Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1395

Appeal MA_000179_1

Toronto Police Services Board

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Toronto Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all records which relate to the appellant or companies with which he has been associated.

The Police granted access to certain records and applied the provisions of section 14 (invasion of privacy) to deny access to portions of two occurrence reports. The Police also informed the requester that they refuse to confirm or deny the existence of any additional records pursuant to section 8(3) of the *Act*.

The requester, now the appellant, appealed the Police's decision.

During the mediation stage of the appeal, the appellant's representative confirmed that the appellant was not pursuing the information which had been withheld by the Police under section 14. As a consequence, the two records which were partially disclosed are no longer at issue in this appeal.

Also during mediation, the Police issued a second decision letter in which they added section 14(5) of the *Act* as an alternative basis for refusing to confirm or deny the existence of any additional records. Because the request related to the personal information of the appellant, the mediator also added section 38 to the scope of the appeal.

I sent a Notice of Inquiry initially to the Police, and received written representations from them. I then sent the Notice of Inquiry, together with a summary of the Police's representations, to the appellant, and received written representations in response.

DISCUSSION:

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF RECORDS - GENERAL

Section 8(3) of the *Act* reads as follows:

> A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) applies.

Section 14(5) of the *Act* states:

> A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

For ease of discussion, I will state that the Police have not established the requirements of either sections 8(3) or 14(5). Records responsive to the request do exist, specifically, a Police intelligence document dated 1989, as well as two attachments referred to in that record.

A full discussion of sections 8(3) and 14(5) will follow later in this order.

PERSONAL INFORMATION

Section 2(1) of the *Act* defines "personal information", in part, as recorded information about an identifiable individual.

The records relate to an intelligence gathering activity undertaken by the Police. This activity involved the appellant, as well as other identifiable individuals. Therefore, I find that the records contain the personal information of the appellant and these other individuals.

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF RECORDS - LAW ENFORCEMENT

Introduction

Section 36(1) of the *Act* provides individuals with a general right of access to their own personal information in the custody or under the control of an institution. However, this right of access under section 36(1) is not absolute; section 38 provides a number of exceptions to this general right of access to personal information by the individual to whom it relates. Specifically, under section 38(a), a head may refuse to disclose to the individual to whom the information relates personal information where the information would qualify for exemption under section 8 of the *Act*.

The Police rely on section 8(3) of the *Act* as one basis for refusing to confirm or deny whether any responsive records exist. Section 8(3) permits an institution to refuse to confirm or deny the existence of a record if that record would qualify for exemption under sections 8(1) or (2). In this case, the Police claim that the records would qualify for exemption under sections 8(1)(a), (e), (g) and (l), which read as follows:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

In Order P-255, I made the following general comments about the purpose and application of section 14(3) of the provincial *Freedom of Information and Protection of Privacy Act*, which is comparable to section 8(3):

> By including section 14(3) the legislature has acknowledged that, in order to carry out their mandates, certain institutions involved with law enforcement activities must have the ability, in the appropriate circumstances, to be less than totally responsive in answering requests for access to government-held information. However, as the members of the Williams Commission pointed out in Volume II of their report entitled *Public Government for Private People, The Report of the Commission on Freedom of Information and Protection of Privacy/1980* at page 301, it would be a rare case in which the disclosure of the existence of a file would communicate information to the requester which may frustrate an ongoing investigation or intelligence-gathering activity.

In Order P-344, I went on to make the following statements about the application of section 14(3):

> A requester in a section 14(3) situation is in a very different position than other requesters who have been denied access under the *Act*. By invoking section 14(3), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power which I feel should be exercised only in rare cases.
>
> In my view, an institution relying on section 14(3) must do more than merely indicate that records of the nature requested, if they exist, would qualify for exemption under sections 14(1) or (2). An institution must provide detailed and convincing evidence that disclosure of the mere existence of the requested records would convey information to the requester which could compromise the effectiveness of a law enforcement activity.

