



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-1867

Appeal PA-990255-2

Ontario Human Rights Commission



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

BACKGROUND:

The appellant submitted a request to the Ontario Human Rights Commission (the OHRC) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "the complete name, title, company name and address of the anonymous writer of the statement...". This request refers to the OHRC's "letter of December 10, 1997, furnishing me an anonymous and partially blacked-out statement from the respondent, who is conceivably a law professional."

The OHRC denied access to the identity of the "anonymous law professional" pursuant to sections 14(1)(a), (b) and (d) of the *Act*.

The appellant appealed this decision and Appeal PA-990255-1 was opened.

During mediation of Appeal PA-990255-1, the appellant clarified that he was seeking access to the identity of the "anonymous human rights lawyer" who had made submissions on behalf of [a named company] in December of 1997. The appellant had filed a complaint against the named company with the OHRC and believed that an anonymous human rights lawyer drafted the respondent's statement but didn't get involved in the investigation.

The OHRC contacted the lawyer representing the named company in an attempt to obtain consent to disclosure but the lawyer declined. The Mediator also contacted the lawyer but the lawyer continued to decline to consent to disclosure.

The OHRC issued a supplementary decision to the appellant denying access to the name of the lawyer on the basis of section 21(2)(e) of the *Act*. The OHRC also provided written confirmation to the Mediator that it was only raising the application of section 21(2) with respect to this information.

Appeal PA-990255-1 was moved into Inquiry. Adjudicator Holly Big Canoe initiated the inquiry by sending a Notice of Inquiry to the OHRC and the lawyer. Representations were received from both parties. In his representations, the lawyer raised the application of additional discretionary exemptions. After reviewing these representations, Adjudicator Big Canoe decided to seek representations from the appellant. The original Notice was modified to reflect the additional issues arising from the representations of the lawyer. In this regard, the Notice asked the following question:

Whether the lawyer is entitled to rely on discretionary exemptions at sections 14(1)(a), (b), (d) and (e) not raised by the OHRC.

The appellant was invited to comment on the raising of a discretionary exemption by the lawyer.

Adjudicator Big Canoe also attached the non-confidential representations of the OHRC to this Notice. In response, the appellant submitted a letter addressed to Commissioner Ann Cavoukian, which the Adjudicator considered as his representations in the matter.

The information at issue in Appeal PA-990255-1 consisted of the name, title, firm name and address of the lawyer.

Adjudicator Big Canoe disposed of the issues in Appeal PA-990255-1 in Order PO-1787 as follows:

- the information at issue does not qualify as "personal information", therefore, section 21(1) does not apply;
- the lawyer may raise the possible application of the discretionary exemption in section 14(1)(e) even though this section was not raised by the OHRC;
- the information at issue qualifies for exemption under section 14(1)(e);
- the OHRC must exercise its discretion under section 14(1)(e) of the *Act* in light of the factual circumstances outlined in the Adjudicator's reasons and any other relevant considerations, and inform the appellant and the lawyer in writing by June 1, 2000 of its decision respecting disclosure.

The OHRC issued a decision to the appellant on June 5, 2000 in which it advised him that it was refusing to disclose the information at issue based on "the detailed and convincing evidence provided to the Adjudicator at the [IPC] by the OHRC and the lawyer." The OHRC stated further that:

the provision of the subject information regarding the lawyer would enable you to contact him. In light of your history of exhibiting behaviour that could endanger those whom you perceive have not treated you fairly and in light of the OHRC's and the lawyer's belief that you perceive that the lawyer is a prime culprit with respect to your human rights complaint, I believe that the OHRC's reliance on the provision of section 14(1)(e) of the *Act* is appropriate in these circumstances.

NATURE OF THE APPEAL:

The appellant subsequently wrote to this office objecting to the OHRC's exercise of discretion in denying him access to the requested information. The appellant also objects to the issuance of the OHRC's decision on June 5 which he indicates "was not issued in conformity with the Order required by June 1, 2000".

