Court File No. C15794
Date: October 29, 1993

COURT OF APPEAL FOR ONTARIO
Morden A.C.J.O., Lacourcière and Houlden JJ.A.

IN THE MATTER OF the *Judicial Review Procedure Act*, R.S.O. 1990, c. J-1

AND IN THE MATTER OF Order P-352 of the Assistant Information and Privacy Commissioner of Ontario ordering disclosure of certain records pursuant to the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F-31

B E T W E E N:	
IAN WILSON, the Archivist of Ontario Applicant/Appellant - and - TOM MITCHINSON, the Assistant Information and Privacy Commissioner of Ontario, CATHERINE THOMPSON, PETER EDWARDS and an UNDISCLOSED AFFECTED PARTY Respondents	*Michael Code* and *John Terry* for the Archivist of Ontario and the Attorney General of Ontario *John Norris* for the Undisclosed Affected Party *Paul Schabas* and *Andrew Diamond* for Peter Edwards
A N D B E T W E E N:	
Peter Edwards Applicant/Appellant - and - THE SOLICITOR GENERAL OF ONTARIO, THE ATTORNEY GENERAL OF ONTARIO, THE ONTARIO PROVINCIAL POLICE, THE WATERLOO REGIONAL POLICE SERVICES, TOM MITCHINSON, the Assistant Information and Privacy Commissioner of Ontario, IAN WILSON, the Archivist of Ontario, CATHERINE THOMPSON, and an UNDISCLOSED AFFECTED PARTY Respondents	*Hilde English* for Catherine Thompson *Dennis O'Connor, Q.C.* and *Christopher Bredt* for Tom Mitchinson Heard: October 18, 19 and 20, 1993

BY THE COURT:

This is an appeal and a cross-appeal from a judgment of the Divisional Court reported as *Ontario (Solicitor General) v. Mitchinson* (1993), 64 O.A.C. 60. Of the many issues submitted to this Court, the one which we believe is determinative of the appeal is whether certain considerations relating to depriving a person of the right to a fair trial set out in s. 14(1)(f) of the *Freedom of Information and Protection of Privacy Act* (the *Act*), were properly taken into account by the Assistant Information and Privacy Commissioner (the "Commissioner").

The appellant Edwards, a newspaper reporter, requested access to a 1976 report prepared by the Inspection and Standards Branch of the Ministry of Correctional Services which dealt with allegations of wrongdoing by the staff at the Grandview Training School for Girls in Waterloo, Ontario. The archivist, who had possession of the report, denied access to it on the basis of ss. 14 and 21 of the *Act*. An appeal was taken from this decision to the Commissioner. The Commissioner rejected the archivist's position and ordered disclosure of the report as edited by the deletion of portions of it and the names of certain individuals. The edited report has not been released as the order of the Divisional Court was stayed pending the disposition of the motion for leave to appeal. When leave to appeal was granted the stay was further extended.

No charges against anyone were pending when the archivist ruled on the matter. On the appeal to the Commissioner he took account of the possibility that charges would be laid. The Commissioner had been informed that a search warrant had been issued under s. 489 of the *Criminal Code* and that the original report had been seized by the police but he made no reference to these facts. The Commissioner held that there was insufficient evidence to establish that the disclosure of the report, as edited, could reasonably be expected to lead to the harms identified in s. 14(1)(a), (b), (d) or (f). The imminence of charges had been elevated to a higher degree than the mere possibility by reasons of the search warrant and the seizure.

Before the matter came on for hearing before the Divisional Court, criminal charges had been laid. The Divisional Court made no reference to that fact or to the fact that the report had been seized pursuant to the search warrant.

Section 14(1)(f) of the *Act* provides:

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

The Divisional Court referred only to s. 14(2)(a), i.e. exemption from disclosure of a report prepared in the course of law enforcement but failed to consider the application of the exemption afforded by s. 14(1)(f). The Divisional Court did not consider the effect on the Commissioner's

jurisdiction of the failure to take into account the imminence of the criminal proceedings in their hearing on the exemption conferred by s. 14(1)(f).

Regardless of the standard of review adopted, it is abundantly clear and counsel for the Attorney General and counsel for the undisclosed affected party agree, that certain parts of the report which were not deleted could reasonably be expected to deprive accused persons of the right to a fair trial. Disclosure of the report, even in its edited form, should not, therefore, be ordered.

When the criminal proceedings are concluded, if the disclosure has not occurred by then, the applicants will be at liberty to renew their application because the section 14(1)(f) concern will no longer exist.

Before concluding, we note that at the outset of the hearing before us, following submissions from counsel, we made the following ruling:

> The hearing should be in open court. We are in essential agreement with the procedure followed by the Divisional Court. This is subject to the court's considering and ruling upon the submission of counsel that a particular point cannot be argued effectively except *in camera*.

Following this ruling it was necessary to hear only a small part of the argument *in camera*.

Accordingly, the appeal is allowed without costs, the judgment of the Divisional Court is set aside and in place thereof, the application for judicial review will be dismissed without costs, thereby restoring the archivist's disposition.

MORDEN A.C.J.O.
LACOURCIÈRE J.A.
HOULDEN J.A.

Released: October 29, 1993

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Respondents

A N D B E T W E E N:

Peter Edwards

Applicant/Appellant

- and -

THE SOLICITOR GENERAL OF ONTARIO, THE ATTORNEY GENERAL OF ONTARIO, THE ONTARIO PROVINCIAL POLICE, THE WATERLOO REGIONAL POLICE SERVICES, TOM MITCHINSON, the Assistant Information and Privacy Commissioner of Ontario, IAN WILSON, the Archivist of Ontario, CATHERINE THOMPSON, and an UNDISCLOSED AFFECTED PARTY

Respondents

JUDGMENT

Released: October 29, 1993