

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

ASTON, GREER and KITELY JJ.

B E T W E E N:)
)
MINISTRY OF COMMUNITY SAFETY AND) *Sara Blake*, Counsel for the Applicant
CORRECTIONAL SERVICES) Ministry and as Respondent on the
) Toronto Star’s application
Applicant)
- and -)
)
)
INFORMATION AND PRIVACY) *William S. Challis*, Counsel for the
COMMISSIONER, and TORONTO STAR) Commissioner as Respondent on both
NEWSPAPERS LIMITED) applications
)
Requester, Respondents) *Ryder Gilliland*, Counsel for the Toronto
- and -) Star as Requester and as Respondent on
) the Ministry’s application

B E T W E E N:)
)
TORONTO STAR NEWSPAPERS LIMITED)
)
Requester, Applicant)
- and -)
)
)
INFORMATION AND PRIVACY)
COMMISSIONER, and MINISTRY OF)
COMMUNITY SAFETY AND)
CORRECTIONAL SERVICES)
)
Respondents) **HEARD at Toronto: May 10, 2007**

REASONS FOR JUDGMENT

BY THE COURT:

[1] On February 28, 2006, Adjudicator S. Faughnan, issued Order PO-2455. The Order addresses requests under the *Freedom of Information and Protection of Privacy Act* (“the Act” or

“FIPPA”) from a member of the media, for information from the Ministry of Community Safety and Correctional Services (“the Ministry”), which is contained in two firearms databases maintained by the Provincial Weapons Enforcement Unit (“PWEU”). These databases are known as the Project SOURCE (“SOURCE”) database and the Firearms Tracing and Enforcement (“FATE”) database.

[2] Under Provision 1 of the Order, the Adjudicator ordered the Ministry to disclose all database fields and data contained in the SOURCE database, listing firearms that have come into the possession of the police, but severing part of the serial numbers of the firearms listed in that database. The Ministry brings its Application for judicial review to quash or set aside Provision 1 of the Order. The Toronto Star Newspaper Limited (“the Star”) does not challenge the partial severance of serial numbers.

[3] Under Provision 2 of the Order, the Adjudicator upheld the Ministry’s decision to deny access to the FATE database on the basis that it fell within one of the exemptions in s. 14 of FIPPA. The Star, whose employee had requested the information, brings an Application for judicial review of that part of the Order, and seeks at least partial disclosure of the FATE database with the exception of certain names and addresses.

[4] We heard one Application after the other. These Reasons encompass our decisions with respect to both Applications.

[5] The Star raised an issue about the constitutionality of the public interest override in s. 23 of FIPPA. Counsel agreed to defer argument on that issue pending release of a decision by the Court of Appeal.¹ On May 25, 2007, the Court of Appeal held that the public interest override should be read into the enforcement and privilege exceptions. Leave is being sought to appeal that decision to the Supreme Court of Canada, [2007] S.C.C.A. No. 382. We have not considered the public interest override in reaching our decision.

Background

[6] On February 3, 2004, the Star’s employee made a request to the Ministry for information maintained by the PWEU relating to illegal firearms and for records relating to trace information about weapons found in Canada but not registered in Canada. When the request was first made, the requester and the Star were unaware how the PWEU stores firearm information.

[7] The PWEU is a joint forces unit, set up in 1994 under the direction of the Ontario Provincial Police (“OPP”). It now consists of ten Ontario police agencies, as well as federal agencies. It works in partnership with the United States Bureau of Alcohol, Tobacco and Firearms. Part of the mandate of the PWEU is to identify persons involved in the illegal movement of firearms and to take enforcement action for offences, including smuggling, trafficking and the possession of crime guns.

[8] Under s. 134(8) of the *Police Services Act* every Chief of Police must maintain a register for all firearms that come into the possession of the police. The register includes the name, address and

¹ Criminal Lawyers Association v. Ontario, 2007 ONCA 392

phone number of any owner to whom a firearm is returned. However, in the information required to be filed annually with the Solicitor General, that particular information is not required, and it is not part of the SOURCE database. Furthermore, the requester had made it clear that “personal information” is not part of the information sought, nor information regarding confidential sources or organizations other than commercial dealers.

[9] SOURCE database is a firearms registry database, established in order to carry out the Ministry’s responsibilities under s. 134(8) of the *Police Services Act*. It is said to contain a record of every firearm that has come into the custody of the police since 1994. It would include both registered and unregistered firearms. The second database, FATE, was created by and is maintained by PWEU to trace firearms that are not registered in Canada. With this information, the police aim to determine the history of the particular firearm, crimes associated with it, and to develop investigative leads for the police.

[10] PWEU maintains and uses both databases to fulfill its mandate of identifying persons involved in the illegal movement of firearms and taking preventative, not just enforcement, action. PWEU continually gathers investigative and intelligence information about crime guns as well as legal firearms. Legally registered weapons can become “crime guns”. If that happens the history of the weapons may be relevant. Weapons may surface in a different jurisdiction from time to time, and it is the central registry that enables a tracing that might otherwise not occur.

