Court File No.: 642/92
Date: May 6, 1993

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)
DIVISIONAL COURT

HARTT, MONTGOMERY AND CARRUTHERS JJ.

IN THE MATTER OF the Judicial Review Procedure Act, R.S.O. 1990, c.J-1	
AND IN THE MATTER OF Order P-351 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	Rebecca Regenstreif and John Terry for the Applicants
B E T W E E N:	Dennis O'Connor, Q.C. and Christopher Bredt for T. Mitchinson, Information and Privacy Commissioner
THE SOLICITOR GENERAL OF ONTARIO, THE ATTORNEY GENERAL OF ONTARIO, THE ONTARIO PROVINCIAL POLICE, and THE WATERLOO REGIONAL POLICE SERVICES	Hilde M. English for Catherine Thompson
Applicants	John Norris for the Undisclosed Affected Party
- and -	Paul B. Schabas and Andrew M. Diamond for Peter Edwards
TOM MITCHINSON, the Assistant Information and Privacy Commissioner of Ontario, IAN WILSON, the Archivist of Ontario, CATHERINE THOMPSON, PETER EDWARDS and an UNDISCLOSED AFFECTED PARTY	Susan M. Vella for Grandview Survivors, asks for standing
Respondents	Heard: April 19, 1993

BY THE COURT:

This application for judicial review attacks the order of the Assistant Information and Privacy Commissioner (the "Commissioner"), which directs disclosure of portions of a 1976 report prepared by the Inspection and Standards Branch of the Ministry of Correctional Services concerning wrongdoing by staff at the Grandview Training School for Girls ("Grandview").

The applicant says none of the report should be released. Two cross-applications by members of the media request production of almost the entire report.

The sensitive nature of the report led the court earlier to seal the application factum, the factum of the Undisclosed Affected Party and three volumes of private records.

Counsel for the Attorney General and for the Undisclosed Affected Party asked that the applications before us be held in private. We declined. Except in the most exceptional circumstances, proceedings before courts must be open to the public. The dilemma was solved by counsel referring to the sealed records by page and paragraph so the court could read the evidence to itself in open court.

These constraints mandate abbreviated reasons for our disposition of the applications.

The next question before us was the attempt to introduce affidavit evidence. We were all of the view that this alleged evidence was simply to establish a lack of prejudice to the release of the full report and could do nothing more than amplify an argument put before the Commissioner.

Standing

An attack was made on the propriety of the applications made by the Solicitor General and the Attorney General on the basis that they lacked standing. Mr. O'Connor, on behalf of the Commissioner, contended that only the Archivist could launch this application based upon the doctrine of indivisibility of the Crown. The Crown must speak with one voice.

If an issue arises between ministries, that is for the Cabinet, not the courts, to resolve. While we see substantial merit to the argument, again a resolution was reached that did not necessitate deciding the question of standing. The Archivist, a respondent in the original application, was plucked to the side of the applicants to validate the problem of standing. We proceeded with the Archivist as the applicant. This accommodation avoided recasting the proceeding another day at great expense and inconvenience. We believe the Archivist to be the proper applicant.

Miss Susan Vella (on behalf of Grandview survivors) appeared without having filed any material, and asked for standing. She was afforded an opportunity to speak but had nothing to add.

The Act

The Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31 contains a comprehensive scheme governing access to information held by government institutions and assuring the protection of the privacy of individuals with respect to personal information held by the government in the Province of Ontario.

The purposes of the Act are defined in s. 1:

> 2. The purposes of this Act are,
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,

(i) information should be available to the public,

(ii) necessary exemptions from the right of access should be limited and specific, and

(iii) decisions on the disclosure of government information should be reviewed independently of government; and

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

The Privacy Commissioner is appointed by the Lieutenant Governor in Council on the address of the Assembly for a term of five years, subject to reappointment. The Commissioner shall appoint one or two assistant Commissioners.

The inelegant term a "head" is defined in the Act as the minister of the Crown who presides over a ministry and the person who presides over an institution.

Section 14 states:

> 14.-(1) A head may refuse to disclose a record where the disclosure 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;
>
> ...
>
> (f) deprive a person of the right to a fair trial or impartial adjudication;

Section 10 of the Act makes clear that every person has a right of access to government held records unless the record or part of the record falls within one of the exemptions set under ss. 12 through 22. These exemptions are intended by the legislature to protect certain defined interests. The exemptions to the right of disclosure include such matters as cabinet records (s. 12), law enforcement (s. 14), trade secrets and other confidential third party information (s. 17), and personal privacy (s. 21). Certain of these exemptions are discretionary (i.e. the law enforcement exemption in s. 14), which means that even if the requirements of the exemption are satisfied, the government is nevertheless required to exercise its discretion as to whether or not the record should be released. Other exemptions (i.e. s. 21 - personal privacy) are mandatory. Further, even if one of the

exemptions is applied, the government must disclose as much of the record as can be reasonably severed without disclosing the information that falls under one of the exemptions (s. 10).

In short, the task of the Commissioner is to perform a balancing act between the individual's right to privacy and the public's right to know. The task is a permanent one.

The Archivist seeks to quash that part of the order of the Assistant Commissioner which required certain portions of the record to be disclosed (the severed record). The report in question was prepared between February and March, 1976 by the Inspection and Standards Branch of the Ministry as a result of its investigation into the alleged mistreatment of wards at the Grandview Training School for Girls.

