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

ORDER P-948

Appeal P-9400750

Ministry of the Solicitor General and Correctional Services

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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The appellant, a newspaper reporter, submitted a request to the Ministry of the Solicitor General and Correctional Services (the Ministry) for access to records pertaining to the overall cost of a police "joint-forces" team to investigate child pornography and exploitation in Ontario, as well as information pertaining to the province's financial contribution towards this project. Specifically, the request was for access to the following:

(1) the overall figure for the estimated cost of the one year, joint forces investigation, including associated personnel costs;

(2) the overall figure for the provincial government's contribution to the project, and a breakdown of its constituent amounts for equipment and other forms of assistance to investigators;

(3) all Ministry documents relating to the approval of the project, and a copy of the proposal for the joint forces investigation submitted by the Chief of the London Police.

The Ministry located some of the financial information referred to in items 1 and 2, above, which was summarized in an administrative memorandum sent to the Ministry's Freedom of Information and Privacy office. The Ministry decided to deny access to this information. The Ministry relies on the following exemptions in the Act as the basis for this denial of access:

- law enforcement - section 14(1)(a)
- right to fair trial - section 14(1)(f).

The appellant filed an appeal from the Ministry's denial of access. During the appeal, the issue of whether the Ministry had conducted an adequate search for records also arose.

A Notice of Inquiry was sent to the appellant and the Ministry. Representations were received from both parties.

In its representations, which are dated May 24, 1995, the Ministry indicates that it has located additional records and that it will make an access decision regarding them within two weeks. To date, I have not been advised that any such decision has been issued. Given that additional records have been located, I will not deal with the issue of the adequacy of the Ministry's search in this order. However, if, once the appellant receives the Ministry's decision regarding the additional records, the appellant still believes that additional records exist, the appellant will be able to appeal from the new decision on that basis (as well as any other ground permitted by the Act).

Accordingly, the issues to be decided in this appeal are: (1) whether the exemptions provided by sections 14(1)(a) and 14(1)(f) apply, and (2) how to deal with the additional records discovered by the Ministry.

DISCUSSION:

LAW ENFORCEMENT/RIGHT TO FAIR TRIAL

Sections 14(1)(a) and (f) of the Act state as follows:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (f) deprive a person of the right to a fair trial or impartial adjudication.

The Ministry's arguments under both section 14(1)(a) and 14(1)(f) relate to concerns about individuals charged as a result of this investigation being able to have fair and impartial trials. With respect to section 14(1)(a), the Ministry submits that "... prejudice to the fairness of a trial clearly constitutes interference with a law enforcement matter". Although this appears to relate primarily to section 14(1)(f), I will also consider whether the Ministry has established the application of section 14(1)(a).

The Meaning of "Could Reasonably Be Expected To"

The Ministry has made extensive submissions on the meaning of the phrase "could reasonably be expected to" in the preamble to this section. The Ministry disagrees with several previous interpretations of this phrase, as set out in past orders of this agency. This phrase modifies both exemptions at issue here, namely sections 14(1)(a) and (f).

For instance, rather than interpreting "could reasonably be expected to" as requiring a reasonable expectation of probable harm, the Ministry argues that a reasonable expectation of **possible** harm will be sufficient.

The Ministry also submits that the common law "sub judice" rule means that courts are concerned to avoid the premature disclosure of information which **could** affect the fairness of a trial.

However, the Ministry also refers me to a passage in Order 188, where then Assistant Commissioner Tom Wright interpreted "could reasonably be expected to" as requiring that the expectation of harm not be "... fanciful, imaginary or contrived, but one that is based on reason". In stating its disagreement with several other interpretations of this phrase, the Ministry states that this passage in Order 188 is "... a more faithful interpretation of `could reasonably be expected to'". As in this appeal, Order 188 considered the meaning of these words in the context of the preamble to section 14(1).

Without accepting the Ministry's submissions concerning other interpretations of the phrase "could reasonably be expected to", I am prepared to decide this case based upon the interpretation just cited from Order 188. In my view, the requirement in Order 188 that the expectation of harm must be "based on reason" means that there must be some logical connection between disclosure and the potential harm which the Ministry seeks to avoid by applying the exemption.

The Canadian Charter of Rights and Freedoms

The Ministry's representations state that

> [t]he overriding factor supporting the Ministry's decision to exercise its discretion to refuse access to the responsive records is its determination to safeguard the Charter right to a fair trial of individuals who may have been charged as a result of this investigation, as well as society's interest in conducting a fair trial.

