



Information and Privacy
Commissioner/Ontario

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

ORDER P-970

Appeal P-9400779

Ministry of the Attorney General



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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 Attorney General 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 (which was the subject of Orders P-534 and P-880). 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 Solicitor General and Correctional Services. However, this appeal only relates to the request to the Ministry of the Attorney General (the Ministry). The request submitted to the Ministry of the Solicitor General and Correctional Services is the subject of Appeal P-9400780 and will be addressed in a subsequent order.

The Ministry's response to the request indicated that it had identified 39 pages of responsive records. The Ministry initially denied access to these records in their entirety, citing the following exemptions in the Act:

- advice to government - section 13(1)
- 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 5, 1995. This decision letter indicates that the parts of the records which continue to be withheld from disclosure are withheld on the basis of the exemption in section 14(1)(b).

In its representations, the Ministry indicates that it no longer relies on the section 13(1) exemption.

The Ministry's representations also state that some parts of the records are being withheld on the basis that they are not responsive to the request. This was not mentioned in either of the decision letters sent to the appellant.

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	Cover page	Non-responsive
7	Last sentence	Section 14(1)(b)
11	Cover page	Non-responsive
16, 29 and 36	Last 2 sentences	Section 14(1)(b)
20	Date, letterhead information, identity of author and recipient, points 2 and 3 at top, part of paragraph 2, full text of paragraph 3	Non-responsive
22-24	Handwritten notes	Non-responsive.

The text of the last 2 sentences on pages 16, 29 and 36, referred to above, is the same in each of these records.

The Ministry made detailed submissions explaining why it takes the position that pages 1, 11, 22-24 and parts of page 20 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 the records are non-responsive, as claimed by the Ministry, and
- (2) whether the parts of the records for which the Ministry has claimed section 14(1)(b) are 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 several 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 records 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.

Pages 1 and 11 are the cover pages of two records. These cover pages were entirely withheld on the basis of non-responsiveness, but parts of the remainder of the documents were disclosed. The disclosed information consists of specific funding proposals and information. The Ministry argues that these cover pages "... are, in all material respects, identical to the cover pages of records 6 and 7 ... which were found not to be responsive in Order P-880."

However, the wording of the request at issue in Order P-880 differed from the wording of the request at issue in this appeal. In Order P-880, Inquiry Officer Fineberg noted that the request

... was clearly one for information as opposed to one for specified records or documents. The request does not describe a document by date, title, author or the like; **nor does it ask for an entire file or "all the information related to" a particular matter.** (emphasis added)

By contrast, in the present case, the appellant requested "all information ... relating to the funding of Project 80."

Page 1 is the cover of a document from which pages 2 through 10 (which the Ministry has disclosed) were extracted. It shows the title of the report and its effective date, which do not appear anywhere on pages 2 through 10. In my view, funding information from which the effective date is deleted or withheld is missing a very relevant detail. Moreover, I am also of the view that the character of the document in which funding information appears (for example, is it in draft or final form?) is another very relevant contextual factor. Given the wording of the request, I find that this information is "reasonably related" to it because it provides a vital context which is very relevant to the meaning of the funding information provided.

Similarly, page 11 is the cover of a document from which pages 12 through 19 (which the Ministry has disclosed) were extracted. In this instance, the cover page is undated, but the character of the document (whether in draft or final form, by whom prepared, etc.) are indicated. For the reasons mentioned in the preceding paragraph, I also find that this information is "reasonably related" to the request.

Page 20 is 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, an extremely general description of the nature of Project 80, and several notes written on the letter by hand, by a third high level official, including his views on the continued funding. 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".

With respect to the handwritten notes on this letter, I disagree with the Ministry because the withheld parts of these notes consist of a high level official's views on continued funding, and factual information which supports those views. In my opinion, this is "reasonably related" to the request as submitted.

I also 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:

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 pages 1, 11 and 20, in their entirety, are responsive to the request. The Ministry's representations do not argue that these pages are exempt under any of the sections which the Ministry has not withdrawn, and I have not been provided with any reason to conclude that those exemptions apply. There is no information in these pages which is subject to a mandatory exemption. Accordingly, they should be disclosed.

I will now consider pages 22, 23 and 24, which are handwritten notes of a meeting concerning global budget allocations, and a second meeting concerning municipal corruption. Based on my review of these records, I agree with the Ministry's submission that they do not contain any information pertaining to the funding of Project 80, and therefore, I find that they are not responsive to the appellant's request.

I have now dealt with all the records which the Ministry claims are non-responsive. 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.

In this regard, I note that only selected pages of the reports of which pages 1 and 11 are the cover pages have been provided to the appellant, and to this office, in connection with this appeal. It is possible that the remaining pages of these reports contain responsive information. This also applies to pages 25 through 31 and pages 32 through 39, which have been extracted from two larger documents.

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 5, 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 parts of pages 7, 16, 29 and 36.

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 these records all 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 pages 1, 11 and 20 to the appellant in their entirety, within 21 (twenty-one) days after the date of this order.
2. I uphold the Ministry's decision to withhold pages 22, 23 and 24 on the basis that they are not responsive to the appellant's request.
3. I uphold the Ministry's decision to deny access to the parts of pages 7, 16, 29 and 36 which have not been disclosed.
4. If the appellant wishes to file an appeal of the Ministry's decision letter of May 5, 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.
5. 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 records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____

John Higgins
Inquiry Officer

_____ August 1, 1995