

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

CHADWICK, HOWDEN AND CAPUTO JJ.

B E T W E E N:)
)
ATTORNEY GENERAL OF ONTARIO) *Elaine Atkinson*, for the Applicant
)
Applicant)
- and -)
)
)
TOM MITCHINSON, ASSISTANT) *Christopher Bredt and Rema J. Imseis*, for
COMMISSIONER, and JOHN DOE,) the Respondent, Tom Mitchinson
REQUESTER)
) *Tony S. K. Wong and Colleen Robertshaw*,
Respondents) for the Applicant/Respondent, John Doe
)
AND B E T W E E N:)
)
BILL SCHILLER) *Tony S. K. Wong and Colleen Robertshaw*,
) for the Applicant
Applicant)
- and -)
)
)
)
TOM MITCHINSON, ASSISTANT) *Elaine Atkinson*, for the Respondent
COMMISSIONER, and MINISTRY OF)
THE SOLICITOR GENERAL)
)
Respondents) **HEARD:** November 28, 2002

CHADWICK J.: (Orally)

[1] With reference to the role of the counsel for the Commissioner, we have considered and followed the decisions in *Northwestern Utilities Ltd. v. Edmonton* and also the Supreme Court of Canada decision in *Pakar*. In our view, the unique nature of the Privacy Commissioner and the legislation requires the Commissioner's counsel to be present and take an active part in these applications. As the reasonableness of the Commissioner's decision is an issue, we are of the view

that counsel should be able to deal with reasonableness and any questions of jurisdiction. Therefore, we are not going to limit the role of counsel.

[2] With reference to the fresh evidence, we have considered the application for the introduction of fresh evidence by the applicant and the submissions of counsel. Before deciding, we would like to hear further submissions from counsel regarding the purpose of the trip as found by the Commissioner. In that regard we note that in the initial application or request for information on Mr. Schiller, it says, "dates, destinations and billing for security for the Ontario Provincial Police [O.P.P.] detail attached to the premier, for each trip to the United States from Jan. 1, 2000 to Jan. 22, 2001, inclusive". Also the Commissioner considered and relied upon the evidence of Detective Sgt. Frank Ryder and I note in his affidavit that he also deals with the question of the attachment of the O.P.P. security to the Premier and in particular reference to paragraph 9 which says: "Further, I submit that this risk of harm is created not only for the Premier and/or other government official(s), but also for the security officers and any member of the public in close proximity to the main target." (and obviously the main target being the Premier).

[3] We would like counsel to address the issue as to whether the Commissioner has defined the purpose too narrowly in his decision.

[4] We have considered the submissions made with reference to the issue of fresh evidence and its admissibility and we have some brief reasons on admissibility of the scope of the order. There is no issue as to the test to be applied. It is reasonable simplicitor.

[5] The request of Mr. Schiller was as follows:

- (i) This is a request under the *Freedom of Information and Privacy Act* for dates, destinations and billings for security, for the Ontario Provincial Police [OPP] detailed attached to the Premier, for each trip to the United States from Jan. 1, 2000 to Jan. 22, 2002, inclusive.

Air costs, hotels and associated expenses for the security detail for each trip to the United States should be listed separately and purpose of trip noted.

I would prefer to receive the above materials as photocopies and it goes on and concludes, "Please call immediately for clarification since there is currently only a \$5.00 waiver per application or some 10 minutes of time per application before a search fees apply."

[6] The Commissioner, in his written reasons dated September 6, 2001, defines the scope of the request as follows. At page 5 he states:

"The appellant also submits that his request was at a minimum, ambiguous and that the Ministry had an obligation under s. 24(2) of the *Act* to seek clarification of its scope before proceeding to identify responsive records."

The Ministry disagrees and submits,

"It is the position of the Ministry that the appellant, late in Mediation expanded the request beyond its original meaning and stated that in addition to the listed "billed" expenses, which included, air costs, hotel, associated expenses, the appellant was now seeking access to the salaries to the security detail as a "billed" expense. The security detail is made up [of] salaried OPP officer(s) and the expense records do not compute salary costs as "billed" item nor is it inserted or form part of the record.

The Ministry also submits that it was not obliged by s. 24(2) of the *Act* to seek clarification from the appellant because the request was sufficiently clear on its face.

Based upon the representation submitted by the parties and the actual wording of the appellant's request, I am satisfied that the Ministry has properly interpreted the scope of the request in the decision not to seek clarification under 24(2) of the *Act* was reasonable in the circumstances. And further on he concludes, "the request covered the dates, destinations and billings for each trip taken within the time frame identified by the appellant who went on to specify the air costs, hotels, associated expenses, should be included and listed separately.