The Ministry submits that, with respect to section 14(1)(f), the right to a fair trial under sections 7 and 11(d) of the Canadian Charter of Rights and Freedoms ought to be considered. The Ministry states that "... s. 14(1)(f) must be interpreted so as to ensure that the accused's Charter right is protected from any reasonable possibility of harm".

The Charter provisions relied on by the Ministry, sections 7 and 11(d), state as follows:

> 7. Every one has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 11. Any person charged with an offence has the right
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

I am prepared to accept that section 14(1)(f) of the Act should be interpreted in a way that affords no less protection to the right of an accused to a fair trial than do sections 7 and 11(d) of the Charter. In light of the similarity of the Ministry's submissions on the application of sections 14(1)(a) and (f), I will also take this approach to section 14(1)(a).

In my view, however, whether the standard being applied is found in the Act or the Charter, sufficient information and reasoning are required to support the application of the provisions relied upon to justify non-publication or non-disclosure.

Harms in Sections 14(1)(a) and (f)

I will now consider the standards to be applied in deciding whether the Ministry has provided sufficient evidence of the particular substantive harms mentioned in sections 14(1)(a) and (f). Section 14(1)(f) deals explicitly with the right to a fair trial and impartial adjudication, and as previously noted, the Ministry's argument under section 14(1)(a) also relates to this issue. In my view, the Supreme Court of Canada's decision in Dagenais v. Canadian Broadcasting Corp. [1994], 3 S.C.R. 835, 120 D.L.R. (4th) 12 (S.C.C.), relating to publication bans, provides useful guidance in this regard.

The Dagenais case, which the Ministry cites in its representations, concerns a publication ban to prevent the television broadcast of a fictional dramatic program until the completion of four criminal charges, where there was a similarity between the subject matter of the television program and the charges faced by the accused individuals. The main issue addressed is whether the infringement of the Charter right to freedomof expression was justified in order to ensure that the accused individuals receive fair and impartial adjudication as contemplated in section 11(d) of the Charter. Speaking for the majority, Lamer C.J.C. said:

> The common law rule governing publication bans has always been traditionally understood as requiring those seeking a ban to demonstrate that there is a **real and substantial risk** of interference with the right to a fair trial. (emphasis added) (page 875)
>
> [P]ublication bans are not available as protections against remote and speculative dangers. (page 880)

In separate reasons, McLachlin J. said:

> What must be guarded against is the facile assumption that if there is any risk of prejudice to a fair trial, however speculative, the ban should be ordered.
> ...
>
> Rational connection between a broadcast ban and the requirement of a fair and impartial trial require demonstration of the following. ... [I]t must be shown that publication might confuse or predispose potential jurors ... (page 950).

In the circumstances of this appeal, I consider these comments as guidelines in deciding whether the information and reasoning provided by the Ministry are sufficient to substantiate the application of the exemptions provided by sections 14(1)(a) and (f).

The Ministry seeks to demonstrate the reasonable expectation of harm under both sections 14(1)(a) and (f) by advancing three arguments. I will summarize each of the Ministry's submissions in this regard, and deal with them in turn.

(1) The Ministry submits that the amount of money spent on this investigation would be irrelevant and inadmissible at the trial of any individual accused as a result of the investigation.

I do not view this submission as a basis for applying either of the exemptions claimed. The Ministry advances this argument to demonstrate the prejudicial impact of the information at issue on the trial of any person charged in connection with the investigation. However, the primary test for the admissibility of evidence is relevance. It is clear that, generally speaking, the cost of an investigation should have no bearing on the guilt or innocence of an accused individual. The exclusion of this information from evidence at trial on the basis that it is irrelevant would not, of itself, establish the prejudicial impact asserted by the Ministry. I am, therefore, not persuaded that the potential exclusion of this information from evidence at any trial supports the conclusion that its disclosure could reasonably be expected to interfere with a law enforcement matter, or deprive a person of the right to a fair trial or impartial adjudication.

(2) The Ministry submits that the release of information about the amount of money spent on the investigation could cause jurors to draw an adverse inference as to the guilt of individuals charged as a result of this investigation.

(3) The Ministry submits that disclosure of the amount of money spent on this investigation could stir up anger and resentment against child pornographers which could prejudice the fairness of future investigations and trials.

Both of these arguments are unsupported by any evidence or example. The Ministry appears to view these statements as obvious conclusions, or, to put it slightly differently, as per se fulfilment of the standards required to qualify for exemption under section 14(1)(a) or (f). I do not agree. In my view, to accept these arguments in the form presented to me, in the absence of sufficient information or reasoning to support them, would be to make the sort of "facile assumption" cautioned against by McLachlin J. in the Dagenais case. In my opinion, neither of these arguments establishes any reasonable expectation of the harms contemplated in sections 14(1)(a) and (f).