There is no right of appeal provided in the Act. Recourse is via judicial review.

It was argued by the applicant that the record was a record under the Young Offenders Act, R.S.C. 1985 ("YOA"). If it was, the paramountcy doctrine would oust the provincial jurisdiction of the provincial statute. The record was created in the 1970s prior to the YOA being enacted in 1984. Further, the record is not a record relating to the offence of delinquency under the predecessor the Juvenile Delinquents Act. The record concerns an internal investigation into the operation of a training school and the conduct of its employees. The record was not created for the purpose of investigating an offence alleged to have been committed by a young person. We conclude that the record in question is not a YOA record.

Standard of Review

In Right to Life Association of Toronto v. Metro Toronto District Health Council (1991), 86 D.L.R. (4th) 441, Callaghan C.J.O.C., speaking for this Court, refused to interfere with the decision of the Commissioner where the decision could be rationally supported on a construction which the relevant legislation may reasonably bear.

The Court relied on the standard adopted by the Supreme Court of Canada in SEIU Local 333 & Nipawin District Staff Nurses Association, [1975] 1 S.C.R. 382. This was a labour relations case involving a tribunal protected by a privative clause.

In Canada (Attorney General) v. Mossop (released February 25, 1993 by the Supreme Court of Canada), the court conclude that in the absence of a privative clause curial deference will apply to decisions of tribunals that exercise specialized expertise.

The specialized role and expertise of the Commissioner is reflected in the powers and duties assigned to the Commissioner pursuant to s. 59 of the Act and the requirement to report to the legislature pursuant to s. 58 of the Act. In particular, the Commissioner is:

(1) required to make recommendations to the legislature with respect to the practices of particular government institutions and with respect to proposed revisions to the Act (s. 58(2)(c));

(2) entitled to offer comment on the privacy protection implications of proposed legislative schemes or government programs (s. 59(a));

(3) entitled to order the government to cease collection practices and destroy collections of informal information that contravene the Act (s. 59(b));

(4) entitled to engage in or commission research into matters affecting the carrying out of the purposes of the Act (s. 59(d)).

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. 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.

The decision of the Commissioner

In the proceedings before the Commissioner, the Archivist claimed that s. 14(2)(a) applied to the record in its entirety. Section 14(2)(a) provides as follows:

> 14.-(2) A head may refuse to disclose a record,
>
> (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law.

The Commissioner has established a three-part test in order to exempt a record under s. 14(2)(a):

(1) the record must be a report;

(2) the report must have been prepared in the course of law enforcement, inspections or investigations; and

> (3) the report must have been prepared by an agency which has the function of enforcing and regulating compliance with law.

The Commissioner determined that the first two parts of the test were satisfied. However, he held that the third part of the test was not satisfied for the following reasons:

> In my view, the investigation conducted by the Ministry [of Correctional Services] was an internal investigation into the operation of a training school. Upon completion of the investigation, the Ministry was not in a position to enforce or regulate compliance with the Training Schools Act or any other law. Rather, it determined that the allegations warranted further investigation and forwarded the report to the local Crown Attorney's Office. In my view, the Ministry had investigatory responsibility for ensuring the proper administration of the training school, but it was the police force and Crown Attorney's Office which had the regulatory responsibilities of law enforcement as envisioned by section 14(2)(a) of the Act. Therefore, I find that section 14(2)(a) is not applicable in the circumstances of this appeal.

Thus, the only issue to be considered is whether the Ministry of Correctional Services is an agency which has the function of enforcing and regulating compliance with the law.

In this case, the Ministry of Correctional Services in conducting an investigation at the Grandview Training School was not engaged in an "external regulatory activity", but was rather conducting an internal investigation pursuant to s. 7 of the Training Schools Act. There is no regulatory offence that the Ministry was in a position to enforce following its investigation. The Commissioner's order is thus consistent with the established approach to s. 14(2)(a).

The interpretation of s. 14(2)(a) is within the specialized expertise of the Commissioner.

The severed record that has been ordered to be disclosed was carefully edited by the Commissioner. His interpretation of the exemption provided in s. 14(1) is one that it can reasonably bear.

Pursuant to s. 21 of the Act, the Commissioner concluded that certain parts of the report could not be produced as such disclosure containing the personal information of the affected person and the other individuals would constitute an unjustified invasion of their privacy.

Having concluded that all interpretations of the constituent statute made by the Commissioner were interpretations that the sections could reasonably bear, we are not prepared to alter the Assistant Commissioner's decision.

The application and cross-applications are, therefore, dismissed.

Costs to the Assistant Commissioner against the Archivist fixed at $5,000. There will be no other order as to costs.

MONTGOMERY J.
I agree. — HARTT J.
I agree. — CARRUTHERS J.

Released: May 6, 1993

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B E T W E E N:

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Applicants

- and -

TOM MITCHINSON, the Assistant Information and Privacy Commissioner of Ontario, IAN WILSON, the Archivist of Ontario, CATHERINE THOMPSON, PETER EDWARDS and an UNDISCLOSED AFFECTED PARTY

Respondents

REASONS FOR JUDGMENT

BY THE COURT

Released: May 6, 1993