



Information and Privacy
Commissioner/Ontario

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

Reconsideration Order PO-1776-R

Appeal PA-000133-1

Appeal P-9700328 - Order P-1538
(Reconsideration Order R-980015)

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BACKGROUND:

On December 17, 1998, I issued Reconsideration Order R-980015 in which I found that the discretionary exemption found in section 20 of the Freedom of Information and Protection of Privacy Act (the Act) did not apply to Records 2-3, 3-1 to 3-6, 3-9 to 3-13, 3-15 to 3-19, 4-2 to 4-4, 4-9, 4-15 to 4-16 and 4-33 to 4-34. These records were, accordingly, ordered disclosed to the appellant. The Ministry of the Attorney General (the Ministry) then brought an application for judicial review of this decision and on March 17, 1999, Adjudicator Holly Big Canoe ordered that Reconsideration Order R-980015 be stayed pending the final disposition of the application for judicial review. The stay was granted with the consent of the appellant.

In another decision released on December 2, 1999, Ontario (Minister of Labour) v. Big Canoe, [1999] O.J. No. 4560 (C.A.), the Court of Appeal for Ontario considered the appropriate test to be applied in situations where sections 14(1)(e) or 20 of the Act have been claimed. Subsequently, on March 1, 2000 I invited the parties to this appeal to make further submissions on the impact which that decision may have on the pending application for judicial review of Reconsideration Order R-980015. The appellant did not provide any representations. One of the affected persons chose to rely on his/her submissions made in support of his/her request for reconsideration of Order P-1538 and his/her response to the subsequent Notice of Inquiry which led to the issuance of Reconsideration Order R-980015.

DISCUSSION:

DANGER TO HEALTH OR SAFETY

In Reconsideration Order R-980015, I found that the affected person resisting disclosure had not provided me with sufficient evidence linking the disclosure of the information contained in the records to a threat to his/her health or safety. In the final paragraph of the decision, I found that “there does not exist a reasonable **likelihood** of a serious threat to the personal health or safety of any of the affected persons.” [my emphasis] The test which I applied, adopting the language used by Adjudicator Big Canoe in Order P-588, was whether the parties resisting disclosure had established “a clear and direct linkage between disclosure of the records and a **serious** threat to the safety or health of an individual.”

In Ontario (Minister of Labour) v. Big Canoe, the Court of Appeal for Ontario took a somewhat different view as to the appropriate test to be applied in circumstances where the exemptions in sections 14(1)(e) or 20 have been claimed. At paragraph 25 of its decision, the Court held that:

The expectation of harm must be reasonable, but it need not be probable. Section 14(1)(e) requires a determination of whether there is a reasonable basis for concluding that disclosure could reasonably be expected to endanger the life or physical safety of a person.

In other words, the party resisting disclosure must demonstrate that the reason for resisting disclosure is not a frivolous or exaggerated expectation of endangerment to safety. Similarly, section 20 calls for a demonstration that disclosure could reasonably be expected to seriously threaten the safety or health of an individual, as opposed to there being a

groundless or exaggerated expectation of a threat to safety. Introducing the element of probability in this assessment is not appropriate considering the interests that are at stake, particularly the very significant interest of bodily integrity. It is difficult, if not impossible, to establish as a matter of probabilities that a person's life or safety will be endangered by the release of a potentially inflammatory record. Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes ss. 14(1)(e) or 20 to refuse disclosure.

This restatement of the test under section 20 differs significantly from that which I applied in my decision in Reconsideration Order R-9800015. In my view, the Court of Appeal has recognized that in situations where personal safety or bodily integrity are in issue, so long as the expectation of harm is reasonable in the sense that it is not groundless, exaggerated or frivolous, section 20 will be found to apply. I adopt the test enunciated by the Court of Appeal for the purposes of this reconsideration.

At page 22 of Reconsideration Order R-9800015, I referred to the extensive submissions of one of the affected persons on the application of section 20 to the information contained in the records. The affected person submitted that:

... there exists a reasonable expectation of harm to him/her personally should the information contained in Records 3-1 to 3-6 be disclosed to the appellant. As noted above, the affected person submits that the organization on whose behalf the request was made is a violent and dangerous group with a history of reprisals and threats against individuals who have publicly denounced it.

At page 23 of the decision, I again referred to the submissions of the affected person with respect to his/her concerns about his/her health or safety as follows:

[T]he affected person has provided me with extensive evidence which he/she argues demonstrates that the organization represented by the appellant has in the past acted in a violent and threatening fashion against those who have spoken out against it.

In support of these assertions, the affected person provided me with extensive references to newspaper articles and information gleaned from various internet web sites, including one operated by an organization associated with the appellant, which indicate that the organization is indeed violent and dangerous. Many of the records addressed in this appeal also support the contention of the affected person that the organization associated with the appellant has a history of violent and anti-social behaviour, particularly against those who choose to speak out against it. Assaults, break-ins and even the planting of an explosive device outside the home of an individual opposed to this organization are documented in the material provided to me by the affected person.

While much of the information about this organization provided by the affected person relates to reprisals taken against former members of the group who have publicly spoken out against it, the evidence also contains examples of actions taken against other individuals who have taken a public stand against this group; including the principal of a school and local residents of neighbourhoods where leafleting by the organization had taken place. The actions taken by the organization associated with the appellant against those who oppose it publicly may be likened to those normally associated with organized crime. I find that intimidation and threats form part of this group's methods and are not confined strictly to former members who "turn coat." By adopting the rhetoric and symbols of fear and intimidation used by Nazi and extremist groups favouring racial separation, hate groups such as that associated with the appellant by their very nature advocate violence and engender fear in the targets of their hostility.

Based on the evidence provided to me, I must conclude that the concerns about health or safety expressed by the affected person cannot be said to be groundless or exaggerated. In my view, these concerns are reasonably-held and have a reasonable basis, particularly in light of the affected person's standing in the community and his/her well-known activities against the aims and objectives of the organization associated with the appellant. The same may also be said for the other affected persons who speak on behalf of organizations which are dedicated to combatting the influence of groups such as that associated with the appellant. Despite the lack of submissions from these individuals, I find that concerns about their safety or health are equally engaged and cannot be said to be exaggerated or groundless given the evidence of violence and intimidation tendered by the other affected person.

Accordingly, I find that the undisclosed information contained in Records 2-3, 3-1 to 3-6, 3-9 to 3-13, 3-15 to 3-19, 4-2 to 4-4, 4-9, 4-15 to 4-16 and 4-33 to 4-34 falls within the exemption contained in section 20 of the Act and ought not to be disclosed to the appellant.

ORDER:

I uphold the Ministry's decision not to disclose Records 2-3, 3-1 to 3-6, 3-9 to 3-13, 3-15 to 3-19, 4-2 to 4-4, 4-9, 4-15 to 4-16 and 4-33 to 4-34 to the appellant. Order Provision 1 of Reconsideration Order R-980015 is, accordingly, rescinded.

Original signed by: _____
Donald Hale
Adjudicator

April 28, 2000