



Information and Privacy
Commissioner/Ontario

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

ORDER P-1487

Appeal P_9700170

Ministry of the Solicitor General and Correctional Services



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NATURE OF THE APPEAL:

The appellant made a request to the Ministry of the Solicitor General and Correctional Services (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act). The request was for access to six described manuals used by the Centre of Forensic Sciences (the CFS). Also requested were records related to DNA lab errors and records relating to the calibration procedure of the Intoxilyzer 5000C.

The Ministry responded by denying access to the requested records pursuant to the following sections of the Act:

- law enforcement - section 14(1)(c);
- facilitate commission of unlawful act - section 14(1)(l);
- third party information - section 17(1);
- valuable government information - section 18(1)(a);
- economic and other interests - section 18(1)(c).

The appellant appealed the decision to deny access to the manuals and the calibration procedure records.

During mediation the appellant withdrew his request for the calibration procedures, leaving only the manuals at issue in this appeal.

This office provided a Notice of Inquiry to the Ministry and the appellant. Representations were received from both parties. In its representations, the Ministry indicated that because the appellant narrowed his request to only the manuals, it was no longer relying on section 17(1) to withhold the records. Accordingly, this section is no longer at issue in this appeal.

RECORDS:

The records at issue consist of the six described manuals.

DISCUSSION:

LAW ENFORCEMENT

Section 14(1)(c) of the Act states:

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

reveal investigative techniques and procedures currently in use or likely to be used in law enforcement.

In order to constitute an “investigative technique or procedure” it must be the case that disclosure of the technique or procedure to the public would hinder or compromise its effective utilization. The fact that a particular technique or procedure is generally known to the public would normally lead to the conclusion that such compromise would not be effected by disclosure and accordingly that the technique or procedure in question is not within the scope of section 14(1)(c) (Order P_170).

The Ministry submits that release of copies of the manuals would reveal detailed investigative techniques and procedures relating to law enforcement activities. The Ministry asserts that the techniques and procedures described in the manuals are not generally well known to the public. The Ministry is of the view that disclosure of copies of the manuals to a member of the public could ultimately compromise future law enforcement investigations relying upon the techniques and procedures detailed in the manuals.

The Ministry does not provide any further evidence to support its assertions in this regard.

The appellant, on the other hand, provides extensive representations on the consistent practices and procedures used in the forensic sciences field. He argues that, because of the nature of the work done by the CFS and other forensic laboratories, and the use to which the results of forensic testing is put (for example, as evidence in a criminal trial), the testing requires consistent and generally accepted procedures and methods. Accordingly, he submits that the general techniques and procedures detailed in the manuals are known within the discipline.

The appellant’s arguments in this regard are persuasive.

The appellant also raises whether these records are generally available to the public. It is interesting to note that the Ministry acknowledges that it:

... had attempted previously to informally satisfy the appellant’s information needs. In this regard the appellant was given the opportunity to attend the Centre of Forensic Sciences library and informally view the requested manuals. The appellant did not avail himself of the opportunity, but chose instead to seek access to copies of the manuals through a formal request under the Act.

The appellant recognizes that an informal offer had been made to him to view the records outside of the Act, however, in his representations, he outlines his fruitless attempts at accessing the manuals through the method offered by the Ministry. His representations reflect his frustration in attempting to work with the Ministry informally. He indicates that, as a result of the Ministry’s continual failure to produce the manuals for viewing, he finally resorted to making an access request.

Previous orders have recognized that access granted to a record outside of the Act does not necessarily render an institution’s ability to claim an exemption in response to an access request moot (Order M-800). In my view, however, the fact that the Ministry has offered to make the manuals available to the appellant outside of the Act is a factor in considering whether the Ministry has met its onus regarding the applicability of a harms based exemption claim under the Act.

It is not clear whether the manuals are available to the public generally, through informal requests to view them. However, in the circumstances of this case, the Ministry had agreed to make them available to the appellant. I find it difficult to understand, therefore, how disclosure under the Act could ultimately compromise future law enforcement investigations relying upon the techniques and procedures detailed in the manuals.

The appellant's arguments, the previous offer of informal disclosure, and the vague assertions made by the Ministry regarding this issue combine to persuade me that the Ministry has not met its onus regarding the applicability of this section and I find that section 14(1)(c) does not apply.

FACILITATE THE COMMISSION OF UNLAWFUL ACT

Section 14(1)(l) states:

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

facilitate the commission of an unlawful act or hamper the control of crime.

In its representations, the Ministry submits that a knowledgeable offender could use the detailed techniques and procedures described in the manuals to increase his or her chances of avoiding detection during the commission of a crime. The Ministry submits further that the detailed techniques and procedures could also be used by a knowledgeable offender to destroy, tamper with or otherwise compromise evidence relating to the commission of a crime. The Ministry does not explain how any of this could reasonably be expected to occur, generally, or as a result of disclosure to the appellant. The Ministry has provided no specifics to support its assertions. Further, much of the reasoning above is also relevant to this issue.

