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

ORDER 195

Appeal 890345

Ministry of the Attorney General

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I N T E R I M O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987, as amended (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) or a request for access to personal information under subsection 48(1) a right to appeal any decision of a head under the Act to the Information and Privacy Commissioner.

On January 5, 1990, the undersigned was appointed Assistant Commissioner and received a delegation of the power to conduct inquiries and make Orders under the Act.

The facts of this case and the procedures employed in making this interim Order are as follows:

1. On September 13, 1989, a request was made to the Ministry of the Attorney General (the "institution") for access to:

> ...any and all information available to myself (including my rights under the Protection of Privacy Regulations to the Criminal Code and under the Access to Information Act) concerning a possible "wiretap order" which may have been in effect concerning myself in or about the month of July 1985 and thereafter.
>
> I have not received notification of such order pursuant to section 178.23 of the Criminal Code; however, I would greatly appreciate any information which could be provided, including the assurance, if such be the case, that no "wiretap order" was ever given in relation to myself. I emphasize that I want assurance that no wiretap ever existed if that be the case.

2. By letter dated October 18, 1989, the institution advised the appellant that:

> ...access is denied. The existence of the record cannot be confirmed or denied in accordance with subsection 14(3) of the Act.

3. On November 14, 1989, the appellant wrote to the Information and Privacy Commissioner (the "Commissioner") to appeal the decision of the head. Notice of the appeal was given to the institution and the appellant.

4. Between November 21, 1989 and February 22, 1990, an Appeals Officer investigated the circumstances of the appeal with a view to settlement, but no settlement was obtained.

5. On March 6, 1990, the institution and the appellant were advised that an inquiry was being conducted to review the decision of the head. Enclosed with each Notice of Inquiry was a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets out questions which appear to the Appeals Officer, or any of the parties, to be relevant to the appeal. This report indicates that the parties, in making their representations, need not limit themselves to the questions set out in the report.

6. Written representations were received from the institution on April 10, 1990.

7. By letter dated April 12, 1990, the institution advised that:

> ...we inadvertently neglected to submit that the request for access to wiretap information is a personal information request. Therefore we wish to submit at this time that access was also denied pursuant to section 49(a) of the Freedom of Information and Protection of Privacy (sic).

8. Clarification was sought and received from the institution on several points arising from its representations.

The purposes of the Act as set out in section 1 are as follows:

(a) to provide a right of access to information under the control of institutions in accordance with the principles that,

  (i) information should be available to the public,

  (ii) necessary exemptions from the right of access should be limited and specific, and

  (iii) decisions on the disclosure of government information should be reviewed independently of government; and

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

Section 53 of the Act provides that the burden of proof that a record, or a part thereof, falls within one of the specified exemptions in the Act lies with the head of the institution.

The issues arising in this appeal are as follows:

A. Would a record of the nature requested, if it existed, contain information that would qualify as "personal information" of the appellant, as defined in subsection 2(1) of the Act.

B. Would a record of the nature requested, if it existed, qualify for exemption under either subsection 14(1) or (2) of the Act.

C. If the answer to Issue B is in the affirmative, whether the head has properly exercised his discretion under subsections 14(3) and 49(a) of the Act, to refuse to confirm or deny the existence of a record of the nature requested.

ISSUE A: Would a record of the nature requested, if it existed, contain information that would qualify as "personal information" of the appellant, as defined in subsection 2(1) of the Act.

"Personal information" is defined in subsection 2(1) of the Act as follows:

> "personal information" means recorded information about an identifiable individual, including:
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment

history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except where they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

It is clear from the appellant's request that he was seeking access to an authorization to intercept his private communication that may have existed in the month of July, 1985 or thereafter.

Upon reviewing the Directory of Records for 1990, I note that the institution has identified "Wiretap Applications" as a type of personal information bank maintained by it. A "personal

information bank" is defined in the Act as a "collection of personal information that is capable of being retrieved". The information contained in a personal information bank is usually retrievable by the individual's name or some other personal identifier.

The Directory of Records identifies the nature of the personal information that would be maintained in a wiretap application personal information bank as including name, address, employment, nature of suspected offence and the authorization for the wiretap.

Section 186(4) of the Criminal Code, R.S.C., 1985, c. C_46, provides that an authorization to intercept a private communication must contain certain information as follows:

> 186(4) An authorization shall
>
> (a) state the offence in respect of which private communications may be intercepted;
>
> (b) state the type of private communication that may be intercepted;
>
> (c) state the identity of the persons, if known, whose private communications are to be intercepted, generally describe the place at which private communications may be intercepted, if a general description of that place can be given, and generally describe the manner of interception that may be used;
>
> (d) contain such terms and conditions as the judge considers advisable in the public interest; and
>
> (e) be valid for the period, not exceeding sixty days, set out therein.

I therefore have no difficulty in concluding that if an authorization for interception of the appellant's private communications existed, it would contain personal information about him.

