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

ORDER 148

Appeal 890311

Ministry of Government Services

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February 19, 1990

VIA PRIORITY POST

Appellant

Dear Appellant:

Re: Order 148
Appeal Number 890311
Ministry of Government Services

This letter constitutes my Order in your appeal of the decision by the Ministry of Government Services (the "institution"), to refuse to confirm or deny the existence of records requested under the Freedom of Information and Protection of Privacy Act, 1987 (the "Act").

On August 4, 1989, you requested access to the following records:

> All correspondence relating to me received by the Minister, Deputy Minister and F.O.I. Coord. and sent from the Ministry of Health and Management Board of Cabinet as well as internal memorandums (sic) for the Period of January 1st, 1989 to August 1st, 1989 (seven months).

On September 13, 1989, the Deputy Minister of the institution responded to your request as follows:

> Access cannot be provided to records of any correspondence relating to you received by the Minister, Deputy Minister and Freedom of Information Co_ordinator sent from Management Board of Cabinet because the records do not exist. Neither are there

> any internal memoranda relating to you for the period of January 1, 1989 to August 1, 1989.
>
> ...
>
> The existence of correspondence sent by the Ministry of Health cannot be confirmed or denied in accordance with subsection 14(3) of the Act.

On September 26, 1989, you wrote to me appealing the institution's decision to refuse to confirm or deny the existence of correspondence sent by the Ministry of Health to the institution. You did not appeal the head's position that records of any correspondence relating to you sent from the Management Board of Cabinet to the institution do not exist. I sent Notices of Appeal to you and to the institution on October 10, 1989.

In an appeal from an institution's decision to refuse to confirm or deny the existence of requested records, considerable effort is taken by my office not to disclose the fact of whether the records exist or not. The correctness of the institution's decision to refuse to confirm or deny the existence of the records is an issue to be determined by me on appeal. Obviously, premature disclosure of the existence of any records would render this part of the appeal moot. Similarly, it can be difficult for me to discuss my reasons for my decision in an Order, particularly where I uphold the head's decision to refuse to confirm or deny the existence of the records.

In the present appeal, I feel compelled to state my conclusion at the beginning of this Order, so that I might provide a fuller explanation of my decision. Accordingly, I confirm that three records exist which are responsive to your request. Having confirmed the existence of these records, it can be inferred that I have concluded that these records may not be withheld from disclosure pursuant to subsection 14(1) or (2) of the Act, a condition which must be satisfied before the head may refuse to confirm or deny the existence of the records. My reasons for reaching this conclusion are set out below.

Upon receipt of the appeal, the Appeals Officer spoke with the institution's Freedom of Information and Privacy Co_ordinator (the "Co_ordinator") and learned that correspondence relating to you from the Ministry of Health, in fact, did exist. The Appeals Officer obtained and reviewed copies of these records.

In an ensuing telephone conversation, the Co_ordinator indicated that the institution was of the view that subsections 14(1)(e), (h), (j), (k), and (l) of the Act applied to exempt each of the three records from disclosure. Further, subsection 14(3) of the Act was cited by the institution in order to protect the consultative process by which the institution responds to requests from yourself.

Given the nature of this appeal, the Appeals Officer formed the view that a mediated settlement of issues arising in the appeal was not possible. Accordingly, Notices of Inquiry were sent to you and to the institution on November 22, 1989. Both you and the institution were asked to make representations to me concerning the subject matter of the appeal.

I have received and considered representations from you and the institution.

The purposes of the Act as set out in section 1 should be noted at the outset. Subsection 1(a) provides a right of access to information under the control of institutions in accordance with the principles that information should be made available to the public and that necessary exemptions from the right of access should be limited and specific. Subsection 1(b) sets out the counter_balancing privacy protection purpose of the Act. This subsection provides that the Act should protect the privacy of individuals with respect to personal information about themselves held by institutions and should provide individuals with a right of access to their own personal information.

Further, section 53 of the Act provides that where a head refuses access to a record, the burden of proof that the record falls within one of the specified exemptions in the Act lies upon the head.

The following records are at issue in this appeal:

- Letter to J. Campbell, Ministry of Government Services, from K. Finney, Ministry of Health, dated June 8, 1989.

