



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

ORDER P-557

Appeal P-9200419

Ministry of Agriculture and Food



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

BACKGROUND:

The Ministry of Agriculture and Food (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to "copies of the reports detailing numbers and species of animals used for every registered research facility in Ontario, for the past three years, as collected under the Animals for Research Act (the ARA) Chap. 22, Sec 5. or their equivalent."

The Ministry provided the requester with a copy of a chart entitled "Animals Used in Registered Research Facilities" which shows the total numbers and species of animals used by all research facilities in the past three years. The requester indicated that she sought access to the reports submitted by each research facility listing the number and species of animals it used for research. The Ministry denied access to these reports, pursuant to sections 14(1)(e) and (i), 20 and 17(1)(c) of the Act. The requester appealed the Ministry's decision.

The appeal could not be resolved by mediation and a notice that an inquiry was being conducted to review the decision of the Ministry was sent to the Ministry and the appellant. Representations were received from both parties. The parties have requested that I also refer to the representations they made in two previous appeals - Appeals 890011 and 900201, both of which involved the requester and the Ministry and dealt with records similar to the ones in this appeal.

In Appeal 890011, the requester sought access to reports filed under the ARA by commercial research facilities while the request in Appeal 900201 related to the same type of reports filed by fourteen named colleges, universities and hospitals. In Order 169, disposing of the issues raised in Appeal 890011, then Assistant Commissioner Tom Wright upheld the Ministry's application of the exemption in section 14(1)(i) of the Act to the reports.

In Appeal 900201, the appellant argued that the facts in the appeal were distinguishable from those in Appeal 890011, on the basis that the records in the former appeal related to research facilities which are publicly funded and which should be subject to a higher level of public scrutiny, whereas the latter appeal involved commercial facilities.

In Order P-252, which disposed of the issues in Appeal 900201, former Assistant Commissioner Tom Mitchinson found that no valid distinction could be made between publicly funded bodies and commercial research facilities with respect to the application of section 14(1)(i) of the Act. He found that the concerns for security which were an important factor in Order 169 remained valid in the factual situation addressed in Order P-252 and that the records at issue in that appeal were properly exempt from disclosure under section 14(1)(i) of the Act.

RECORDS AT ISSUE:

The records at issue are the annual reports filed by 80 facilities in 1989, 82 facilities in 1990, and 87 facilities in 1991, as required by section 4 of Regulation 22, made under the ARA. They contain:

- (a) the total number of every species of animal used for research in the research facility in the year covered by the report,
- (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,
 - (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.

ISSUES:

The issues arising in this appeal are as follows:

- A. Whether the discretionary exemption provided by section 14(1)(i) of the Act applies to the records.
- B. Whether the discretionary exemption provided by section 14(1)(e) of the Act applies to the records.
- C. Whether the discretionary exemption provided by section 20 of the Act applies to the records.
- D. Whether the mandatory exemption provided by section 17(1)(c) of the Act applies to the records.

ISSUE A: Whether the discretionary exemption provided by section 14(1)(i) of the Act applies to the records.

Section 14(1)(i) states:

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

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;

In its representations, the Ministry states:

If disclosed, reports of the number and types of animals used by individual research facilities could reasonably be expected to be used by animals rights extremists to target facilities for acts of violence. Typical activities carried out by extremists endanger the security of research facilities and vehicles used by the facilities or research staff.

In support of its claim, the Ministry has provided very extensive representations and documentary evidence, including photographs, newspaper clippings and articles.

In her representations, the appellant submits:

The burden of proof is on the institution to demonstrate a causal connection between the release of information and the perceived breach of security, something which the Ministry has not done. Indeed, no breaches of security have occurred since the last release of such information in 1987.

...

It is most important to keep in mind that the information requested has already been released through previous freedom of information requests, with no catastrophic results. Access was granted a few years ago to the annual summary reports for all Ontario universities for the period from 1982-1987. Whatever damage that could be wrought based on release of old information could have already been done; the appellant is just asking for an update of the information of a similar nature.

