Court File No.: 621/93
Date: June 30, 1994

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)
DIVISIONAL COURT

HARTT, THEN and ADAMS JJ.

B E T W E E N:	)	
	)	
THE ATTORNEY GENERAL OF ONTARIO	)	Kim Twohig, Lori R. Sterling and
	)	Priscilla Platt for the Applicant
Applicant	)	
	)	
- and -	)	
	)	
	)	
ANITA FINEBERG, Inquiry Officer and	)	Christopher D. Bredt and Gerald Fahey
JOHN DOE	)	for the Respondent Anita Fineberg
	)	
Respondents	)	Paul B. Schabas and Andrew M.
	)	Diamond for the Respondent John Doe
	)	
	)	
	)	Heard: June 16, 1994

ADAMS J. (Orally)

This is an application and cross-application for judicial review of Order P-534 of the respondent Anita Fineberg, Inquiry Officer (the "Officer") with the Office of the Information and Privacy Commissioner for Ontario. In Order P-534, the Inquiry Officer ordered the Ministry of the Attorney General (the "Ministry") to disclose to Kevin Donovan ("Donovan") of the Toronto Star certain information related to the funding of a law enforcement investigation, pursuant to the Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31. The applicant and cross-applicant seek review of the order on quite different grounds.

The Ministry of the Attorney General seeks to have the entire order of Anita Fineberg, Inquiry Officer, quashed on the basis that she erred in finding that s. 14(1)(a), (b), (d) and (f) did not apply to the records in issue. The cross-applicant John Doe or, as is his proper name, Kevin Donovan, submits that the Inquiry Officer erred in finding s. 14(1)(b) did apply to portions of record 6 and in finding that much of the information and records 2, 4, 6 and 7 and all of records 1, 3, and 5 were not relevant to the cross-applicant's request. The cross-applicant also submits that ss. 52 and 55(1) of the *Freedom of Information and Protection of Privacy Act* violate s. 2(b) of the *Canadian*

Charter of Rights and Freedoms and are not reasonable limits justifiable under s. 1. An improper delegation argument based on s. 56(2) was not pursued in argument.

The interpretation of s. 14 of the Act lies at the heart of the specialized expertise of the Information and Privacy Commissioner and those who act on the Commissioner's behalf. As this court stated in *John Doe v. Ontario (Information & Privacy Commissioner)* (1993), 13 O.R. (3d) 767 at p. 783, 106 D.L.R. (4th) 140:

> The commission has issued over 500 orders in the five years since its creation, resulting in an expertise acquired on a daily basis in the management of government information.
>
> Faced with the task of developing and applying the new statutory concept of unjustified invasion of privacy, one of the touchstones of its unique regulatory scheme, the commission is performing the same task begun years ago by labour tribunals in the development of then novel concepts, such as unfair labour practices. Central to its task, and at the heart of its specialized expertise, is the commissioner's interpretation and application of its statute and in particular, the sections under consideration, being ss. 21, 22 and 23, which regulate the core function of information management.
>
> We therefore conclude the commissioner's decisions, already protected by the lack of any right of appeal, ought to be accorded a strong measure of curial deference even where the legislature has not insulated the tribunal by means of a privative clause.

Similarly, at p. 607 of *Ontario (Solicitor General) v. Ontario (Assistant Information & Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, this court again stated:

> The Commissioner has accumulated a great deal of experience and expertise in interpreting and applying the Act and the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56. Specifically, he has accumulated experience and expertise in balancing three competing interests: public access to information; individuals' right to protection of privacy in respect to personal information held by government; and the government's interest in confidentiality of government records. In this regard, the Commissioner has received over 1,500 appeals under the Act in the past three years, and over 800 appeals under the *Municipal Freedom of Information and Protection of Privacy Act* in the past two years. Further, the Commissioner has issued over 530 orders to date (432 under the Act and 105 orders under the municipal Act) and, accordingly, has developed a body of jurisprudence that guides it and functions as a precedent.

> We conclude that the proper test is curial deference to those decisions which lie within the Commissioner's area of expertise. Thus, a distinction can be made between decisions of the Commissioner relating to such matters as constitutional interpretation, to which no deference would be appropriate, and decisions interpreting the exemptions provided for by the Act which are squarely within his specialized area of expertise, to which curial deference is appropriate.

Accordingly, curial deference in reviewing the instant decision is appropriate. This court will not intervene where the Commissioner or Officer has accorded interpretations to the exemptions in s. 14(1) which they can reasonably bear.

