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

ORDER P-534

Appeal P-9200506

Ministry of the Attorney General

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/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

ORDER

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to information relating to the funding, by the Ministry, of Project 80, the municipal corruption squad comprised of police officers from Metro, York Region and the Ontario Provincial Police. The requester indicated that, in addition to information on the amount of the funding, he wanted access to:

> ... any documentation explaining the reasons for this funding, and any special conditions. I also wish access to any correspondence, interministry, or outside the ministry, dealing with this funding.

The Ministry identified seven records containing 84 pages as being responsive to the appellant's request. The Ministry denied access to all the records pursuant to sections 14(1)(a), (b) and (d) of the Act. The requester appealed the Ministry's decision.

Mediation of the appeal was not successful and the matter proceeded to inquiry. Notice that an inquiry was being conducted to review the decision was sent to the Ministry and the appellant. Representations were received from both parties.

In its representations, the Ministry raised the application of section 14(1)(f) of the Act as a new exemption. The Ministry also discussed the application of section 14(3) of the Act. However, it stated that it "appreciate(d) the futility" of invoking this provision in this case, given that it had already made an access decision which acknowledged the existence of records responsive to the request. Since the Ministry has not claimed the discretionary exemption under section 14(3) of the Act in this case, I need not address this issue in this order.

I have reviewed all the records and, in my opinion, a large portion of the records identified by the Ministry as being responsive to the appellant's request deal, in fact, with matters other than the **funding** of Project 80. Those parts of the records identified by the Ministry that are not responsive to the request are outside the scope of this appeal and will not be considered in this order.

The records at issue therefore consist of:

Record 2: Undated "Critical Issue (two pages) with attached "Additional Considerations for the Minister" (one page): "Additional Considerations for the Minister" -paragraph 4 (excluding three words on lines 4 and 5)

Record 4: Memorandum dated February 12, 1992 from the Regional Director of Crown Attorneys to the Assistant Deputy Attorney General (two pages): Page 1, paragraph 1; and page 2, point 1 under paragraph 4

Record 6: Draft "Operational Plan for Project 80 - Extension" (45 pages): Pages 5 (the last three paragraphs), 6, 30 (excluding the names of the force representatives), 31, 32 (excluding the names and positions), 33, 36, 37, 38, 39, 40, 41, 42 and 43

Record 7: "Operational Plan for Project 80" dated February 1991 (34 pages): Pages 5, 6, 19 (excluding the names), 20 (excluding the name and position), 26, 27, 28, 29, 30, 31 and 32

The sole issue in this appeal is whether the discretionary exemptions provided by sections 14(1)(a), (b), (d) and/or (f) of the Act apply to the records that I have identified as being responsive to the request.

These sections of the Act read as follows:

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

Sections 14(1)(a), (b) and (d) all require that the records at issue fall within the definition of "law enforcement" as found in section 2 of the Act. The words "law enforcement" are defined as follows:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in clause (b);

In my view, it is clear that the records at issue satisfy the above definition of "law enforcement" in that they all relate to the investigation currently being conducted by a number of regional police forces and the Ontario Provincial Police into alleged criminal improprieties between elected and non-elected public officials and developers. However, that is not sufficient to satisfy the requirements for exemption under sections 14(1)(a), (b) and/or (d).

Section 14(1) of the Act provides that a provincial institution may refuse to disclose a record where disclosure **could reasonably be expected** to result in the types of harms described in subparagraphs (a) through (l). In my view, the general test required by section 14(1) is set out in Order 188. Decisions of the Federal Court of Canada which interpret sections of the federal Access to Information Act which contain similar wording apply the same general principles to the interpretation of the wording as applied in Order 188. The Federal Court decisions elaborate further on those general principles. They also provide guidance as to the sufficiency of the evidence required for a government institution to satisfy the burden of proof that a record or a part of a record falls within an exemption which contains wording similar to that contained in section 14(1).

In Order 188, former Assistant Commissioner Tom Wright interpreted the phrase "could reasonably be expected to" as follows:

> It is my view that section 14 of the Ontario Act similarly requires that the expectation of one of the enumerated harms coming to pass, should a record be disclosed, not be fanciful, imaginary or contrived, but rather one that is based on reason. An institution relying on the section 14 exemption, bears the onus of providing sufficient evidence to substantiate the reasonableness of the expected harm(s) by virtue of section 53 of the Act.

The federal Access to Information Act has similar wording to that found in section 14(1), although in the context of a different exemption. In Canada Packers Inc. v. Canada (Minister of Agriculture) [1989] 1 F.C. 47 at 59-60, the Federal Court of Appeal interpreted the words "could reasonably be expected to" as follows:

> [The words in question must be viewed] in their total context, which must here mean particularly in light of the purposes of the Act as set out in section 2. Subsection 2(1) provides a clear statement that the Act should be interpreted in the light of the principle that government information should be available to the public and that exceptions to the public's right of access should be "limited and
>
> specific". With such a mandate, I believe one must interpret the exceptions to access in paragraphs (c) and (d) to require a reasonable expectation of probable harm. [emphasis added]

More recently, the Federal Court discussed in more detail the meaning of the "reasonable expectation of probable harm" test in The Information Commissioner of Canada v. The Prime Minister of Canada, unreported decision of the Federal Court Trial Division, November 19,

