



Information and Privacy
Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-971

Appeal P-9400780

Ministry of the Solicitor General and Correctional Services



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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The appellant made a request to the Ministry of the Solicitor General and Correctional Services for information pertaining to the funding of Project 80. Project 80 is a police investigation into municipal corruption, and is comprised of officers from several police forces including the Metropolitan Toronto Police, York Regional Police and the Ontario Provincial Police. The request was for access to the following:

... all information current to today's date relating to the funding of Project 80 by either the Ministry of the Attorney General or the Ministry of the Solicitor General. This information is to include, but not be limited to, budget projections, actual payouts, and correspondence, inside and outside the Ministry.

The appellant went on to indicate that the request was not intended to apply to information previously requested. Rather, the appellant sought access to "... information in government files after May 26, 1992, which includes 1992, 1993, 1994 and any projections for 1995 and beyond." The appellant also indicated that he would be interested in both projections and actual payouts.

The request letter stated that the appellant was also sending the request to the Ministry of the Attorney General. However, this appeal only relates to the request to the Ministry of the Solicitor General and Correctional Services (the Ministry). The request submitted to the Ministry of the Attorney General is the subject of Appeal P-9400779 and was addressed in Order P-970.

The Ministry identified a number of responsive records, and initially denied access to them in their entirety, citing the following exemptions in the Act:

- law enforcement - sections 14(1)(a) and (b)
- right to fair trial - section 14(1)(f).

The appellant filed an appeal of the Ministry's decision, stating that the exemptions claimed do not apply.

A Notice of Inquiry was sent to the Ministry and the appellant. Representations were received from both parties.

In its representations, the Ministry states that it has reconsidered its original decision, and as a result, a substantial amount of information has now been disclosed to the appellant. The Ministry sent its revised decision in this regard, including the information being disclosed, on May 12, 1995. This decision letter indicates that parts of the records which continue to be withheld from disclosure are withheld on the basis that they are not responsive to the request, and other parts on the basis of the exemption in section 14(1)(b).

The Ministry's representations also state that it no longer relies on the exemptions in sections 14(1)(a) and (f).

The parts of the records which have not been disclosed, and the basis for the non-disclosure as indicated in the Ministry's representations, are as follows (adopting the Ministry's page numbers):

Page	Description	Reason for non-disclosure
1	Date, letterhead information, identity of author and recipient, part of paragraph 2, full text of paragraph 3	Non-responsive
7	Last sentence	Section 14(1)(b).

I note that page 1 is the same record as one identified as page 20 in Order P-970, except that the copy at issue here does not have any handwritten notations on it. Similarly, page 7, as described above, is identical in every respect to page 7 as referred to in Order P-970.

The Ministry made detailed submissions explaining why it takes the position that parts of page 1 are not responsive to the request. In order to permit the appellant to comment on this issue, a supplementary Notice of Inquiry was sent to him. The appellant submitted additional representations in response to this supplementary notice.

The issues to be decided in this appeal are:

- (1) whether parts of page 1 are non-responsive, as claimed by the Ministry, and
- (2) whether the part of the records for which the Ministry has claimed section 14(1)(b) is properly exempt under that section.

DISCUSSION:

RESPONSIVENESS OF RECORDS

The issue of responsiveness of records was canvassed in detail by Inquiry Officer Anita Fineberg in Order P-880. That order dealt with a re-determination regarding this issue which resulted from the decision of the Divisional Court in Ontario (Attorney-General) v. Fineberg (1994), 19 O.R. (3d) 197. As in the current appeal, this case also involved requests for Project 80 funding information.

In the Fineberg case, the Divisional Court characterized the issue of the responsiveness of a record to a request as one of relevance. In her discussion of this issue in Order P-880, Inquiry Officer Fineberg stated as follows:

In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.

I agree with these conclusions and adopt them for the purposes of this appeal.

Another aspect of the non-disclosure of records on the basis of non-responsiveness is the issue of whether an institution can withhold **parts** of a record for this reason. As noted above, the Ministry seeks to withhold parts of one of the records because of its view that the withheld portions are non-responsive. I dealt with this issue in Order P-913. In that order, I found that, with respect to passages in a record which are in fact non-responsive, this approach is consistent with the Act. In particular, I found that this approach is supported by the wording of section 10(1), which provides a right of access to "a record or a **part of a record** in the custody or under the control of an institution" unless an exemption applies (emphasis added). This view is consistent with the approach taken by Inquiry Officer Fineberg in Order P-880.

I will now consider the particular parts of page 1 which have not been disclosed because of the Ministry's view that they are non-responsive, in order to determine whether I will uphold the Ministry's assessment in this regard.

Page 1 consists of a one-page letter from one Deputy Minister to another. The portions which the Ministry deleted as "non-responsive" include the printed letterhead of the originating ministry, the date, the names and job titles of both the sender and the recipient of the letter, and an extremely general description of the nature of Project 80. The Ministry argues that the information deleted from this letter "relates to the purpose and management of the investigation and is not reasonably related to the funding of Project 80".

