Court File No. 556/90

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)
DIVISIONAL COURT

B E T W E E N:	)	
	)	
KEN RUBIN	)	Ken Rubin,
	)	in person,
Applicant	)	for the applicant
(Respondent on the motion)	)	(Respondent on the motion)
- and -	)	
	)	
	)	
	)	
THE INFORMATION AND PRIVACY COMMISSIONER/ ONTARIO	)	Thomas R. Lederer
	)	and Shemin Manji
	)	for the Respondent
Respondent	)	(Moving Party)
(Moving Party)	)	
	)	
	)	HEARD: May 6, 1991

ISAAC J.

[1] The respondent brings this motion in a proceeding for judicial review, pursuant to Rule 37.01 of the Rules of Civil Procedure, for an order that portions of the Record of the respondent Information and Privacy Commissioner/Ontario ("the Commissioner") be sealed and not form part of the Public Record, and that the applicant shall not have access to the sealed portions of the Record.

[2] The facts giving rise to the dispute, as they appear in the Interim Order of the Commissioner, may be shortly stated.

[3] In November, 1987, the applicant, Rubin, wrote to Stadium Corporation of Ontario Limited, ("the Corporation") seeking access to certain information concerning the operations and organization of the Corporation "in the spirit of" the Freedom of Information and Protection of Privacy Act, 1987, S.O. 1987 c. 25, as amended ("the Act") which was not then in force. In December, 1987, the

Corporation informed Rubin that his request could not be processed under the Act since it was not then in force, but that it would be held and considered for processing under the Act when it was proclaimed in force. That event occurred on January 4, 1998. Between January 18, 1988 and April 29, 1988, there were exchanges of letters between Rubin and the corporation concerning Rubin's request.

[4] During the week of May 16, 1988, Rubin attended at the premises of the Corporation and was given an opportunity to review the records in which he was interested. He reviewed then and identified particular documents which he asked the corporation to copy for him. The Corporation released some of those records to Rubin, but refused to release others.

[5] In June, 1988, Rubin complained to the Commissioner about the refusal and thereafter, the Commissioner's office became engaged; the Commissioner having decided to treat the matter as an appeal under the Act.

[6] As a result of mediation efforts by the Commissioner's office between July, 1988 and January, 1989, Rubin received from the Corporation additional records, some of which were edited or severed. As well, the Corporation refused to release others, claiming that they were exempt from disclosure under the Act.

[7] The Corporation charged fees prescribed by the Act and the regulations passed pursuant thereto in respect of the documents or parts of documents which it had agreed to release. Rubin refused to pay those fees and asked the Corporation to waive them. The corporation refused to waive.

[8] Rubin brought to the Commissioner's attention the conduct of the Corporation in editing some of the documents, in refusing to release others, in charging fees and in refusing to waive them.

[9] As a result, on July 13, 1989, the Commissioner instituted an inquiry to review the decision of the Corporation in these respects and notified the parties. Both Rubin and Corporation made representations to the Commissioner on the several issues identified in the inquiry.

[10] At pages 8 and 9 of his Interim Order, the Commissioner identified nine (9) issues determination. Of these, six (6) relate to the exemptions claimed and two (2) relate to the statutory fees charged and to waiver. Since the ninth issue featured prominently in the submissions on the motion before me, I will state it here in the manner in which it was formulated by the Commissioner:

> A. Whether affording the appellant the opportunity to view the records in the circumstances arising in this appeal amounts to giving the appellant access to the records for the purposes of section 30 of the Act.

[11] The Commissioner dealt with this issue at pages 10-12 of his Interim Order. He concluded at page 12 "that, in these circumstances, access for the purposes of section 30 of the Act, was not granted to the appellant".

