



**Information and Privacy
Commissioner/Ontario**

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

ORDER P-254

Appeal P-910108

Ministry of the Attorney General



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O R D E R

BACKGROUND:

On November 22, 1990, the Ministry of the Attorney General (the "institution") received a request from the appellant under the Freedom of Information and Protection of Privacy Act, 1987 (the "Act"), for a copy of any information recorded on or about the appellant with regard to wiretap applications.

By letter dated December 19, 1990, the institution advised the appellant that "the Ministry will neither confirm or deny the existence of a record pursuant to subsection 14(3) of the Freedom of Information and Protection of Privacy Act."

On March 12, 1991, this office received a letter from the appellant appealing the decision of the institution.

The Appeals Officer investigated the circumstances of the appeal with a view to settlement, however, it became evident that mediation was not possible.

On May 2, 1991, a Notice of Inquiry was sent to the appellant and the institution enclosing a copy of a report prepared by the Appeals Officer. Both parties were invited to provide this office with representations in response to the Appeals Officer's Report and the subject matter of the appeal.

Written representations were received from the appellant and the institution.

ISSUES:

The main issues arising in this appeal are as follows:

- A. Whether the refusal to confirm or deny the existence of a record under section 14(3) of the Act is a violation of a right under the Charter of Rights and Freedoms.
- B. Whether a record of the nature requested, if it existed, would contain information that would qualify as "personal information" of the appellant, as defined in section 2(1) of the Act.
- C. Whether a record of the nature requested, if it existed, would qualify for exemption under either section 14(1) or 14(2) of the Act.
- D. If the answer to Issue C is in the affirmative, whether the head properly exercised his discretion under section 49(a) of the Act to refuse to confirm or deny the existence of a record of the nature requested.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the refusal to confirm or deny the existence of a record under section 14(3) of the Act is a violation of a right under the Charter of Rights and Freedoms.

The appellant contends that the refusal on the part of the institution to confirm or deny the existence of a record constitutes a violation of his rights pursuant to the Canadian Charter of Rights and Freedoms (the "Charter"). However, no reference was made to any specific provisions of the Charter.

The issue of whether the refusal to confirm or deny the existence of a record under section 14(3) was a violation of a Charter right was considered by former Commissioner Sidney B. Linden in Order 106, dated October 24, 1989. In that Order Commissioner Linden stated, at pages 10 and 11:

I have reviewed several court decisions that address the issue of the jurisdiction of an administrative

tribunal to determine constitutional issues. These decisions reach different conclusions (see for example, Cuddy Chicks Limited v. Ontario Labour Relations Board et al, (unreported decision, September 8, 1989, Ontario Court of Appeal) and Guy Poirier v. Minister of Veterans Affairs, Federal Court of Appeal, (unreported decision, March 29, 1989, document number A-659-88).

In my view, even if I were to conclude that I have the jurisdiction to hear and determine a Charter challenge to the validity of provisions of the Act, I would have to be convinced by a clear and compelling argument that the section the appellant seeks to impugn is, in fact, inconsistent with the Charter.

The section that the appellant seeks to challenge is part of a comprehensive statutory scheme. Given the unique nature of the subject matter addressed by the Act, the role of an independent Commissioner is an integral part of this scheme. It is an important part of the role of the Commissioner to ensure that the potential abuses the appellant has referred to do not occur. To that end, the Commissioner has the statutory authority to make a binding Order in an appeal and has other significant powers with respect to the conduct of an inquiry under section 52 of the Act. These powers include the ability to require production and examination of any record in the custody or control of an institution and the right to enter the premises of an institution.

I have considered the appellant's submission with respect to the applicability of the Charter, and I am not convinced that the ability of a head to refuse to confirm or deny the existence of a record pursuant to subsection 14(3) is in conflict with any Charter provision.

