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

ORDER 123

Appeal 880110

Ministry of the Attorney General

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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 (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) of the Act, a right to appeal any decision of a head to the Information and Privacy Commissioner.

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

1. On November 20, 1987, the requester filed a written request with the Ministry of the Attorney General (the "institution") for "...reports on allegdly (sic) illegal acts committed by the RCMP in Ontario brought out by the Macdonald (sic) Commission and follow up actions, including prosecutions, or other actions, including rationales for dropping possible cases."

2. After extending the time limit in order to conduct further consultations, the institution wrote to the requester on May 2, 1988, advising him that access to the records was denied for the following reasons:

   a) subsection 13(1) as disclosure would reveal advice and recommendations of a public servant;

   b) subsection 21(1), 3(b)(d)(f)(g) and (h), as disclosure would constitute an unjustified invasion of personal privacy;

c) subsection 14(1)(c) as disclosure would reveal investigative techniques currently in use or likely to be used in law enforcement;

d) subsection 14(1)(d) as disclosure would reveal the identity of a confidential source of information in respect of a law enforcement matter;

e) subsection 14(1)(g) as disclosure would reveal law enforcement intelligence information in respect of organizations or persons;

f) subsection 14(2) as the record is a report prepared in the course of law enforcement;

g) subsections 15(a) and (b) as disclosure could prejudice the conduct of intergovernmental relations by the Government of Ontario and the Ministry and reveal information received in confidence from another government or its agencies;

h) subsection 22(a) as the information is currently available to the public.

3. By letter dated May 4, 1988, the requester wrote to me appealing the head's decision, and I gave notice of the appeal to the institution.

4. The records were obtained and reviewed by an Appeals Officer, and initial attempts were made to mediate a settlement between the parties. During mediation, the institution raised section 19, subsection 12(1)(e) and subsection 21(3)(e) as additional exemptions being relied on to deny access.

5. Settlement efforts were unsuccessful, as both parties retained their respective positions.

6. By letter dated October 18, 1988, I advised both the appellant and the institution that I was conducting an inquiry to review the decision of the head. Enclosed with this letter was a copy of an Appeals Officer's Report, 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 paraphrase those sections of the Act which appear to the Appeals Officer, or any of the parties, to be relevant to the appeal. In this case, the Appeals Officer's Report also advised the appellant of the additional exemptions raised by the institution during the mediation stage.

   The Appeals Officer's Report indicates that the parties, in making representations to the Commissioner, need not limit themselves to the questions set out in the Report. The Report is sent to all persons affected by the subject matter of the appeal, in this case the appellant and the institution.

7. By letter dated October 31, 1988, I wrote to both parties inviting them to provide me with written representations. I have received representations from both the institution and the appellant.

8. In addition to these written representations, I met with counsel for the institution in Toronto on January 5, 1989, and with the appellant in Ottawa on February 22, 1989, and received oral representations from each party on the issues under consideration in this appeal. The appellant also

provided me with further written representations at our meeting.

9. I have considered all representations from both parties in making my Order.

The appellant also requested that his name be used in association with this Order. I have no objection to the appellant using his name in any manner he wishes, but for the purposes of this Order I have decided to follow my usual practice of not referring to an appellant by name.

The purposes of the Act as set out in section 1 should be noted at the outset. Subsection 1(a) provides the right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. Subsection 1(b) sets out the counterbalancing 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 the burden of proof that the record falls within one of the specific exemptions in this Act lies upon the head.

The records at issue in this appeal consist of the following:

Record #1 Case summaries concerning evidence given to the Commission of Inquiry Concerning Certain Activities of the RCMP (the "McDonald Commission");

Record #2 Excerpts from a 2-part aide memoire;

Record #3 A 24-page internal memorandum prepared by a solicitor for the institution;

Record #4 The public statement which was read into the record by Crown counsel when a stay of proceedings was entered on behalf of the Ministry of the Attorney General in the Dowson case; and

Record #5 A letter from the Ontario Attorney General to the federal Minister of Justice regarding the McDonald Commission.

It should be noted that the records at issue in this appeal date back several years. They contain information which relates to events which took place in the early 1970s and came to light in the late 1970s and early 1980s. The passage of time, combined with what would appear to be somewhat disorganized records managements systems, have resulted in an inability on the part of the institution to determine the precise origin and nature of Records #1 and #2. Because of this, my staff have spent considerable time and effort in researching issues concerning these records in order to ensure that they have been properly considered in the context of the Act.