[12] The Commissioner upheld the decision of the Corporation in respect of the two issues relating to fees, but with respect to the six issues relate to exemptions, he made the following interim Order:

> 1. the institution shall disclose to the appellant the records or parts of records listed in Appendix "A" as "Additional Records which the Institution Stated can now be Released: and the following records or parts of records listed in Appendix "B": #4, 5, 6, 28, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 50, 56, 57 , 58, 59, 60, 61 and 62;
>
> 2. the institution shall disclose these records to the appellant within ten (10) days of the payment of the fees by the appellant and notify my office as to the date of such disclosure within five (5) days of the date on which disclosure is made;
>
> 3. the institution shall notify the third parties to whom the records or parts of records for which section 17 was claimed publicly available, being the following records or parts of records listed in Appendix "B": #3, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 46, 47, 48, 49, 51, 52, 53, 54 and 55;

4. the institution shall notify the third parties to whom the records or parts of records listed in paragraph #3 above relate, providing them with copies of the records in question. The institution is to notify these parties within twenty (20) days of the date of this Interim Order and copies of the notices are to be sent to my office within five (5) days of the date on which they are provided to the third parties. The third parties will be contacted directly to elicit representations from them as to the application of section 17 of the Act; and

5. the institution shall provide my office with representations as to the exercise of discretion under subsections 13(1) and 18(1) and section 19 in respect of the following records or parts of records listed in Appendix "B": #1, 2, 14, 21, 33, 34 and 35, within twenty (20) days of the date of this Interim Order.

[13] Rubin seeks judicial review of the Commissioner's Interim Order on the following grounds:

(i) The commissioner erred in law in ruling that access to the documents viewed by the applicant was not given;

(ii) The Commissioner erred in law in ruling that the institution had not waived its right to invoke discretionary exemptions after giving the applicant access to view the records in issue, and

(iii) the Commissioner erred in law in ruling that the applicant was not entitled to copies of documents viewed, pursuant to section 30(3) of the Freedom of Information and Protection of Privacy Act, 1987.

[14] Counsel for the Commissioner says in paragraph 5 of his factum, that the Record for hearing for judicial review will consist of the following:

(a) certain correspondence between the applicant and the Institution (the Corporation), the applicant and the Commissioner, and the Commissioner and the Institution;

(b) the Appeal's officer's report;

(c) the representations of the applicant and of the institution;

(d) the records at issue, and

(e) Interim Order 162 (the order under review).

[15] Counsel for the respondent (moving party) says that the representations of the Institution disclose information contained in the records at issue. Hence the request to seal not only the records

at issue but also the representations of the Institution. In consequence, counsel for the respondent has filed with the Court two records - a public record containing some 38 documents and a "sealed record" containing some 18 documents, two of which are representations made by the Corporation to the Commissioner.

[16] Rubin opposes the motion, saying that he requires the documents in the "sealed record" in order to prepare and present fully his case for judicial review. He advanced several arguments in support of his basic submission, but, in my respectful view, they may be summarized as follows:

a) the rules of natural justice require that he, as a party to the dispute, should have an opportunity to see everything which is relevant to the decision of the Court;

b) the representations made by the Corporation to the Commissioner form part of the record in the case and procedural fairness requires that they should be disclosed to him;

c) the purpose of the Act is to ensure openness and sealing of part of the record would run counter to the express purpose of the Act; furthermore sealing was contrary to the notion that justice must not only be done but be seen to be done.

[17] As a compromise, Rubin indicated if he were allowed to see and examine in the "sealed record"? he would undertake to the Court to use the documents for the purpose of argument on the application for judicial review only and for no other purpose. Specifically, he would not disclose them to third parties on this aspect of his argument he referred to a number of decisions of the Federal Court both at the trial and the appellate levels and to Order 164 of the commissioner in Re: Ontario Human Rights Commission, Appeal Number 890056.