Subsection 47(1) of the Act gives individuals a general right of access to:

> (a) any personal information about the individual contained in a personal information bank in the custody or under the control of an institution; and
>
> (b) any other personal information about the individual in the custody or under the control of an institution with respect to which the individual is able to provide sufficiently specific information to render it reasonably retrievable by the institution.

However, this right of access under subsection 47(1) is not absolute. Section 49 provides a number of exceptions to this general right of disclosure of personal information to the person to whom it relates. In particular, subsection 49(a) provides that:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> (a) where section 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information (emphasis added);

In this appeal, the institution has refused to confirm or deny the existence of a record that would respond to the appellant's

access request, pursuant to subsection 14(3) of the Act. Subsection 14(3) provides that:

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

Before deciding whether the institution has properly applied subsections 14(3) and 49(a), I must determine whether a record of the nature requested, if it existed, could be exempt from disclosure pursuant to either subsection 14(1) or (2) of the Act.

ISSUE B: Would a record of the nature requested, if it existed, qualify for exemption under either subsection 14(1) or (2) of the Act.

Subsections 14(1) and (2) of the Act provide:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information

furnished only by the confidential source;

(e) endanger the life or physical safety of a law enforcement officer or any other person;

(f) deprive a person of the right to a fair trial or impartial adjudication;

(g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

(h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;

(i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

(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.

(2) A head may refuse to disclose a record,

(a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function

> of enforcing and regulating compliance with a law;
>
> (b) that is a law enforcement record where the disclosure would constitute an offence under an Act of Parliament;
>
> (c) that is a law enforcement record where the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability; or
>
> (d) that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority.

The institution has argued that subsections 14(1)(a), (b), (l), and 14(2)(a) would apply to exempt from disclosure a record of the nature requested, if it existed.

With respect to the applicability of subsection 14(1)(a), the institution provided arguments as to how knowledge of an outstanding wire tap authorization could have the effect of hampering or impeding the carrying out of a law enforcement activity.

In support of the exemption provided by subsection 14(1)(b), the institution argued that a record of the nature requested could interfere with an investigation by hampering or impeding it.

The institution also argued, in support of the exemption provided by subsection 14(1)(l), that a record of the nature requested could be used by the requester or one associated with

the requester in committing unlawful acts or in escaping detection.

It is apparent that wiretap authorization records relate specifically to police investigations. It is my view that disclosing the contents of such records could reasonably be

expected to "interfere with a law enforcement matter" or "interfere with an investigation". Based on the representations made by the
institution regarding the nature and general content of such records, I am satisfied that disclosure of a record of the nature requested, if it existed, could be refused by the head under either subsection 14(1) or (2) of the Act. As a result, it is not necessary for me to consider the representations of the institution as they relate to the application of subsections 14(1)(l) or 14(2)(a) of the Act.

Therefore, the answer to Issue B is in the affirmative.

ISSUE C: If the answer to Issue B is in the affirmative, whether the head properly exercised his discretion under subsections 14(3) and 49(a) of the Act, to refuse to confirm or deny the existence of a record of the nature requested.

Subsection 14(3) reads as follows:

> A head may refuse to confirm or deny the existence of a record to which subsection 14(1) or (2) apply.

Subsection 14(3) provides the head with the discretion to refuse to confirm or deny the existence of a record, if it has been established that either subsection 14(1) or (2) apply to a record. In dealing with Issue B, I found that disclosure of a record of the nature requested, if it existed, could be denied under either subsection 14(1) or (2).

In any case in which the head has exercised his/her discretion and refused to confirm or deny the existence of a record, I look very carefully at the manner in which the head has exercised this discretion. Provided that this discretion has been exercised in accordance with established legal principles, in my view, it should not be disturbed on appeal.

In this case, it is my view that the head has failed to provide me with sufficient information to permit me to determine if the exercise of his discretion was in accordance with these established legal principles. In his request the appellant indicates that he has never "received notification of [a 'wiretap order'] pursuant to... the Criminal Code." I assume that the appellant is referring to the fact that the Criminal Code requires that the Attorney General of the province in which an application for an authorization was made must give written notice to the person who was the object of the interception pursuant to an authorization. This obligation is contained in section 196.(1) of the Criminal Code. Section 196.(2) also requires that this notice be given within 90 days next following the period for which the authorization was given or renewed or within such other period as may have been set by application to a court.

Given that the appellant's request relates to the period from July, 1985 on; that there is a statutory obligation to notify an individual of the existence of an authorization; and that the information requested by the appellant, if it existed, would be personal information, I order the head to provide me with further representations concerning the exercise of his discretion to refuse to confirm or deny the existence of a record of the nature requested by the appellant. The head's representations should contain reference to the relevance, if any, of the requirements of section 196.(1) of the Criminal Code as it relates to the appellant's request. The representations shall be submitted to Maureen Murphy, Registrar of Appeals, Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1, by September 14, 1990.

Original signed by: August 30, 1990
Tom A. Wright Date
Assistant Commissioner