Accordingly, in my view, before it may be permitted to exercise its discretion to invoke section 8(3), the Police must provide sufficient evidence to establish that:

1. Disclosure of the records (if they exist) would qualify for exemption under sections 8(1) or (2); and

2. Disclosure of the fact that records exist (or do not exist) would in itself convey information to the requester which could compromise the effectiveness of a law enforcement activity which may exist or may be reasonably contemplated.

Requirement one: disclosure of the records (if they exist)

Definition of Law Enforcement

In order for the records to be considered for exemption under sections 8(1)(a), (e) or (g), the matter to which the record relates must first satisfy the definition of the term "law enforcement" as found in section 2(1) of the *Act*. The definition includes “policing” within the meaning of law enforcement, and the Police clearly have a law enforcement mandate and engage in law

enforcement activities. The Police also submit, and I accept, that the information contained in the records relates to the detection, prevention and prosecution of crime, and I find that the records at issue in this appeal relate to a law enforcement matter, as the term is defined in section 2 of the *Act*.

Section 8(1)(g)

The purpose of section 8(1)(g) is to provide an institution with the discretion to preclude access to records in circumstances where disclosure would interfere with the gathering of or reveal law enforcement intelligence information. Previous orders have defined intelligence information as:

> ... information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violation of law, and is distinct from information which is compiled and identifiable as part of the investigation of a specific occurrence (Orders M-202 and P-650).

The Police identify that the records were created in the course of carrying out their responsibilities to prevent crime. According to the Police, these responsibilities include collecting, maintaining, analyzing and disseminating intelligence information on individuals and organizations that are reasonably believed to be involved in criminal activities.

The Police submit that disclosing information which was obtained as part of this intelligence gathering activity could have a number of consequences. Given the nature of the section 8(1)(g) exemption claim, I am constrained in the level of detail I can provide in this order, but I can indicate that the Police have described how they feel that disclosure of the information in the records could restrict their ability to effectively monitor organized criminal activity, and to effectively reduce the existence of and opportunities for crime in this sensitive area of their law enforcement mandate.

The appellant's representations deal primarily with the application of section 8(3), and do not address the specific requirements of section 8(1)(g).

Having reviewed the records, I accept the Police's position that disclosure of the information contained in the records would reveal law enforcement intelligence information gathered by the Police. Accordingly, I find that the records qualify for exemption under section 8(1)(g). Because the records contain the personal information of the appellant, they are exempt under section 38(a).

It is not necessary for me to consider the application of the other section 8 exemptions claimed by the Police.

Therefore, I find that the first requirement of section 8(3) has been established.

Requirement two: disclosure of the fact that records exist (or do not exist)

To satisfy the second requirement, the Police must demonstrate that disclosure of the fact that records exist (or do not exist) would in itself convey information to the appellant which would compromise the effectiveness of a law enforcement activity which may exist or may be reasonably contemplated (see Order PO-1656).

The Police have provided reasons why, in their view, merely confirming the existence or non-existence of the type of records at issue would reveal information to the requester. They submit that individuals who are being investigated are aware of investigative techniques, and that the confirmation that they are under investigation would endanger those involved in gathering the information and/or providing information to the Police. Furthermore, the Police state that, if the existence of an intelligence file can be verified concerning one person, then it can be verified that files exist or do not exist for other individuals associated with that individual. The Police take the position that if the existence or non-existence of records concerning certain individuals could be confirmed through use of the *Act*, individuals under investigation could use this information to adjust their actions to avoid detection.

The Police also submit that confirming the existence or non-existence of a record of this nature would diminish their ability to prevent crime, would provide individuals with increased opportunities to avoid apprehension, and would created opportunities for these individuals to deter the Police in a variety of other ways described in the representations.