This office opened a related appeal file, Appeal PA-990255-2, in response to the appellant's objections and streamed the file directly to Adjudication. The issues to be determined in this inquiry are:

- whether the OHRC issued its decision in conformity with Order PO-1787, and if not, what impact this has on the decision; and
- whether the head of the OHRC properly exercised his discretion under section 14(1)(e) of the *Act*.

I sent a Notice of Inquiry to the OHRC initially. The OHRC submitted representations in response. I also sought the appellant's representations on the issues in this appeal, and attached the non-confidential portions of the OHRC's representations to the Notice of Inquiry that was sent to him. The appellant was asked to

review these representations and to refer to them where appropriate in responding to the issues in the Notice. The appellant submitted representations in response.

DISCUSSION:

DID THE OHRC ISSUE ITS DECISION IN CONFORMITY WITH ORDER PO-1787?

The *Act* establishes a comprehensive scheme for access to information and protection of privacy in the province of Ontario relating to government-held information. This scheme includes a statement of the purposes of the legislation, and provisions regarding the administration of the *Act*, including the structures and procedures that the legislature deemed necessary to effect the purposes of the *Act*. The *Act* contains a number of provisions dealing with time limits. For example, sections 26 and 28(7) provide that the head shall give notice of his or her decision on access to a requester within thirty days after the request is received or after third party notifications have been sent out. Section 50(2) provides that an appeal of a decision of a head shall be made within thirty days after the notice was given of the decision.

As part of the administration of the *Act*, the legislation created the Information and Privacy Commissioner's office and provided for the appointment of a Commissioner to oversee its functions. The role of the Commissioner in the overall administration of the access provisions of the *Act* are set out in Part IV, which provides, in part, that the Commissioner may conduct an inquiry to review the head's decision (section 52(1)) and that where she chooses to do so, she shall make an order disposing of the issues raised by the appeal.

In the vast majority of cases, institutions comply with the order provisions within the specified time. In some cases, the deadline is missed for various reasons. In these cases, the Commissioner's office will normally contact the institution and compliance routinely follows.

In determining this issue there are two questions to consider. First, was the institution in non-compliance with the order, and second, what effect does this have on the institution's decision?

Was the decision in conformity with Order PO-1787?

The OHRC notes that Order PO-1787 provided that it was to exercise its discretion under section 14(1)(e) and inform the parties in writing of its decision "by 2 weeks". The OHRC indicates that it received its copy of the order (which is dated May 18, 2000) on May 23. The OHRC indicates further that it received a letter from Adjudicator Donald Hale on May 29, 2000 stating that there was an error in Order PO-1787 and that the reference to "2 weeks" meant that a decision was to be rendered by June 1, 2000.

The OHRC states that its Registrar is responsible for co-ordinating matters under the *Act* as well as being responsible for a number of other functions. The OHRC indicates that the last week of May was an extremely busy time for the Registrar and that she was unable to consult with the decision-maker in time to meet the June 1 deadline. The OHRC states that it attempted to contact former Adjudicator Big Canoe on
[IPC Order OP-1867/February 15,2001]

the due date but was unable to do so. However, on June 2, the OHRC indicates that it was able to contact the Adjudication Review Officer and after explaining the situation, it advised him that a decision would be sent on June 5. The OHRC notes that the Adjudication Review Officer did not voice any objection to this arrangement.

The OHRC states that the deadline was missed only by four days, that it made good faith attempts to meet the deadline and that it informed the Commissioner's office promptly of its inability to comply. The OHRC submits that in these circumstances, it was in "substantial compliance with the spirit of the Order".

The appellant outlines his dealings with the OHRC over the past few years and states:

Based on my three-year-and-four-month experience with OHRC, the delay is mainly attributed to the head's unpredictable character towards making a shaky decision like this that he has to take it up with his business partner, the Bay Street lawyer on how to write an ambiguous decision letter to exploit the loophole in the law. Therefore, it is my belief that it was not the registrar's fault to blow the deadline, it was the head, who took the time to ponder on how to write a decision under pressure required to provide "detailed and convincing evidence" of a reasonable expectation of harm to discharge the burden ...