The appellant further states that "information supporting the contention that research facilities are conducting experiments on animals is already in the public domain." She states that the location of the research facilities is also publicly available. She submits that "the additional information being requested, that is the number and species of animals, does not in [and] of itself provide reasonable causal grounds to believe that their release could be expected to `endanger the security of a building ... a vehicle ... or of a system or procedure'".

In addition, the appellant states that the type of information she requested is "routinely released in many other jurisdictions including United States, Great Britain, Europe and Australia". She argues that disclosure of the records is consistent with the policy and general intent of the Act.

The appellant has submitted documentary evidence in support of her position.

In considering the specific issues arising in this appeal, I have been mindful of the fact that one of the purposes of the Act is to provide the public a right of access to information under the control and in the custody of institutions. The Act also provides that necessary exemption from this right of access should be limited and specific.

Under section 53 of the Act, the burden of proof that the record or part of the record falls within the section 14(1)(i) exemptions lies upon the Ministry.

In interpreting the provisions of section 14(1)(i), in my view, it is necessary to attach a meaning to the phrase "could reasonably be expected to" which is found in the section.

In Order P-188, then Assistant Commissioner Tom Wright defined the phrase "could reasonably be expected to" as follows:

In my view, section 14 of the Act ... requires that the expectation of one of the enumerated harms coming to pass, should the record be disclosed, not be fanciful, imaginary or contrived.

In Order P-534, Inquiry Officer Anita Fineberg, after discussing a number of federal court decisions which elaborated on similar wording found in the federal Access to Information Act, concluded that in order to satisfy the test of "reasonable expectation " under section 14(1), the institution must establish a clear and direct linkage between the disclosure of the information contained in the records and the harms alleged.

I agree with the views of Commissioner Wright and Inquiry Officer Fineberg. In my view, the exceptions to access set out in section 14(1) of the Act require that there exist a reasonable expectation of probable harm. The mere possibility of harm is not sufficient. At a minimum, the institution must establish a clear and direct linkage between the disclosure of the information and the harm alleged.

In her representations, the appellant seems to argue that because the disclosure of similar records in the past did not materialize in harms to the facilities concerned, there can be no reasonable expectation that the disclosure of the records at issue in this appeal could result in the harm alleged by the Ministry. While I am not able to comment on the factual content of the appellant's claim, in my view, the fact that disclosure of similar records in the past did not materialize in the alleged harm is a relevant consideration but not determinative of the issue under section 14(1)(i). As indicated previously, the issue to be decided is whether in the circumstances of this appeal, the disclosure of the records can reasonably be expected to endanger the security of a building or the security of a vehicle carrying items, for which protection is reasonably required. In my view, the Ministry is not required to prove that disclosure of the records will actually result in the alleged harm.

The appellant states:

The information is being requested in order to provide to the public a clear and accurate picture of animal experimentation in Ontario. [The appellant's organization] is registered as a non-profit corporation in accordance with the laws of this country. Our mandate is the protection of animals through public education and legislative advocacy; we carry this out through legal and moral measures only.

As in Orders 169 and P-252, my conclusion that the disclosure of this information could reasonably be expected to result in the section 14(1)(i) harms is not based upon the identity of

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the appellant's organization or its activities but rather on the principle that disclosure of the record to the appellant's organization must be viewed as disclosure to the public generally. If disclosed, the information in the records would be 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.

I have examined the records at issue as well as the representations and documentary evidence submitted by both parties. I have also reviewed the representations and materials included in Appeals 890011 and 900201. Having carefully considered all of the above, I am satisfied that the Ministry has provided me with sufficient evidence to establish that, in the circumstances of this appeal, disclosure of the records could reasonably be expected to endanger the security of a building where animal research is being conducted or the security of a vehicle carrying animals for research and/or other items, for which protection is reasonably required. Accordingly, the records qualify for exemption under section 14(1)(i).

Section 14(1)(i) is a discretionary exemption which provides the Ministry with the discretion to release a record even if it meets the test for the exemption. I have reviewed the Ministry's representations with respect to the exercise of discretion and I find nothing improper in the way in which the Ministry has exercised its discretion and would not alter it on appeal.

Because of the manner in which I have disposed of Issue A, it is not necessary for me to consider Issues B, C, or D.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____
Asfaw Seife
Inquiry Officer

_____ October 20, 1993