The Ministry identified expense claim form as responsive records which I find to be reasonable since the type of record is normally used for the purpose of accounting for travel expenses and identifies dates and destinations as well as air costs, hotels and associated expenses. Records reflecting chargeback arrangements for OPP salary costs if they exist will be quite different in nature not reasonably related to expense claim form.

It is also significant that as explained by the Ministry, Cabinet office is not charged for security services provided by the OPP to the Premier and certainly not in the way it breaks these costs down of a per trip basis requested by the appellant."

[7] And further on the Commissioner then deals with the purpose of the trip. "The appellant takes the position that the phrase "purpose of the trip" he was seeking information that would confirm whether the trips were taken by the Premier for government business or for pleasure. The appellant states that because his request specifically identified information concerning the security detail, it was clear that he understood the purpose of the trip from the OPP's perspective and to restrictively interpret the request in this manner was both unreasonable and incorrect he submits. The (appellant's) interest was not in respect to the OPP's security detail generally but the security detail attached to the Premier. In this context it should have been obvious that the appellant was seeking information relating to the Premier's purpose for taking the trip. The Ministry disagrees. In a letter provided after the close of mediation, the Ministry submits,

"With regard to the "purpose of the trips" the [appellant], in the first paragraph of the request, seeks access to the dates, destinations and billings for OP security for each trip taken to the United States from January 1, 2000 to January 22, 2001. The second

paragraph is clearly a continuation of the first by requesting the air costs, hotels and associated costs for the security deal for each trip. The Ministry did respond to the [appellant] in a decision letter on this point, by indicated that the OPP purpose for the trips was "security". The Ministry is satisfied that the request speaks specifically to the OPP purpose with respect to the trips."

[8] The Commissioner concludes:

"In the circumstances, I am satisfied that the Ministry's response to the request is reasonable. The wording of the appellant's request focuses on expense information relating to the security detail attached to the Premier. All of the type of information identified by the appellant in his request relates specifically to the security detail and if the appellant wanted records confirming the Premier's purpose of the trip, in my view he should have made this clear in his request. I also note the records relating to the purpose of various trips from the Premier's perspective should any exist would in all likelihood be in the custody of a different institution specifically Cabinet office rather than the Ministry of the Solicitor General. The appellant can submit a request of that nature to Cabinet office should he chose to do so. As I have already determined, there is nothing inappropriate in the appellant having raised the scope-related issue during the mediation and I accept the Ministry's interpretation of this aspect of his request may indeed have only been evident to him at that point. However, I note nonetheless find the perspective applied by the Ministry responding to the request in its interpretation that the purpose of the trip was to provide security service to the Premier was a reasonable one in the circumstances."

[9] Justice La Forest in *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 at p. 432-33 reviewed the nature and scope of similar type of legislation. He states as follows:

"The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. As Professor Donald C. Rowat explains in his classic article, "How Much Administrative Secrecy?" (1965), 31 *Can. J. of Econ. and Pol. Sci.* 479, at p. 480:

Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view."

[10] We are of the view the narrow interpretation applied by the Commissioner regarding both billing and purpose is unreasonable. In our view, the position put forth by Mr. Schiller is reasonable. We are not prepared to allow the introduction of new evidence on this judicial review application. The new evidence must be introduced before the Commissioner. The Ministry must have the opportunity of searching for the records, providing the relevant documents and raising their claims

for exemption. We regret having to refer this matter back to the Commissioner in view of the time that has been occupied since the initial request.

[11] I have endorsed the Attorney General's application records, "for orals reasons delivered, the matter is referred back to the Commissioner."

[12] I have endorsed Mr. Schiller's application record, "for oral reasons delivered, the matter is referred back to the Commissioner. Costs to Mr. Schiller payable by the Attorney General of Ontario fixed at \$6,000."

CHADWICK J.
HOWDEN J.
CAPUTO J.

Date of Reasons for Judgment: November 28, 2002

Date of Release: November 29, 2002

COURT FILE NO.: 631/01 and 671/2001

DATE: November 28, 2002

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ATTORNEY GENERAL OF ONTARIO

Applicant

- and -

TOM MITCHINSON, ASSISTANT
COMMISSIONER, and JOHN DOE,
REQUESTER

Respondents

AND B E T W E E N:

BILL SCHILLER

Applicant

- and -

TOM MITCHINSON, ASSISTANT
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ORAL REASONS FOR JUDGMENT

CHADWICK J.

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