Based on the description of the Police's representations which I paraphrased in the Notice of Inquiry provided to the appellant, he takes the position that the Police have failed to exercise discretion when applying section 8(3). He states:

> In this case, the [Police] did not consider the individual circumstances of [the appellant's] request. ...
> ...
>
> Here, the Police have merely made broad and vague statements about the importance of intelligence gathering. The Police have not provided any detail as to why, in this particular case, the mere disclosure that records exist would adversely affect the law enforcement process.

I understand the appellant's position. However, I should point out that, given the nature of the exemption claims at issue in this appeal, I was not able to provide the appellant with the actual representations provided to me by the Police. In appeals where the issue is whether the institution can refuse to confirm or deny the existence of records, the representations provided in support of the exemption claim must be stated in general terms when provided to an appellant, in order to ensure that disclosure of the content of the representations does not itself disclose whether or not records exist. The Police did provide me with additional details in support of the exemption claims that I was unable to share with the appellant in the circumstances.
That being said, based on the particular circumstances of this appeal, I find that the Police have failed to establish that disclosure of the existence or non-existence of the records would compromise an existing or reasonably contemplated law enforcement activity. I have reached this conclusion for the following reasons:

- The records responsive to the request are more than ten years old.

- The Police have not provided sufficiently detailed and convincing evidence necessary to establish that confirming the existence of the records could reasonably be expected to interfere with a law enforcement matter (section 8(1)(a)), or endanger the life or physical safety of any individual (section 8(1)(e)).

- The representations provided by the Police focus on the possible harm in disclosing criminal investigation records, rather than the possible harm in confirming that the specific records responsive to the appellant's request do or do not exist. Based on the generalized nature of the Police's representations, I am not persuaded that disclosure of the existence of the records would itself interfere with the gathering of or reveal law enforcement intelligence information (section 8(1)(g)), or facilitate the commission of an unlawful act or hamper the control of crime (section 8(1)(l)).

- The appellant is aware of the possible existence of responsive records. He points out in his request letter that he "has been informed by provincial officials ... that they have 'received rumours' that he is or has been involved in organized crime".

- The appellant's request is for records containing his own personal information under Part II of the *Act*, which recognizes a higher right of access than a request for general records made under Part I.

The representations provided by the Police focus primarily on the requirements of section 8(1)(g), and the importance of ensuring the integrity of intelligence gathering activities. I accept the importance of this exemption claim, and indeed have determined that it applies to the records at issue in this appeal. However, that finding alone is not sufficient to establish the requirements of section 8(3). As stated earlier, section 8(3) is an exemption claim available in rare cases where the existence of a record would communicate information which could frustrate ongoing intelligence gathering activity. In my view, were I to accept the application of section 8(3) based on arguments put forward by the Police in this case, I would in effect be allowing the Police to invoke section 8(3) in any circumstance where the requirements of section 8(1)(g) are present. That clearly cannot have been the intention of the legislature in including section 8(3) in the *Act*. Even if disclosure of a record would interfere with the gathering of or reveal law enforcement intelligence information, in order to claim section 8(3), an institution must go on to establish, based on the particular facts and circumstances of the law enforcement matter, that the mere existence or non-existence of records would itself cause the harm outlined in section 8(1)(g). The Police have not done so in this appeal, and for that reason I find that the requirements of section 8(3) of the *Act* have not been established.

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF RECORDS - INVASION OF PRIVACY

The Police have also relied on section 14(5) to refuse to confirm or deny the existence of any records. Section 14(5) of the *Act* reads as follows:

> A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

As with section 8(3), a requester in a section 14(5) situation is in a very different position than other requesters who have been denied access under the *Act*. By invoking section 14(5), an institution is denying the requester the right to know whether a record exists. This section gives institutions a significant discretionary power which should be exercised only in rare cases [Order P-339].