- Memorandum to M. Rodrigues, Ministry of Government Services, from J. H. Danson, Ministry of Health, dated June 28, 1989.

- Memorandum to J. H. Danson, Ministry of Health, from M. Rodrigues, Ministry of Government Services, dated July 7, 1989.

By way of background to this appeal, I should state that prior to the appellant's request which generated this appeal, the appellant requested and received from the institution certain records which were subsequently confiscated from the appellant by an official employed by the Ministry of Health. The appellant's right of access to the confiscated records is the subject matter of another appeal. As a result of these events, officials with the Ministry of Health wrote to the institution to advise of these developments and to request that the institution consult with the Ministry of Health when it receives requests from the appellant in the future. These memoranda also indicate the exemptions which the Ministry of Health considered to be applicable to the confiscated records.

The records at issue in this appeal relate to the Ministry of Health's consultation proposal and the Ministry of Government Services' response thereto.

The provisions of the Act relied upon by the head have been included here for ease of reference.

> 14.(1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
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> ...
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> (h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;
>
> (j) facilitate the escape from custody of a person who is under lawful detention;
>
> (k) jeopardize the security of a centre for lawful detention; or
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.
>
> ...

> (3) A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) apply.

In its representations, the institution submitted a number of statements in support of the head's decision, including the following:

- The records contain information regarding what documents were confiscated by security officers at the facility. (14(1)(h))

- The records could reasonably be expected to facilitate the escape from custody of a person who has been voluntarily committed to a psychiatric institution under a Lieutenant Governor's warrant. They contain descriptions of the facility and projects which have been used to make renovations which would not normally be available to persons who are not involved in the projects. (14(1)(j))

- The records while appearing to be innocuous, nonetheless imply details of security measures in place. Further, attention is drawn to details of possible uses of the information which may not have been conceived by the requester which could endanger the safety of the public at large. (14(1)(k))

- The records could facilitate the commission of an unlawful act and/or impede the Province's control of crime by revealing discussions and consultations between institutions on security measures. (14(1)(l))

While conceivably true for other records, the difficulty I have with these statements is that they do not appear to be applicable to the records at issue in this appeal. I have reviewed the three records and, in my view, none of the exemptions cited by the institution under subsection 14(1) of the Act apply to exempt the records from disclosure. As the institution did not make any arguments pursuant to subsection 14(2) of the Act, it follows that the institution cannot refuse to confirm or deny the existence of the three records under subsection 14(3) of the Act.

In its representations, the institution also made a number of policy arguments in support of the head's decision. These arguments related to the desirability of promoting public confidence in the integrity of the Government and the need to foster better labour relations at the Penetanguishene Mental Health Centre.

As compelling as these arguments may be, they are not couched in the language of any exemption contained in the Act. As stated above, one of the principles of the Act is that information should be available to the public and exemptions from the right of access should be limited and specific. To deny access to a record on a public policy basis, no matter how compelling, offends this principle unless that public policy has been addressed by the Legislature in the form of an exemption from disclosure. Indeed, subsection 10(2) of the Act provides legislative support for this principle. Subsection 10(2) of the Act reads as follows:

> Where an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

I wish to reiterate, that I have reviewed the records at issue in this appeal and I am of the view that none of the exemptions cited by the institution apply to exempt these records from disclosure. In particular, I am satisfied that disclosure of these records could not reasonably be expected to jeopardize the security of the Oak Ridge Division, Penetanguishene Mental Health Centre.

In this Order, I have disclosed the existence of records responsive to the appellant's request. Because the institution may apply for judicial review, I have decided to release this Order to the institution in advance of the appellant. The purpose for doing this is to provide the institution with an opportunity to review the Order and determine whether to apply for judicial review. If I have not been served with an Application for Judicial Review within fifteen (15) days of the date of this Order, I order the institution to release to the appellant unsevered copies of the three records at issue in this appeal within twenty (20) days of the date of this Order. I

further order the institution to advise me in writing of the date of disclosure of the records within five (5) days of the date on which disclosure is made. A copy of this Order will be sent to the appellant upon the expiration of the fifteen (15) day period referred to above, unless an Application for Judicial Review has been served upon me.

Yours truly,

Sidney B. Linden
Commissioner

cc: The Honourable Christopher Ward
Minister of Government Services
Mr. John Campbell, FOI Co_ordinator