It is clear that the OHRC was not in strict compliance with the order provisions of Order PO-1787; the decision was to be issued by June 1 and it was rendered on June 5. The OHRC admits to this non-compliance and in my view, offers a reasonable explanation for it, beginning with the confusion created by the Commissioner's office in not providing a specific date in the order. It is the practice of the Commissioner's office to specify an exact date for compliance with an order provision. This office acknowledged the error in not doing so. Unfortunately, the OHRC only received the corrected order within days of the compliance date.

Further, contrary to the appellant's assertions, in my view, the OHRC made reasonable efforts to comply with the order and promptly contacted the Commissioner's office to advise the adjudicator of its inability to do so. The OHRC provided a date for compliance that was not only reasonable (taking into account that two of the four days fell on a weekend) but reflected an intention to abide by the spirit of the order. The OHRC then complied with this date.

In the circumstances of this appeal, the delay of four days, part of which included a weekend, is very minor. Further, I am not persuaded by the appellant that there was any bad faith on the part of the OHRC. In addition, the appellant has not established that he has been significantly prejudiced by the delay. The OHRC has issued a decision in compliance with Order PO-1787 in a reasonably timely manner. I will, therefore, retroactively relieve the OHRC of the requirement of issuing a decision within the time specified in the order.

Because I have relieved the OHRC of complying with the time requirements in Order PO-1787, it is not necessary for me to consider the impact of non-compliance on its decision.

DID THE HEAD PROPERLY EXERCISE HIS DISCRETION UNDER SECTION 14(1)(e) OF THE ACT?

The OHRC indicates that the head reconsidered his original decision in light of Order PO-1787. In this regard, the OHRC notes that in exercising his discretion not to disclose the information at issue to the appellant the head took a number of factors into consideration, including: the concerns expressed by the affected person; the past threatening and violent behaviour exhibited by the appellant against those whom he perceives as not having treated him fairly; the experiences of OHRC mediation staff who were previously involved in processing the appellant's human rights complaint and the Adjudicator's findings in Order PO-1787.

In support of the head's decision on the exercise of discretion, the OHRC provided several staff reports about the appellant to the Commissioner's office. These reports reflect staff's concern regarding the appellant's behaviour during their contact with him.

The OHRC indicates that it was particularly relevant to the head that the appellant is specifically seeking the identity and whereabouts of a particular individual "who in the mind of the requester is the 'prime culprit' in the unfairness he perceives".

The OHRC indicates further that the head considered the fact that the appellant has received full disclosure of the investigation findings regarding his complaint and considered whether disclosure of the information at issue was crucial to the appellant's right to know the case against him or to enable him to respond to the issues in his human rights complaint. The head came to the conclusion that this information was not relevant to the complaint itself and decided that, in the circumstances, the appellant's "right to know does not override considerations of health and safety risks where such apprehension by the affected third person has a reasonable basis in fact".

The appellant takes issue, first, with Adjudicator Big Canoe's findings regarding the application of section 14(1)(e) as well as any evidence presented that would tend to support such a finding. He also complains about the manner in which he has been dealt with by the OHRC and by all involved parties generally and submits that his human and *Charter* rights have been infringed by such treatment. In essence, he feels that he has been dealt with unfairly and that the actions of the OHRC and the Commissioner's office are "illegal" and improper.

Based on the submissions of the OHRC, I am satisfied that the head has taken appropriate considerations into account in exercising his discretion not to disclose the information to the appellant. Accordingly, I find that the head's exercise of discretion under section 14(1)(e) should not be disturbed.

ORDER:

1. I uphold the OHRC's decision.

Original signed by: _____
Laurel Cropley
Adjudicator

_____ February 15, 2001