The issues arising in this appeal are as follows:

A. Whether any of the records are properly exempt from disclosure pursuant to subsections 15(a) or (b) of the Act.

B. Whether any of the records are properly exempt from disclosure pursuant to section 19 of the Act.

C. Whether any of the records are properly exempt from disclosure pursuant to subsection 13(1) of the Act.

D. Whether any of the records are properly exempt from disclosure pursuant to subsections 14(1)(c) or 14(2)(a) of the Act.

E. Whether any of the records are properly exempt from disclosure pursuant to subsection 21(1) of the Act.

F. Whether any of the records are properly exempt from disclosure pursuant to subsection 22(a) of the Act.

G. If any of Issues A, B, C, D, E, or F are answered in the affirmative, whether any exempt records can reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under an exemption.

H. Whether there is a compelling public interest in disclosure of the records exempted under section 15 that clearly outweighs the purpose of the exemptions, as provided by section 23 of the Act.

The institution's claim for exemption under subsection 12(1)(e) was dropped during the course of this appeal and will not be discussed in this Order.

Before dealing with the substantive issues raised in this appeal, I want to touch briefly on an objection raised by the appellant regarding the institution's introduction of additional exemptions during the course of the appeal. I have dealt with this matter in previous Orders and remain of the view that, in appropriate circumstances and with sufficient notice to the appellant, the Act does not preclude an institution from raising

additional exemptions following the initiation of any appeal. In this case, the appellant was provided with notice of the additional exemptions and given an opportunity to address them in his representations. Although it is clearly preferable for all relevant exemptions to be identified by the institution and outlined in the section 26 notice to the appellant denying access, I am prepared to consider the possible application of the additional exemptions claimed by the institution in the circumstances of this appeal.

ISSUE A: Whether any of the records are properly exempt from disclosure pursuant to subsections 15(a) or (b) of the Act.

The institution raised subsections 15(a) and (b) as the basis for denying access to Records #1, #2 and #5.

Subsections 15(a) and (b) read as follows:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
>
> (b) reveal information received in confidence from another government or its agencies by an institution.

In its representations, the institution submitted that Record #1 contains information received in confidence from the federal government. It points out that the case summaries were prepared by employees of the federal government and provided to the

institution, based on transcripts of in-camera evidence given to the McDonald Commission. Because the original transcripts were based on in-camera testimony, the institution argues that the case summaries produced from this evidence should also qualify as "information received in confidence from another government" and therefore exempt under subsection 15(b).

As far as Record #2 is concerned, the institution points out that both parts of the aide memoire were originally prepared by the federal government and provided to the institution. The only distinction between the two parts is the addition of legal opinions prepared by one of the institution's solicitors and incorporated into the body of one of the parts of the aide memoire. Record #2 contains the information included in Record #1, together with additional references to transcripts of evidence and the legal opinions of the solicitor. The institution submitted that this record is properly exempt from disclosure under subsection 15(b).

Turning to Record #5, the letter from the Attorney General to the federal Minister of Justice, the institution submitted that:

> the tenor and content of the correspondence both to and from the Attorney General of Ontario is of such a nature that should these documents [the letter] be disclosed the relations between the provincial Attorney General's office and the various Federal Departments and its agencies would be seriously hampered despite the fact that the matter arose some eight years ago.
>
> ...[the record] also discloses confidential correspondence from the federal ministers and the McDonald Commission to the Attorney General of Ontario concerning matters which at the time involved national security and meetings of the Federal Cabinet.

For these reasons, the institution argues that the letter meets the requirements for exemption under both subsections 15(a) and (b).

Having reviewed the contents of these records and considered the representations made by both parties in this appeal, in my view, Record #1 and all parts of Record #2 with the exception of the sections containing the solicitor's legal opinions, qualify for exemption under subsection 15(b) of the Act. To satisfy the requirements of subsection 15(b) the institution "may refuse to disclose a record where the disclosure could reasonably be expected to reveal information received in confidence..." (emphasis added). Investigations by my staff relating to the origin and nature of these two records have satisfied me that their disclosure could reasonably be expected to reveal information which was received by the institution in confidence from the federal government. I will address the proper treatment of the portions of Record #2 which contain the legal opinions of the institution's solicitor in my discussion of Issue B.