An institution relying on section 14(5) must do more than merely indicate that the disclosure of the record would constitute an unjustified invasion of personal privacy. It must provide sufficient evidence to demonstrate that disclosure of the mere existence of the requested records would convey information to the requester, and that the disclosure of this information would constitute an unjustified invasion of personal privacy [Orders P-339 and P-808 (upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 1669, leave to appeal refused [1996] O.J. No. 3114 (C.A.)]

Therefore, before the Police are permitted to claim section 14(5), they must provide sufficient evidence to establish that:

1. Disclosure of the records (if they exist) would constitute an unjustified invasion of personal privacy; and

2. Disclosure of the fact that records exist (or do not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[Order MO-1179]

The request in this case relates to the appellant's own personal information. This raises the question of whether section 14(5) can be claimed by the Police in these circumstances. Former Adjudicator John Higgins faced a similar issue in Order M-615, where he found:

> Section 37(2) provides that certain sections from Part I of the *Act* (where section 14(5) is found) apply to requests under Part II (which deals with requests such as the present one, for records which contain the requester's own personal information). Section 14(5) is not one of the sections listed in section 37(2). This could lead to the conclusion that section 14(5) cannot apply to requests for records which contain one's own personal information.

> However, in my view, such an interpretation would thwart the legislative intention behind section 14(5). Like section 38(b), section 14(5) is intended to provide a means for institutions to protect the personal privacy of individuals other than the requester. Privacy protection is one of the primary aims of the *Act*.
>
> Therefore, in furtherance of the legislative aim of protecting personal privacy, I find that section 14(5) may be invoked to refuse to confirm or deny the existence of a record if its requirements are met, even if the record contains the requester's own personal information.

I agree with this reasoning, and adopt it for the purposes of considering the records in this appeal.

Requirement one: disclosure of the records (if they exist)

The records are documents concerning intelligence gathering activities undertaken by the Police concerning suspected unlawful actions. These records were all compiled and are identifiable as part of an investigation into a possible violation of law, specifically the *Criminal Code*. Based on my review of the records and the representations provided by the Police, I find that their disclosure would constitute a presumed unjustified invasion of privacy under section 14(3)(b). Because the records contain the personal information of the appellant, they are exempt under section 38(b).

Therefore, I find that the first requirement of section 14(5) has been established.

Requirement two: disclosure of the fact that records exist (or do not exist)

To satisfy the second requirement, the Police must demonstrate that disclosing the fact that records exist (or do not exist) would in itself convey information to the appellant, and the nature of the information conveyed would itself constitute an unjustified invasion of personal privacy.

I have not been provided with sufficient evidence to establish that confirming or denying the existence of records in this appeal would provide the appellant with any information relating to other identifiable individuals. Confirming the existence of records would confirm to the appellant that the Police have custody and control of records containing his own personal information, but that is not sufficient to satisfy the requirements of section 14(5). No individual, other than the appellant, is identified by the simple acknowledgement of the intelligence gathering activities, nor is any information contained in the records either confirmed or conveyed through this acknowledgement. Rather, the head is merely confirming that records associated with such a process exist, without indicating the parties involved.

I find that the Police have not established that disclosing the existence of the records requested by the appellant would convey information which would constitute an unjustified invasion of personal privacy of an identifiable individual, and therefore, section 14(5) does not apply.

ORDER:

1. I do not uphold the Police's decision to refuse to confirm or deny the existence of records.

2. I uphold the Police's decision to deny access to the records under sections 38(a) and 38(b) of the *Act*.

3. In this order, I have confirmed the existence of records responsive to the appellant's request. I have released this order to the Police in advance of the appellant in order to provide the Police with an opportunity to review the order and determine whether to apply for judicial review.

4. If I have not been served with a Notice of Application for Judicial Review by **February 28, 2001**, I will release this order to the appellant by **March 5, 2001**.

5. In accordance with the requirements of section 43(4) of the *Act*, I will give the appellant notice of the issuance of this order by a separate letter, concurrent with the issuance of the order to the Police.

Original signed by: February 13, 2001
Tom Mitchinson
Assistant Commissioner