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

ORDER P-344

Appeal P-911135

Ministry of the Attorney General

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ORDER

BACKGROUND:

The Ministry of the Attorney General (the institution) received a request for access to any "wiretap application" records relating to the requester. The institution responded by advising the requester that the existence of any records could neither be confirmed nor denied in accordance with section 14(3) of the Freedom of Information and Protection of Privacy Act (the Act).

The requester appealed the institution's decision.

Mediation was not possible in the circumstances, and the matter proceeded to inquiry. Notice that an inquiry was being conducted to review the institution's decision was sent to the appellant and the institution. Enclosed with each Notice of Inquiry was a letter intended to assist the parties in making representations concerning the subject matter of the appeal. Representations were provided by the institution. Although the appellant did not submit formal representations, his letter of appeal includes statements in support of his position.

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 the constitutional doctrine of federal legislative paramountcy applies so as to exclude requests for access to wiretap application records from the scope of the Act.

C. If the answer to Issue B is no, whether the institution has properly exercised discretion under sections 14(3) and 49(a) of the Act in refusing 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, in part:

"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,

...

(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;

"Wiretap Applications" are included in the institution's Directory of Records as a type of personal information bank maintained by the institution. According to the Directory, the nature of the personal information that would be maintained in a wiretap application personal information bank is the name, address, employment, nature of suspected offence, and the authorization for the wiretap.

In my view, if a wiretap application record existed, it would contain "personal information" of the appellant, as the term is defined in section 2(1) of the Act. (Orders 195, P-262)

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 is not absolute. Section 49 provides a number of exceptions to this general right of access, including section 49(a) which 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 any records 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.

The institution submits that the constitutional doctrine of federal legislative paramountcy operates so as to require the institution to invoke the provisions of section 14(3) in response to all requests for access to wiretap application records. I will deal with this issue first.

ISSUE B: Whether the constitutional doctrine of federal legislative paramountcy applies so as to exclude requests for access to wiretap application records from the scope of the Act.

Part VI of the Criminal Code of Canada (the Code) contains the criminal law provisions regarding the interception of private communications, commonly known as "wiretaps".

The institution's position is that the Code, a federal statute, establishes a complete legislative framework to deal with all information relating to wiretaps; in effect, that the Code "fully occupies the field", thereby removing requests for access to wiretap application records from the scope of the Act, on the basis of the constitutional doctrine of federal legislative paramountcy. The institution points out that Part VI of the Code provides a comprehensive secrecy and notification scheme which, among other things, requires the institution to notify the subject of a wiretap application upon the completion of criminal investigations (section 196); requires notification of the accused in the context of a criminal trial (section 189); requires the Solicitor General of Canada and the Attorney General of each province to make an annual report to Parliament regarding the wiretap applications, interceptions and proceedings commenced (section 195); and gives the court responsibility to authorize wiretaps and to oversee compliance with the notification provisions of Part VI (sections 188 and 196). The institution also points out

that the Code makes it an offence to disclose information relating to wiretaps other than through the provisions contained in Part VI.

The constitutional doctrine of federal legislative paramountcy can be stated as follows: where valid federal legislation is inconsistent with or conflicts with valid provincial legislation, the federal legislation prevails to the extent of the inconsistency or conflict. For the doctrine to apply, the courts have held that the inconsistency or conflict must amount to an "express contradiction". As Professor Peter Hogg states at page 355 of his book Constitutional Law of Canada, (2d ed., 1985):

> The only clear case of inconsistency, which I call express contradiction, occurs when one law expressly contradicts the other. For laws which directly regulate conduct, an express contradiction occurs when it is impossible for a person to obey both laws; or as Martland J. put it in Smith v. The Queen [1960] S.C.R. 776, 800, "compliance with one law involves breach of the other".

In the case of Multiple Access Ltd. v. McCutcheon et al. [1982] 2 S.C.R. 161, (1982) 138 D.L.R. (3d) 1, the Supreme Court of Canada set out a frequently quoted test for what constitutes "express contradiction" at page 23-4:

> In principle, there would seem to be no good reason to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; the same citizens are being told to do inconsistent things; compliance with one is defiance of the other.

The doctrine was also considered in the case of R. v. Chiasson (1982) 135 D.L.R. (3d) 499, 66 C.C.C. (2d) 195, [adopted by the Supreme Court of Canada in Chiasson v. The Queen (1984) 8 D.L.R. (4th) 767 (S.C.C.)], where the New Brunswick Court of Appeal stated at page 508:

> There may be cases where the continued operation of the provincial legislation would genuinely interfere with the operation of a federal statute. Apart from this, Parliament in legislating respecting a matter should be given scope to decide the ambit of its policies.

The case law appears to establish that "express contradiction" includes both an express conflict in the wording of a federal and provincial statute, as well as a conflict in the operation of the two legislative schemes in a way which interferes with the functioning of the federal scheme.