[18] Counsel for the Commissioner, supports his request for sealing on a number of bases and relies an unreported decision of Steele J. in N.E.I. Canada Limited v. Information and Privacy Commissioner/Ontario, [1990] O.J. No. 701, released April 23, 1990. In that case the issue as stated by Steele J. (page 2) was whether the Commissioner had erred in law in determining that the records were not subject to mandatory exemption from release pursuant to s. 17 of the Act. He concluded that in order to argue this issue properly on the application for judicial is review all parties must

know what the records contain. He acknowledged that disclosure of the records at issue might render the purpose of the application for judicial review nugatory (one of the contentions made by counsel for the Commissioner in this case). However, he resolved the problem by following the decisions of the Federal Court and of Anderson J. of this Court, cited therein and ordered disclosure of the documents to counsel for the applicants upon his giving an undertaking to the court to use them only for the purposes of the application for judicial review. Rubin urges a similar disposition here.

[19] Although such a disposition might have been appropriate in that case, given the issue which Steele J. identified, I am of the opinion that it is not appropriate in this case. The reason is that, in my opinion, the documents in the sealed records are not relevant to any issue in the application for judicial review, as I understand them.

[20] I have already listed the three grounds upon which Rubin intends to challenge the Interim order made by the Commissioner and, therefore, need not repeat them here. As I understand them, each ground is an aspect of the first issue decided by the Commissioner, namely, whether, in the circumstances of this case, the viewing of the records by Rubin at the premises of the corporation amounted to access within the meaning of s. 30 of the Act. For ease of reference I reproduce that section here in its entirety:

> 30.-(1) Subject to subsection (2), a person who is given access to a record or a part thereof under this Act shall be given a copy thereof unless it would not be reasonably, practicable to reproduce the record or part thereof by reason of its length or nature, in which case the person shall be given an opportunity to examine the record or part thereof in accordance with the regulations.
>
> (2) Where a person requests the opportunity to examine a record or a part thereof and it is reasonably practicable to give the person that opportunity, the head shall allow the person to examine the record or part thereof in accordance wide the regulations.
>
> (3) Where a person examines a record or a part thereof and wishes to have portions of it copied, the person shall be given a copy of those portions unless it would not be reasonably practicable to reproduce then by reason of their length or nature.

[21] As noticed earlier, the Commissioner decided that Rubin had not been given access. In my view, in order to determine the correctness of the conclusion of the Commissioner on that issue the Divisional Court will be required to construe s. 30 of the Act according to well known principles of statutory interpretation. Availability of the documents in the "sealed record" is not necessary, in my opinion, either for preparation or presentation of argument to the Court on that issue. I conclude, therefore, that the documents in the "sealed record" filed by the Commissioner should be sealed by the registrar and not disclosed to Rubin for the purposes of the application for judicial review.

[22] I am also of the opinion that there is an additional reason why that part of the "sealed record" which consists of representations made by the Corporation to the Commissioner should be sealed and not disclosed to Rubin for purposes of the application for judicial review. This reason is found in two sections of the Act which, in my view shield such information from disclosure.

[23] Section 52(23) deals specifically with representations made to the Commissioner by the various parties to a dispute. It reads:

> 52. – . . .
>
> (13) The person who requested access to the record, the head of an institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled, to be present during, to have access to or to comment on representations made to the Commissioner by any other person . . . (Emphasis added)

[24] Section 55(1) deals with confidentiality of information coming to the knowledge of the Commissioner and his officials in the performance of their duties. It reads:

> 55. – (1) The Commissioner or any person acting on behalf of or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their powers, duties and functions under this or any other Act.

[25] For these reasons, there will be an order that portions of the record of the respondent (moving party) contained in the "sealed record" shall be sealed and not form part of the public record on the

application for judicial review and that the applicant, Rubin, shall not have access to the sealed portions of the record.

[26] The point raised on the motion is novel. For that reason I do not consider this a case in which I should award costs.

Released: May 14, 1991 ISAAC J.

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B E T W E E N:

KEN RUBIN

Applicant
(Respondent on the motion)

- and -

THE INFORMATION AND PRIVACY COMMISSIONER/ ONTARIO

Respondent
(Moving Party)

REASONS FOR JUDGMENT

ISAAC J.

Released: May 14, 1991