As far as Record #5 is concerned, I am satisfied that it meets the requirements for exemption under subsection 15(a). In my view, a letter of this nature is precisely the type of record intended to be protected from disclosure under subsection 15(a). It is correspondence between the senior justice officials of two governments which deals with highly sensitive and controversial issues. I have reviewed the contents of this record in detail, and, in my view, its release could reasonably be expected to prejudice the conduct of intergovernmental relations, notwithstanding that the issues under discussion in the letter were resolved several years ago.

ISSUE B: Whether any of the records are properly exempt from disclosure pursuant to section 19 of the Act.

Section 19 has been raised by the institution as the basis for denying access to Record #2 and Record #3. Because I have decided under Issue A to exempt all portions of Record #2 with the exception of the parts dealing with the legal opinions of Crown counsel, I will restrict my discussion in Issue B to the remaining parts of Record #2 and all of Record #3.

Section 19 reads as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

This section provides an exemption in two possible situations:

1. a head may refuse to disclose a record that is subject to common law solicitor-client privilege; or

2. a head may refuse to disclose a record prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

A record can be exempt under the second part of section 19 regardless of whether the common-law criteria relating to the first part of the exemption are satisfied.

In its representations, the institution submitted that the relevant parts of Record #2 and all of Record #3 qualify for exemption under the second branch of the section 19 exemption.

Specifically, the institution argues that the legal opinions contained in Record #2 were prepared by Crown counsel in contemplation of litigation, and that Record #3 was prepared by Crown counsel for use in giving legal advice.

To meet the requirements for inclusion under the second branch of the section 19 exemption, the institution must demonstrate two things:

1. that the records in question were prepared by or for "Crown counsel"; and

2. that they were prepared either for use in giving legal advice, in contemplation of litigation, or for use in litigation.

I considered the proper interpretation of the term "Crown counsel" under section 19 in my Order 52 (Appeal Number 880099), released on April 12, 1989. At page 10 of that Order I stated that "...the term "Crown counsel" should be read expansively to include any legal advisor to any institution covered by the Act".

I have reviewed the contents of Record #2 and Record #3 and, in my view, they were both prepared by "Crown counsel" as the term is used in section 19.

At pages 10-11 of Order 52 I also outlined the two current common law requirements for according a record privileged status on the basis of having been prepared in contemplation of litigation. They are:

(a) the dominant purpose for the preparation of the document must be contemplation of litigation; and

(b) there must be a reasonable prospect of such litigation at the time of the preparation of the document - litigation must be more than just a vague or theoretical possibility.

I am satisfied by the evidence presented and by examination of the relevant parts of Record #2 that the legal opinions were prepared in contemplation of litigation, as the term is defined in common law. I am also satisfied that the contents of the internal memorandum prepared by Crown counsel (Record #3) indicate a clear intention to use this memorandum in giving legal advice to the institution.

Accordingly, I find that the requirements for exemption under section 19 of the Act have been satisfied with respect to Record #3 and the portions of Record #2 containing the legal opinions of Crown counsel.

The institution has exempted Records #3 and #5 under subsection 13(1) (Issue C); Records #1, #2, #3 and #5 under subsections 14(1)(c) and 14(2)(a) (Issue D); and Records #1, #2 and #3 under subsection 21(1) (Issue E). Because I found these records to be exempt under my discussion of Issues A or B, it is not necessary for me to address the possible application of the exemptions as referred to in Issues C, D and E.

ISSUE F: Whether any of the records are properly exempt from disclosure pursuant to subsection 22(a) of the Act.

The institution has claimed subsection 22(a) of the Act as the basis for exempting Record #4, the "public statement which was read into the record by Crown counsel then a stay of proceedings was entered on behalf of the Attorney General in the Dowson case."

Subsection 22(a) reads as follows:

> A head may refuse to disclose a record where,
>
> (a) the record or the information contained in the record has been published or is currently available to the public.

In its submissions, the institution stated that the transcript of court proceedings held on October 30, 1980 would contain the contents of Record #4, and could be obtained from the Provincial Court Reporters office. However, the institution also indicated that it was prepared to provide the appellant with a copy of this public statement.