Section 187 of the Code requires that applications and authorizations for wiretap records must be kept confidential, and the application records are sealed by the court. Section 193 provides that

disclosure of the existence or the content of a wiretap record is an offence. In my view, there appears to be a conflict between these provisions of the Code and provisions of the Act. On the one hand, the Act includes the principle that decisions of the provincial government regarding access to information should be reviewed independently of government, and section 52(4) of the Act authorizes the Information and Privacy Commissioner to require the production of any record in order to carry out this review function "despite any Act or privilege". On the other hand, the Code appears to preclude the Commissioner from requiring production of a wiretap application record, and also appears to remove the discretion provided to the head under section 14(3) of the Act to confirm the existence of a record where one does exist, and perhaps even where a record does not exist.

In my view, where a request is made for a wiretap application record, and the record exists, there is an express contradiction between the Act and the Code; to comply with an order for production or to inform the Commissioner of the existence of a wiretap application record, or to do anything other than refuse to confirm or deny the existence of the record to the requester would, in my view, involve a breach of the Code. Therefore, applying the doctrine of federal legislative paramountcy, the Code prevails over the Act in situations where a wiretap application record exists.

The situation is more difficult when a record does not exist. The Code does not explicitly address the situation where no application for a wiretap authorization has been made, no authorization has been granted, and no interception has been made. In fact, the various provisions of Part VI appear to be based on the assumption that a record does exist.

The institution addressed this situation in its representations, arguing that it is not possible to confirm the non-existence of records in certain cases without creating a situation which would imply the existence of records in other cases. In the institution's view, if it refused to confirm or deny the existence of records in situations where a record does exist, and acknowledged that a record does not exist in certain cases when it doesn't, the pattern of responses provided by the institution would permit accurate inferences to be drawn as to the existence of records, thereby offending the disclosure provisions of the Code.

In my view, there is an operational conflict between the Act and the Code in responding to requests for access to wiretap application records in situations where a record does not exist, and this is sufficient to invoke the doctrine of paramountcy. In reaching this decision I take some comfort from the fact that Part VI of the Code does, in effect, provide a disclosure scheme covering situations where wiretap application records both exist and do not exist. Where they exist, section 196 of the Code requires the Attorney General of the province in which the application for authorization was made to notify the person who is the subject of the wiretap; where no records exist, the fact that no notification has been received tells the person that records do not exist. Although this is clearly less than an ideal disclosure scheme for situations where records do not exist, in my view, providing a separate disclosure scheme in the Act would be operationally incompatible with Part VI of the Code. It should also be noted that, according to the institution, it is possible for an individual to apply to a judge of the Ontario Court of Justice (General Division) for a declaratory judgment as to whether any wiretap application records exist.

In summary, I find that the doctrine of federal legislative paramountcy operates so as to exclude requests for wiretap application records from the scope of the Act.

ISSUE C: If the answer to Issue B is no, whether the institution has properly exercised discretion under sections 14(3) and 49(a) of the Act in refusing to confirm or deny the existence of a record of the nature requested.

Because of the way I have disposed of Issue B, it is not necessary for me to address Issue C in order to resolve this appeal. However, I thought it would be useful for me to outline my position with respect to the proper exercise of discretion under sections 14(3) and 49(a) of the Act.

The institution made submissions regarding the exercise of discretion under these sections. It submits that the wording of the Code requires the institution to invoke section 14(3) in every case where a request for wiretap application records is received, irrespective of the individual applicant, the circumstances of the case, or whether or not a record exists. To do otherwise, in the institution's view, would permit a requester to draw accurate inference as to the existence of records.

In my view, the position taken by the institution would represent an improper exercise of discretion under sections 14(3) and 49(a).

I have considered the proper interpretation of section 14(3) in a number of past orders. In Order P-255 I outlined some general comments about this section:

> 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.
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> ... 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.

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), the institution is denying the

requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power which I feel should be exercised only in rare cases.

In my view, an institution relying on section 14(3) must do more than merely indicate that records of the nature requested, if they exist, would qualify for exemption under sections 14(1) or (2). An institution must provide detailed and convincing evidence that disclosure of the mere existence of the requested records would convey information to the requester which could compromise the effectiveness of a law enforcement activity.

In my view, taking a "blanket" approach to the application of section 14(3) in all cases involving a particular type of record would represent an improper exercise of discretion. Although it may be proper for a decision maker to adopt a policy under which decisions are made, it is not proper to apply this policy inflexibly to all cases. In order to preserve the discretionary aspect of a decision under sections 14(3) and 49(a), the head must take into consideration factors personal to the requester, and must ensure that the decision conforms to the policies, objects and provisions of the Act.

In considering whether or not to apply sections 14(3) and 49(a), a head must be governed by the principles that information should be available to the public; that individuals should have access to their own personal information; and that exemptions to access should be limited and specific. Further, the head must consider the individual circumstances of the request. These considerations would include whether an investigation exists or is reasonably contemplated, and if there is an investigation, whether disclosure of the existence of records would interfere with the investigation. If no investigation exists or is contemplated, the head must be satisfied that some other provision of sections 14(1) or (2) applies to the record, and must still consider whether disclosure would harm the interests protected under the specific provision of section 14.

ORDER:

I uphold the decision of the head to refuse to confirm or deny the existence of wiretap application records.

I find that the constitutional doctrine of federal legislative paramountcy operates so as to exclude requests for wiretap application records from the scope of the Act.

Original signed by: August 21, 1992
Tom Mitchinson

Assistant Commissioner