At the outset of these proceedings, the Ministry sought to adduce an affidavit setting out the current status of the investigation. The affidavit described the occurrence of various trials, charges laid, and preliminary hearings, all arising out of the investigation. This information is a matter of public record. The cross-applicant's motion to quash the affidavits is therefore dismissed.

Section 14(1) permits a head to refuse to disclose a record where the disclosure:

> 14(1) . . . could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
>
> (f) deprive the person of the right to a fair trial or impartial adjudication;

Pursuant to s. 53 of the Act, the burden of proof that the requested information falls within the scope of s. 14(1)(a), (b), (d) or (f) resides with the Ministry.

The record reveals that the submissions made to the Officer by the head were of the most general sort, emphasizing that the project was funded pursuant to the rarely used and secretive funding mechanism of s. 9 of the *Ministry of Treasury and Economics Act*, R.S.O. 1990, c. M.37, and repeating the language of s. 14 of the *Freedom of Information and Protection of Privacy Act*. Clearly, sufficient information and reasoning has to be provided to the Officer in order that he or she may make an informed assessment of the reasonableness of the expectations required by s. 14. In this case, the Ministry proceeded before the Officer and this court as if the concerns detailed in s. 14 were

self-evident from the record, or the request of such material during an active criminal investigation constituted a per se fulfilment of the relevant exemptions. These positions are inconsistent with the purpose and scheme of the statute.

It is our view that the findings by the Officer with respect to the application of s. 14(1)(a), (b), (d) and (f) were reasonable in light of the material before her, including the representations and the records themselves. The affidavit filed concerning the current status of the investigation does not alter this conclusion.

In this court, the Ministry's submissions centred on the concern that the financial information could reveal investigation techniques and procedures. This submission is not readily apparent from the information at issue. Moreover, this precise concern is an exemption specifically provided for by s. 14(1)(c) and this exemption was not relied on by the Ministry before the Officer. We emphasize that this case involved a request for financial information only and where there was very limited representations and evidence offered by the Ministry to the Officer, possibly in order to test its per se theory.

As well, we note the investigation has already attracted much publicity, making it difficult to understand the claims of potential harm or interference arising from disclosure of this information. In the circumstances, the Officer also reasonably concluded that the concern with respect to s. 14(1)(f) appeared quite unlikely. Finally, the Ministry's other concerns in relation to s. 14(1)(a), (b) and (d) were reasonably considered to be speculative given the financial nature of this particular information and in light of the representations made.

We note the exemptions are intended to be limited and specified, as indicated in the statute's purpose clause. In our view, the Officer's determinations reflect this statutory scheme. While the exemptions are to be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context, the result is not inconsistent with this required approach. In the circumstances of this case, it is not necessary for us to determine whether a "clear and direct linkage" test applied in one of the cases quoted by the Officer is reasonably related to the words of the statute. The reasonableness of the Officer's determination does not turn on the application of this test.

The request was "for information on funding by the Attorney General's Ministry of Project 80". The Officer determined that certain records were not relevant to the request. The cross-applicant submits that the Officer has no jurisdiction to determine relevancy and, alternatively, that the failure to seek representations from him, and from the Ministry we might add, before making such a determination, was contrary to s. 52(13).

In our opinion, the Officer must have the jurisdiction to consider the information and records at issue, in light of the wording of the request. Such jurisdiction necessarily entails a right to determine the scope of the request and the related relevance of the information at issue. However, s. 52(13) imposes a mandatory obligation on the Officer to provide the person making the request, and others as specified, with an opportunity to make representations. This was not done and it does not now lie in counsel's mouth to submit that Mr. Donovan, or the Ministry, could not have made meaningful representations. Section 52(13) contains no such qualification. In the result, this portion

of the Officer's order is set aside and the matter is remitted back for a redetermination of the issue of relevancy and, potentially, for a consideration of whether any of the exemptions apply, all with the benefit of representations from the parties to the request proceedings.