Having reviewed the contents of Record #4, I am in agreement with the institution's position that the information contained in the record is currently available to the public, and, therefore, the requirements for exemption under subsection 22(a) have been satisfied. However, in my view, whenever an institution relies on subsection 22(a), the head has a duty to inform the requester of the specific location of the records or information in question. The head did not properly discharge his responsibility in this case and, in view of the institution's expressed willingness to provide the appellant with a copy of Record #4, I order the head to do so.

ISSUE G: If any of Issues A, B, C, D, E or F are answered in the affirmative, whether any exempt records can reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under an exemption.

The question of severability is relevant to all records found to be exempt in my discussion of Issues A and B, namely Records #1, #2, #3 and #5.

Subsection 10(2) provides:

> 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.

In my Order 24 (Appeal Number 880006), dated October 21, 1988, I established the approach which should be taken when considering the severability provisions of subsection 10(2). At page 13 of that Order I state:

> ...it is not reasonable to require a head to sever information from a record if the end result is simply a series of disconnected words or phrases with no coherent meaning or value. A valid subsection 10(2) severance must provide the requester with information that is in any way responsive to the request, while at the same time protecting the confidentiality of the portions of the record covered by the exemption.

I have reviewed the contents of Records #1, #2, #3 and #5 and, in my view, no information that is in any way responsive to the appellant's request could be severed from these documents and provided to the appellant without disclosing information

properly withheld from disclosure under subsections 15(a) or 15(b), or section 19 of the Act.

ISSUE H: Whether there is a compelling public interest in disclosure of the records exempted under section 15 that clearly outweighs the purpose of the exemptions, as provided by section 23 of the Act.

Records #1, #2 and #5, which I have found to be exempt under subsections 15(a) and (b) of the Act, are the only records subject to consideration under section 23 of the Act.

The appellant submitted that Record #3, which was exempt by the institution under section 19, should also be considered in the context of section 23. He argued that "the section 23 test should not be ruled out for exemptions 12/14/16/19 because they are not explicitly ruled out...". I do not agree with the appellant's submission. In my view, a plain reading of section 23 leaves no doubt that sections 12, 14, 16 and 19 are not included within the ambit of this section.

Section 23 of the Act reads as follows:

> 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.

I considered the proper interpretation of section 23 in my Order 61 (Appeal Number 880166), released on May 26, 1989, and found that two requirements must be satisfied in order to invoke

the application of the so-called "public interest override". As stated at page 11 of that Order:

> ...there must be a compelling public interest in disclosure and this compelling public interest must clearly outweigh the purpose of the exemption, as distinct from the value of disclosure of the particular record in question (emphasis added).

Although the Act is silent as to who bears the burden of proof in respect of section 23, as I have stated in a number of orders, in my view, it is a general principle that a party that is asserting a right or a duty has the onus of proving its case, and therefore the burden of establishing that section 23 applies is on the appellant.

As far as the records at issue in this appeal are concerned, the institution submitted that no compelling public interest has been demonstrated and that section 23 should not apply.

The appellant submitted that "...the matters of RCMP wrongdoings were compelling enough to result in a Royal Commission", and that there is a compelling public interest in disclosure.

Having reviewed the contents of Records #1, #2 and #5, and considered the submissions of the appellant, I have reached the conclusion that the circumstances of this case are not sufficient to invoke the application of section 23.

All records requested by the appellant in this appeal relate to the Royal Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, headed by Mr. Justice D.C. McDonald. This Commission held extensive public hearings and

presented a detailed report to the House of Commons. A great deal of information about the conduct of RCMP affairs was released to the public during the course of the Royal Commission's investigation and, in my view, the public's interest in the subject matter of the Commission's review has been adequately and properly served without the release of Records #1, #2 #5 in this appeal.

In summary, my Order is as follows:

1. I uphold the decision of the head to exempt Records #1, #2, #3, and #5 from disclosure.

2. I Order the head to release Record #4 to the appellant within twenty (20) days of the date of this order. The institution is further ordered to advise me in writing, within five (5) days of the date of disclosure, of the date upon which disclosure was made.

Original signed by: November 24, 1989
Sidney B. Linden Date
Commissioner