I note that since Order 106, supra, was issued, the Supreme Court of Canada has addressed the issue of the jurisdiction of administrative tribunals to determine Charter issues in a number of decisions. (See Tetrault-Gadoury v. Canada (Canada Employment and Immigration Commission) (1991), 122 N.R. 361, (S.C.C.), rel. June 6, 1991, Cuddy-Chicks Limited v. (Ontario) Labour Relations

Board, (1991), 81 D.L.R. (4th) 358 (S.C.C.) rel. June 6, 1991 and Douglas/Kwantlen Faculty Assn. v. Douglas College, [1990] 3 S.C.R. 570.) Having reviewed these decisions and solely for the purposes

of this appeal, I have assumed that I have jurisdiction to determine a Charter challenge to provisions of the Act arising in matters properly before me.

I agree with Commissioner Linden's view as expressed in Order 106, supra, that I would have to be convinced by a clear and compelling argument that the section the appellant seeks to impugn is, in fact, inconsistent with the Charter.

Accordingly, I have considered the appellant's submissions with respect to the applicability of the Charter in the circumstances of this appeal. As stated, in my view, it is incumbent upon the party who raises such an issue to provide sufficient support for it. Based on the submissions received from the appellant, which are general in nature, I am not persuaded that the provisions of section 14(3) of the Act offend the Charter.

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

Section 2(1) of the Act states:

"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;

The appellant's request clearly indicates that he was seeking access to any information which had been recorded on or about him with regard to wiretap applications. Wiretap applications

are completed in order to obtain the appropriate authorization to intercept a person's private communications.

I previously dealt with a similar fact situation in Order 195, dated August 30, 1990, which involved the same institution as in this appeal. At page 6 of that Order, I stated that "I ...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". Further, I also noted that the institution had identified "Wiretap Applications", in the Directory

of Records for 1990, as a type of personal information bank maintained by it. This also appears in the 1991 Directory of Records, which 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.

It is my view that a record of the nature requested, if it existed, would contain personal information of the appellant within the definition of personal information contained in section 2(1) of the Act.

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

any personal information about the individual contained in a personal information bank in the custody or under the control of an institution;

However, this right of access under section 47(1)(a) 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, section 49(a) states:

A head may refuse to disclose to the individual to whom the information relates personal information,

where section 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information;

In this appeal, the institution has refused to confirm or deny the existence of a record that would respond to the appellant's request, pursuant to section 14(3) of the Act. Section 14(3) states:

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

Therefore, before deciding whether the head has properly exercised his discretion under section 49(a) to refuse to confirm or deny the existence of a record pursuant to section 14(3), I must determine whether a record of the nature requested, if it existed, would qualify for exemption under either section 14(1) or (2) of the Act.

ISSUE C: Whether a record of the nature requested, if it existed, would qualify for exemption under either section 14(1) or 14(2) of the Act.

Section 14(1) of the Act states:

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.

In Order 195, supra, at pages 9 and 10, I stated that:

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".

After reviewing the institution's representations in that matter I stated, "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."

I have reviewed the institution's representations in this appeal and I am satisfied that a record of the nature requested, if it existed, would qualify for exemption under section 14(1) of the Act.

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

In Issue C I found that records of the nature requested, if they existed, would qualify for exemption under section 14(1) of the Act. Therefore, I am of the view that section 14(3) of the Act would be available to the head in the circumstances of the appeal.

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.

The institution has provided submissions regarding the exercise of discretion to refuse to confirm or deny the existence of a record of the nature requested. After reviewing these submissions, I am of the view that the head's decision should not be disturbed on appeal.

In closing, I wish to add that I consider the provisions of section 14(3) of the Act, which enable a head to refuse to confirm or deny the very existence of a record, to be a clear contradiction of the central purposes of the Act as stated in section 1. I believe I understand why such provisions are contained in the Act, however, in all cases, I will review very carefully the circumstances in which they are relied upon by the head.

ORDER:

I uphold the head's decision.

Original signed by: _____
Tom Wright
Commissioner

November 27, 1991

Date