Taken as a whole, I find that the Ministry has not met its onus with respect to this issue and section 14(1)(l), therefore, does not apply.

VALUABLE GOVERNMENT INFORMATION

Section 18(1)(a) of the Act states:

A head may refuse to disclose a record that contains,

trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value.

In order to qualify for exemption under section 18(1)(a), the head must establish that the information:

1. is a trade secret, or financial, commercial, scientific or technical information; **and**
2. belongs to the Government of Ontario or an institution; **and**
3. has monetary value or potential monetary value.

The Ministry states that:

... all six manuals at issue in the appeal contain highly detailed scientific and technical information within the meaning of section 18(1)(a). The manuals contain very detailed information about the equipment and procedures used in the scientific analysis of evidence submitted to the Centre of Forensic Science for testing relating to law enforcement activities.

The information contained in the manuals was compiled by the Centre of Forensic Sciences, which is a section of the Ministry of the Solicitor General and Correctional Services, an Ontario Government institution. The Ministry is of the opinion that the information contained in the manuals has potential monetary value and would be a valuable asset for anyone intending to establish a private forensic science laboratory. The manuals have an intrinsic monetary value and could potentially be marketed to the private sector if the Ontario Government was so inclined.

I agree that the manuals contain technical and scientific information. I am satisfied that the information contained in the manuals was compiled by the CFS and as such, belongs to the CFS. I am further satisfied that the CFS is a part of the Ministry which is an institution of the Government of Ontario.

The use of the term “monetary value” in section 18(1)(a) requires that the information itself have an intrinsic value. The purpose of section 18(1)(a) is to permit an institution to refuse to disclose a record which contains information where circumstances are such that disclosure would deprive the institution of the monetary value of the information (Order P-219).

In his representations, the appellant goes to great lengths to provide evidence that the information which is contained in the manual is readily available from other sources, albeit in different formats and organization. As I have noted above, he contends that the nature of the work that the CFS and other forensic testing centres do requires that there be consistency in testing procedures and methods. Therefore, he argues that there is no intrinsic monetary value in the information contained in the records as the information would already be widely known in the field.

Other than the blanket assertion cited above, which is based on a statement made in a memorandum from the Director of the CFS, the Ministry does not provide any further information regarding this issue. In my view, the appellant has raised some doubt as to the monetary value or potential monetary value of the information in the records. In light of the

above, I find that the Ministry has not satisfied the onus on it, and section 18(1)(a), therefore, does not apply.

ECONOMIC AND OTHER INTERESTS

Section 18(1)(c) of the Act reads as follows:

A head may refuse to disclose a record that contains,

information where the disclosure could reasonably be expected to
prejudice the economic interests of an institution or the
competitive position of an institution.

Section 18(1)(c) provides institutions with a discretionary exemption which can be claimed where disclosure of the records could reasonably be expected to prejudice an institution in the competitive marketplace, interfere with its ability to discharge its responsibilities in managing the provincial economy, or adversely affect the government's ability to protect its legitimate economic interests (Order P-441).

Previous orders of the Commissioner have interpreted the term "could reasonably be expected" to mean that the expectation of harm should be based on reason. It is not necessary to prove actual harm will result from disclosure. I agree with this interpretation and adopt it for the purposes of this appeal.

The Ministry's representations do not specifically address this section, but rely on the same argument as presented with respect to section 18(1)(a) above. In addition to the above submissions, the Ministry simply states that:

In regard to both of these exemptions, the Ministry wishes to refer the IPC to the attached letter dated October 9, 1997, from the Director of the Centre of Forensic Sciences expressing his view that the manuals contain valuable scientific and technical information which belongs to the Government of Ontario.

The Ministry does not indicate that it is the government's intention to market the information contained in the manuals. Nor has it given any tangible evidence that such a market exists and/or would be interested in the information contained in the manuals. The Ministry does not explain how disclosure could reasonably be expected to prejudice the Ministry's, or any other institution's economic interests or the competitive position of any institution. In my view, the Ministry's assertions are not sufficient to satisfy me that the harms contemplated by section 18(1)(c) could reasonably be expected to occur as a result of the disclosure of the manuals. Accordingly, this section does not apply.

ORDER:

1. I order the Ministry to disclose the records to the appellant by providing him with a copy no later than **December 9, 1997**.

2. In order to verify compliance with the terms of this order, I reserve the right to require the Ministry to provide me with a copy of the records that are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Laurel Cropley
Inquiry Officer

_____ November 18, 1997