1992, in the context of the application of section 14 of the federal Access to Information Act to a request for disclosure of public opinion polls relating to the national unity issue. Mr. Justice Rothstein stated that the mere "possibility" of harm was not sufficient. Specifically, he stated in part:

> The focus in this case based on evidence, is whether the government had reasonable grounds to expect harm from disclosure or whether it was taking an overly cautious approach to disclosure, based on the possibility, which is not justified by the legislation...
>
> ... What is being considered is the validity of an opinion of a government official that disclosure of specific government documents could reasonably be expected to result in harm to the government's conduct of federal-provincial affairs. While no general rules as to the sufficiency of evidence in a section 14 case can be laid down, what the Court is looking for is support for the honestly held but perhaps subjective opinions of the government witnesses based on general references to the record. Descriptions of possible harm, even in substantial detail, are insufficient in themselves. At the least, there must be a clear and direct linkage between the disclosure of the specific information and the harm alleged. The Court must be given an explanation of how or why the harm alleged would result from disclosure of specific information. If it is self-evident as to how and why harm would result from disclosure, little explanation need be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantiated the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a Court to be satisfied as to the linkage between disclosure of particular documents and the harm alleged.
>
> In addition, allegations of harm from disclosure must be considered in light of all relevant circumstances. In particular this includes the extent to which the same or similar information that is sought to be kept confidential is already in the public realm. While the fact that the same or similar information is public is not necessarily conclusive of the question of whether or not there is a reasonable expectation of harm from disclosure of the information sought to be kept confidential, the burden of justifying confidentiality, would, in such circumstances, be more difficult to satisfy. [emphasis added]

It is the position of the appellant in this case that:

> The public already knows a great deal about Project 80. The people who have become or may be targets of Project 80 can reasonably be expected to understand that police officers are vigorously performing their jobs. For those individuals now being prosecuted, I make the same argument. Release of the information will neither hurt or help their prosecution. I believe, therefore, that the Ministry's reasons for not disclosing the level of funding are, as stated in Order P-324, "fanciful, imaginary or contrived".
> ...

> It will not hinder the work of Project 80 if the public learns that the Ministry has provided funding along with some of the machinations of that ongoing support.

In support of the application of sections 14(1)(a) and (b), the Ministry submits that disclosure of the records could interfere with the conduct of this high profile investigation by hindering the efforts of investigators to secure further evidence and adversely affect the detection of other politicians involved in similar offenses.

In support of the application of section 14(1)(d), the Ministry states that release of the records would disclose the names of a confidential source of information.

As far as the application of section 14(1)(f) is concerned, the Ministry states that disclosure of the record:

> could reasonably be expected to deprive the politicians already charged as a result of the Project 80 investigation of a fair trial. Members of the public, and therefore potential members of the jury, may unreasonably conclude that the accused must be guilty due to the money spent on the investigation.

In my view, most of the arguments put forth by the Ministry do not apply to those portions of the records that I have found to be responsive to the request. The records at issue do not contain any information about the method of the investigations, the people to be investigated, the potential charges to be laid, the identity of any confidential sources of information, or any other substantive information about the investigation itself. The information contained in the records relates to the **funding** of the investigation.

In my view, only lines 4-10 and the last two words of line 3, under point 12, page 40 of Record 6 qualify for exemption pursuant to section 14(1)(b) of the Act. This portion of the record deals with funding for certain travel expenses incurred or to be incurred by investigators involved with Project 80. The disclosure of proposed travel plans could, in my view, reasonably be expected to interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result. I have reviewed the Ministry's representations on the exercise of discretion in withholding this information. I find nothing improper in the manner in which it was exercised and would not alter it on appeal.

As far as the balance of the records are concerned, it is my view that the Ministry's representations fail to establish a clear and direct linkage between disclosure of the information contained in the records and the reasonable expectation that the harms enumerated in sections 14(1)(a) and/or (b) could come to pass. In fact, the Ministry's representations do not go much beyond a restatement of the wording of these exemptions and the conclusion that certain harms could result from disclosure of the information contained in the records.

Accordingly, I find that the Ministry has not provided sufficient evidence to establish that disclosure of the balance of the records could reasonably be expected to lead to the harms

identified in sections 14(1)(a) and/or (b) or satisfy the requirements of section 14(1)(d) of the Act.

As far as the Ministry's submissions with regard to section 14(1)(f) are concerned, it is my view that the harm envisioned by the Ministry is not one that is "based on reason". As the Ministry itself indicates, it is "unreasonable" to conclude that there is a positive relationship between the amount of money spent on a law enforcement investigation and the guilt or innocence of any persons charged as a result of the investigation. In my view, the Ministry has not submitted sufficient evidence to substantiate the reasonableness of the expectation of the harm described in section 14(1)(f) should the records be disclosed.

The Ministry has failed, in my view, to discharge the burden of proof that the balance of the records fall within one of these sections, under section 53 of the Act.

Therefore, I find that, with the exception of that portion of page 40 of Record 6 described above, the records at issue do not qualify for exemption under sections 14(1)(a), (b), (d), and/or (f) of the Act.

ORDER:

1. I order the Ministry to disclose to the appellant the portions of the records which **are** highlighted on the copy of the records which is being forwarded to the Ministry with this order, within 15 days following the date of this order.

2. In order to verify compliance with the provisions of this order, I order the head to provide me with a copy of the parts of the records which are disclosed to the appellant pursuant to Provision 1, only upon request.

Original signed by: September 10, 1993
Anita Fineberg
Inquiry Officer