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

ORDER P-625

Appeal P-9200822

Ministry of the Attorney General

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ORDER

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) respecting wiretap information. The appellant requested confirmation as to whether the police had intercepted conversations between two named individuals and requested the content of the conversations.

The Ministry responded to the request by stating that the existence of the information requested would not be confirmed or denied, pursuant to section 14(3) of the Act. The Ministry also advised that in Order P-344, former Assistant Commissioner Tom Mitchinson found that the contradictions which exist between the Act and The Criminal Code (the Code) are such that the Code operates to exclude requests for wiretap application records from the scope of the Act. The requester appealed the Ministry's decision.

Mediation was not successful and notice that an inquiry was being conducted to review the Ministry's decision was sent to the Ministry and the appellant. Subsequently, the Ministry disclosed what it claimed were all of the records in its custody or under its control to the appellant, indicating "... there is no additional information pertaining to your request in our possession."

Upon receipt of the records, the appellant submitted that the information released was not responsive to the request, as it pertains to interceptions of conversations which occurred at a location other than the one specified in the request.

A second Notice of Inquiry was sent to the parties respecting this issue. Representations were received from the Ministry.

The issue arising in this appeal is whether the Ministry's search for records was reasonable in the circumstances. However, in my view, prior to determining this issue I must first determine whether a request for wiretap information is within the scope of the Act.

In Order P-344, Assistant Commissioner Mitchinson found that the doctrine of federal legislative paramountcy operates so as to exclude requests for wiretap application records from the scope of the Act. This order was provided to the appellant and the Ministry during the course of this appeal.

The appellant submits that Order P-344 is of no binding effect because the federal Department of Justice was not notified of the constitutional question, as required by the Courts of Justice Act.

Section 109 of the Courts of Justice Act reads:

> (1) Where the constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature or of a regulation or by-law made thereunder is in question, the Act, regulation or by-law shall not be adjudged to be invalid or inapplicable unless notice has been served on the Attorney General of Canada and the Attorney General of Ontario in accordance with subsection (2).
>
> (2) The notice shall be in the form provided for by the rules of court, and, unless the court orders otherwise, shall be served at least ten days before the day on which the question is to be argued.

The "rules of court" which are referred to in section 109(2) are set out in Ontario's Rules of Civil Procedure. Rule 1.02(1) provides:

> These rules apply to all civil proceedings in the Court of Appeal and in the Ontario Court (General Division), subject to the following exceptions:
>
> 1. They do not apply to proceedings in the Small Claims Court, which are governed by Regulation 201 of Revised Regulations of Ontario, 1990.
>
> 2. They apply to proceedings under the Estates Act only in respect of matters for which Regulation 197 Revised Regulations of Ontario, 1990 makes no provision.
>
> 3. They do not apply if a statute provides for a different procedure. O.Regs. 711/89, s.2; 441/90, s.2.

In my opinion, neither the Courts of Justice Act nor the Rules of Civil Procedure apply to proceedings before administrative tribunals such as the Information and Privacy Commissioner/Ontario (the IPC). In my view, they are intended to apply to courts of law only. Because the Courts of Justice Act does not, in my view, apply to the IPC, a failure of the IPC to comply with section 109 cannot be said to invalidate Order P-344.

The appellant also submits that there is no conflict between the Act and the wiretap provisions of the Code because (1) the Act deals with records maintained by institutions and the Code deals with records maintained by the courts; (2) the wiretap provisions of the Code are effective only for a period of three years and after this period the wiretap provisions no longer apply; and (3) the Code allows disclosure of wiretap records where (a) the persons whose conversations were intercepted consent to the disclosure and (b) the records are used in proceedings under oath such as proceedings before the Commissioner. The appellant submits that because there is no conflict, the federal doctrine of legislative paramountcy cannot apply to invalidate the provisions of the Act with respect to wiretap records.

To address the appellant's first argument, I have reviewed the provisions of the Code respecting wiretap records. There is nothing in the provisions which would lead me to conclude that they are intended to apply only to records which are in the custody or control of the courts. For example, section 193 prohibits "everyone" from wilfully using or disclosing the substance of a wiretapped conversation. In my view, the provisions of the Code are worded in a sufficiently broad fashion to cover both situations where the records are in the custody or control of the court **and** where they are in the custody or control of an institution.

Regarding the appellant's second argument, the Code has been recently amended. Prior to the amendments, there was a finite time limit of three years, after which the Ministry was required to notify persons who had been the subject of a wiretap application. This provision has since been amended to permit a judge to grant extensions and subsequent extensions of the three year period. It would therefore appear that there is no finite time period within which the wiretap provisions of the Code apply.

The appellant's third argument is focused on essentially the same facts as those faced by Assistant Commissioner Mitchinson in Order P-344. Assistant Commissioner Mitchinson came to the conclusion that, while the Code and the Act were not expressly contradictory on every count, they were nonetheless operationally incompatible with one another. I agree. Accordingly, I find that the appellant's request falls outside the scope of the Act, and his appeal of the Ministry's decision is dismissed.

Original signed by: February 9, 1994
Holly Big Canoe
Inquiry Officer