I disagree with the Ministry's decision to withhold the extremely general information about Project 80 contained in the letter. While the right of an institution to withhold non-responsive information has been upheld in a number of previous orders, as noted above, in my view this right must be exercised in a reasonable manner. This particular information appears in a document comprising one page, and the Ministry's representations do not argue that any exemption applies to it. The decision to withhold it appears to be based on a very technical and narrow reading of the request which, in my view, is contrary to the spirit of the Act. In the circumstances, I find that the Ministry's decision to deny access to this information was not a reasonable exercise of the right to withhold non-responsive information, and I do not uphold it.

With regard to the other information withheld from this document, several comments made by Inquiry Officer Fineberg in Order P-880 are relevant. On the issue of severances and the question of whether any meaningful information is being disclosed, the Inquiry Officer stated as follows:

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The concept of severance in section 10(2) deals with disclosure of as much of a record as possible when such a document contains **information that falls within an exemption**. The information which is thus disclosed must be meaningful. In my view, the same approach should be adopted in deciding which portions of the records are responsive. That is, one should consider whether the information which is responsive is meaningful when it is only portions of a larger document.

I agree with these comments and adopt them for the purposes of this appeal. In my view, absent any compelling reason to withhold the letterhead, the date of the letter, and the identities of the author of the letter and its recipient (both of whom are high level government officials acting in their professional capacities), the withholding of this information as non-responsive offends the principle enunciated by Inquiry Officer Fineberg. This is so because the appellant's ability to discern the meaning and significance of the information disclosed would be severely impeded by the removal of this information. Moreover, for the same reasons enunciated above (in my discussion of general information about Project 80 in this record), I am also of the view that the decision to remove the information under discussion here is not a reasonable exercise of the right to withhold non-responsive information. For these reasons, I do not agree with the Ministry's decision to withhold this information as non-responsive.

Therefore, I find that page 1, in its entirety, is responsive to the request. The Ministry's representations do not argue that this page is exempt under section 14(1)(b) (the only exemption still relied on by the Ministry in this case), and I have not been provided with any reason to conclude that this exemption applies to this record. There is no information in this document which is subject to a mandatory exemption. Accordingly, page 1 should be disclosed.

I have now dealt with the only record for which responsiveness or non-responsiveness was an issue. However, the appellant's supplementary representations raise another matter which I must address. Although the appellant was asked to comment on the issue of responsiveness in the supplementary Notice of Inquiry which was sent to him, his comments are in fact more directed to the issue of whether additional records exist.

He states, in part, as follows:

My submission is that, related to the funding of Project 80, there is a large amount of correspondence and additional documents that have not been released. For example, I know that correspondence has been sent to the Ministry by [a named police official], who is in charge of Project 80.

The appellant did not raise the issue of additional responsive records in his initial letter of appeal. However, in my view this is understandable, given that he was not given access to any documents at the request stage.

It was only after he received copies of the documents the Ministry decided to disclose during the inquiry stage of this appeal that the appellant was in a position to judge whether he had the whole body of records

which might reasonably be seen as responsive. In effect, the letter enclosing the disclosed records was a new decision from which the appellant is entitled to appeal.

The usual time limit for appealing a decision is 30 days (section 50(2) of the Act). In this case, where an appeal is in process, the appellant would not have considered it necessary to file a new appeal to deal with this issue. Moreover, the Ministry's amended decision did not advise the appellant of his right to appeal.

Accordingly, although I am not in a position to make a determination regarding additional records in this order (since representations on this subject have not been sought), I am of the view that the appellant's right to appeal in this regard should be preserved. If the appellant wishes to file an appeal of the Ministry's decision letter of May 12, 1995, regarding the possible existence of additional records, he may do so by sending a letter of appeal to this office on or before August 31, 1995.

LAW ENFORCEMENT

The Ministry relies on section 14(1)(b) to deny access to part of page 7.

That section states:

A head may refuse to disclose a record where the disclosure could 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.

Order P-403 established that the purpose of section 14(1)(b) is to provide institutions with the discretion to preclude access to records in circumstances where disclosure could reasonably be expected to interfere with an ongoing law enforcement matter or investigation.

It is clear that Project 80 is an ongoing investigation undertaken with a view to a law enforcement proceeding. The information withheld from this record pertains to travel arrangements for investigators, and I am satisfied that its disclosure could reasonably be expected to interfere with the investigation. Inquiry Officer Fineberg reached the same conclusion about Project 80 travel arrangements in Order P-534. Accordingly, I find that this information is exempt under section 14(1)(b).

I note that the appellant's representations make reference to the public interest in disclosure of the information to which access was denied. This raises the possible application of the "public interest override" in section 23 of the Act. This section states:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

The only exemption I have applied in this case is found in section 14 of the Act, which is not one of the sections mentioned in section 23. Accordingly, section 23 cannot apply to override the exemption provided by section 14 and I cannot order disclosure of this information based on any public interest in this information.

ORDER:

1. I order the Ministry to disclose page 1 to the appellant in its entirety, within 21 (twenty-one) days after the date of this order.
2. I uphold the Ministry's decision to deny access to the part of page 7 which has not been disclosed.
3. If the appellant wishes to file an appeal of the Ministry's decision letter of May 12, 1995, regarding the possible existence of additional responsive records, he may do so by sending a letter of appeal to this office on or before August 31, 1995.
4. In order to verify compliance with Provision 1 of this order, I reserve the right to require the Ministry to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
John Higgins
Inquiry Officer

_____ August 1, 1995