The Ministry seeks to bolster these arguments by referring to Order P-534, in which Inquiry Officer Anita Fineberg ordered disclosure of funding information about Project 80 (a municipal corruption squad comprised of officers from several police forces). In that order, the Inquiry Officer rejected arguments that sections 14(1)(a) and (f), among others, applied to exempt this information from disclosure. The Ministry argues that Order P-534 was incorrectly decided because the Inquiry Officer failed to appreciate the fallibility of jurors.

The fact situation in Order P-534 is remarkably similar to the one under consideration here. There, as here, the project in question was a high profile investigation involving officers from several police forces. In Order P-534, the Inquiry Officer dealt with essentially the same argument presented by the Ministry in this case, to the effect that disclosure of funding information would interfere with accused persons obtaining a fair trial.

Moreover, the representations in that case also consisted of bare assertions with little supporting information.

In my view, it is significant that Order P-534 was reviewed by the Divisional Court (Ontario (Attorney General) v. Fineberg, 19 O.R. (3d) 197). The Divisional Court upheld the Inquiry Officer's findings concerning the exemptions, including sections 14(1)(a) and (f). The Court stated that "... it is our view that the findings by the Inquiry Officer with respect to the application of sections 14(1)(a), (b), (d) and (f) were reasonable in light of the material before her ...". With respect to section 14(1)(f) and the question of interference with a fair trial, the Court stated that "[i]n the circumstances, the Officer also reasonably concluded that the concern with respect to section 14(1)(f) appeared quite unlikely".

The Divisional Court upheld Inquiry Officer Fineberg's conclusion that disclosure of funding information concerning Project 80 could not reasonably be expected to trigger the harms contemplated in either section 14(1)(a) or 14(1)(f) of the Act. In my view, this seriously undermines the Ministry's argument that Order P-534 was wrongly decided.

With respect to the Ministry's concerns about jurors, I am not satisfied, on the basis of the information provided to me, that there is a reasonable expectation that disclosure (or publication) of the information at issue would lead to jurors being confused or predisposed with respect to matters at issue in any trial.

I agree with the conclusions of the Inquiry Officer in Order P-534 concerning sections 14(1)(a) and (f), as affirmed by the Divisional Court, and in my view, they are also applicable in this case. The facts are similar, and the Ministry has failed to provide sufficient information and reasoning to support a conclusion that disclosure of the financial information at issue could reasonably be expected to result in any interference with a law enforcement matter, or to deprive a person of the right to a fair trial or adjudication.

Returning to my discussion of the meaning of the words "could reasonably be expected to", above, the Ministry has not demonstrated any logical connection between disclosure of the information at issue and the harms mentioned in section 14(1)(a) or (f). Moreover, even if I were persuaded that the proper interpretation of these words is that a "reasonable expectation of **possible** harm will be sufficient" to establish the application of these exemptions, or that they would apply if disclosure of the information at issue "**could** affect the fairness of a trial", I would find that I have not been provided with sufficient information and reasoning to meet those standards.

In the result, I am of the view that the Ministry has failed to meet the burden of proof imposed on it by section 53 of the Act, and I am not satisfied that a reasonable expectation of the harm contemplated in either section 14(1)(a) or (f) has been established. Therefore, I find that these exemptions do not apply to the funding information identified by the Ministry. As no other exemptions have been claimed for this information, it should be disclosed.

RECORDS FOR WHICH NO DECISION HAS BEEN MADE

As noted at the beginning of this order, the Ministry's representations state that it has located additional records and that it will make an access decision regarding them. However, the time estimated for this decision has now passed and I have not been advised that any such decision has been issued. Given that this request was submitted in July, 1994, I will order the Ministry to issue its decision regarding these additional records within fifteen days after the date of this order.

ORDER:

1. I order the Ministry to disclose the funding information set out in the memorandum sent to the Ministry by the Criminal Intelligence Service of Ontario dated August 3, 1994, either by disclosing that part of the memorandum or by setting out the information in letter form if it so chooses, within fifteen (15) days after the date of this order.

2. I order the Ministry to issue a decision letter to the appellant concerning the additional records referred to in its representations, in compliance with sections 26 and 29 of the Act, within fifteen (15) days after the date of this order, and without recourse to a time extension. I further order the Ministry to send a copy of this decision letter to me within twenty (20) days after the date of this order. My copy of this letter should be sent to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

3. In order to verify compliance with Provision 1 of this order, I reserve the right to require the Ministry to provide me with a copy of the information which is disclosed to the appellant pursuant to Provision 1.

Original signed by: June 30, 1995
John Higgins
Inquiry Officer