This brings us to the cross-applicant's Charter submissions. It is his position that freedom of the press, provided by s. 2(b) of the Charter, entails a constitutional right of access to any and all information in the possession and under the control of government, subject to whatever limitations might be justified pursuant to s. 1 of the Charter. It is further submitted that the inquisitorial and secrecy provisions provided for by ss. 52 and 55(1) of the Act which, it is argued, precluded Mr. Donovan from making meaningful representations to the Officer, are excessive and not tailored to minimally impact the freedom of the press as defined by counsel. No judicial authority was cited in direct support of these submissions. Rather, they are based on the principle that a democratic government must be accountable to the people and information concerning its performance is essential to such accountability. In turn, the press is a fundamental vehicle for keeping the public informed. Effectively, the submission amounts to the claim of a general constitutional right to know: see Thomas I. Emerson, Legal Foundations of the Right to Know (1976), 1 Wash. U. L. Rev. 1; but see Houchins v. K.Q.E.D., 438 U.S. 1 (1978).

The Canadian legal authority to which we were referred essentially centres on freedom of the press in the context of our courts. Thus, cases such as Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326, 45 C.R.R. 1, are distinguishable. They deal with the traditional emphasis which has been placed, in our justice system, upon an open court process. The tradition of open courts runs deep in Canadian society, as does the notion that the media are surrogates for the public. It is against this history that the Supreme Court of Canada has concluded that arguments in favour of the right of the press to report on the details of judicial proceedings are strong and that restrictions on that right clearly infringe s. 2(b). However, even this right has been confined to access to the court in contrast to information not revealed and tested in open court proceedings.

When it comes to government itself, other considerations may pertain. The information government has at its disposal, if looked at generally, potentially affects many interests, including privacy concerns of a constitutional dimension. The issue before us, therefore, is not just one of ensuring that government does its job effectively. Thus, the profound difficulty, represented by the statutory title "Freedom of Information and Protection of Privacy Act", in equating responsible or accountable government with transparent governance. Indeed, this may explain why there is no history of unfettered public access to all information controlled by government akin to our almost unqualified tradition of open courts.

By contrast, our political access makes government bureaucracy accountable to elected officials who, in turn, conduct their business in the context of public elections and legislatures and where the media, again, play a fundamental reporting role. Opposition parties ask questions of the government in the legislature and in committees. Opposition parties are also dedicated to causing a critical public evaluation of the government's performance. Against this tradition, it is not possible to proclaim that s. 2(b) entails a general constitutional right of access to all information under the control of government and this is particularly so in the context of an application relating to an active criminal investigation.

This does not mean that governments are unaware of the growth of bureaucracy, the related assembly of vast amounts of information and the difficulties of obtaining information by relying exclusively on the political process as described. Indeed, several mechanisms have been enacted to enhance the disclosure of such information in response to public interest in this area while, at the same time, protecting the public interest in matters of privacy. The statute in question is one example and the Ombudsman is another. There are many others. The difficult accommodation of such profoundly conflicting interests is therefore evolving in a manner consistent with political tradition and discourages sweeping Charter pronouncements of the type requested by the cross-applicant. In this case, we need not consider whether positive government support in obtaining information, in contrast to government's opposition as in International Fund for Animal Welfare Inc. v. Canada (Minister of Fisheries & Oceans), [1989] 1 F.C. 335, 35 C.R.R. 359, 83 N.R. 303 (C.A.), could ever be constitutionally required.

Most of the representations of the parties concerning the Charter centred on the issue of breach. Accordingly, the court did not obtain the assistance it would have liked in regard to s. 1. However, for the sake of completeness, we wish to provide our view on the record before us.

Had there been established a s. 2(b) violation, we would have found, in these circumstances, the interests reflected in s. 14 constitute pressing and substantial objectives sufficient to support a Charter limitation. We would also have found, on the state of the record before us, that the institutional design of the statutory mechanisms together with the exemptions in question constitute (1) rational links between the means and the objectives, (2) minimum impairments on the right or freedom asserted, and (3) a proper balance between the effects of the limiting measures and the legislative objectives, recognizing that government need not be held to the ideal or perfect policy instrument.

In the result, the cross-applicant's Charter application is dismissed.

The Ministry's judicial review application is also dismissed.

The cross-applicant's judicial review application is allowed in part. The Officer's determination on relevancy, without first obtaining representations from the cross-applicant and the Ministry, is quashed. That matter is remitted for proper consideration of both relevancy and, potentially, the application of any exemption.

ADAMS J.
THEN J.
HARTT J.

RELEASED: June 30, 1994

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HARTT, MONTGOMERY AND CARRUTHERS JJ.

B E T W E E N:

THE ATTORNEY GENERAL OF ONTARIO

Applicant

- and -

ANITA FINEBERG, Inquiry Officer and JOHN DOE

Respondents

ORAL JUDGMENT

ADAMS J.

RELEASED: June 30, 1994