUE D: Whether the requested records could reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under one of the exemptions.

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 provisions 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, at the same time protecting the confidentiality of the record covered by the exemption.

Following a review of the requested records, I find that no information that is in any way responsive to the request 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.

In summary, I uphold the head's decision not to disclose the records at issue in this appeal.

Original signed by: May 25, 1990
Tom Wright Date
Assistant Commissioner