[11] When the Ministry first rejected the Star’s request for weapons information, the Star resubmitted its request to more specifically identify information it wanted, asking for the following information:

- (1) The number of crime gun trace requests made by the Toronto Police Service to the U.S. Bureau of Alcohol, Tobacco and Firearms for 2000, 2001 and 2002;
- (2) The number of crime gun trace requests made to the OPP’s Weapons Unit for 2000, 2001 and 2002, and the results of those traces;
- (3) Information collected by the Toronto Police Service relating to all gun traces including type of firearm (handgun, rifle, etc.), make, model and point of origin for the same years;
- (4) Information relating to the type of crime associated with each trace and a description of every gun traced during those same years.

[12] On April 30, 2004, after this resubmission had taken place, the Ministry granted the Star’s request in part and disclosed some information from the SOURCE database.

[13] On May 6, 2004, the Star made fresh requests to the Ministry for additional weapons information relating to the PWEU’s activities. On July 7, 2004, the Ministry denied the requests on the basis that the information sought was exempted under subsections 14(1)(a), (c), (g) and (l) of FIPPA. The Star appealed that decision to the Information and Privacy Commissioner (“IPC”).

[14] The Star only learned of the two specific databases in question when the Ministry made its submissions to the Adjudicator on that appeal. Some of the information contained in the two databases overlaps but much is different; and certain tracing information found in FATE is not included in the SOURCE database. While the SOURCE database has 14 categories of information with respect to a particular firearm, the FATE database, which is more extensive, has 59 categories.

The Adjudicator's Order

[15] The Adjudicator, at p. 4 of his decision, noted that at the hearing the requester revised the information she wanted from both databases. The requester wanted information regarding police 'traces' stored in the FATE database about firearms not registered in Canada. In particular, the requester asked for the identity of commercial dealers and retailers who had originally sold the recovered or identified firearms. The Adjudicator confirmed that the requester did not seek information from either database regarding individuals, confidential sources or organizations other than commercial dealers.

[16] The Adjudicator, on examining the requester's description of what was being asked, said, "In effect, the request is for a list of the SOURCE database fields and for all data in both the SOURCE and FATE databases."

[17] In order to make a determination of what information should or should not be released, the Adjudicator examined what was in the two databases. The Ministry provided copies of certain printouts from the databases for the benefit of the Adjudicator, but given the confidentiality issue raised by the Ministry these records were the subject of a sealing Order. The sealed documents were seen by us during the judicial review proceedings but were not made part of the public file. Further, the material was resealed by us at the end of the hearing.

[18] In reaching his decision, the Adjudicator, first reviewed the provisions of s. 134(8) of the *Police Services Act*, which sets out how the police force must keep a register of firearms coming into the possession of police and the rules which apply as to how it is kept. The rules under that Act are:

1. Every firearm's description (including serial number) and location shall be recorded.
2. When a firearm ceases to be in the possession of the Police Services Board or of a member of the police force, full particulars shall be recorded, including the name of the person who disposed of it and the date and method of disposal.
3. If the firearm is returned to its owner, his or her name, address and telephone number shall also be recorded.
4. On or before the 31st day of January in each year, a statement shall be filed with the Solicitor General listing the firearms that have come into the possession of the police force during the preceding calendar year, indicating which firearms are still being retained and which have been disposed of, and giving the particulars of disposition.

[19] Second, the Adjudicator considered whether any or all of the following four subsections of section 14(1) of FIPPA applied in restricting the release of information:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (a) interfere with a law enforcement matter;...
- (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;...
- (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons; or...
- (l) facilitate the commission of an unlawful act or hamper the control of crime.

[20] Section 14 of FIPPA sets out exemptions from disclosure under the heading “Law Enforcement”. In interpreting the term “law enforcement” in these four subsections, the Adjudicator applied the definition of that term in section 2(1) of FIPPA: “policing, investigations or inspections that lead or could lead to proceedings in court or before a tribunal if a penalty or sanction could be imposed in those proceedings, and the conduct of such proceedings.” He found on p. 10 of his decision that the creation and maintenance of the SOURCE and FATE databases fell within the “policing” component of the law enforcement definition. He then turned to the information within those databases.

[21] The Adjudicator went on to find that the information in the FATE database falls within the exception for “intelligence information”, as set out in subsection 14(1)(g) of FIPPA. As the Adjudicator said on p. 12 of his decision, the information in the FATE database “... is assembled in a covert manner, kept confidential, and shared only in the law enforcement community on a ‘need to know’ basis.” He further found that the database was created in the context of the ongoing effort devoted to the detection and prosecution of crime or its prevention. He concluded that its disclosure to the requester, “... could reasonably be expected to reveal law enforcement intelligence information respecting organizations or persons.”

[22] The Adjudicator refused to sever the FATE database record to order even partial disclosure, as he could find “no way of meaningfully severing the record” without disclosing the information that he found to fall within section 14(1)(g). He was therefore not satisfied that it could be provided in a severed form. Having found that the FATE database fell within the exemption in 14(1)(g), he did not consider the other possible exemptions in relation to it.

[23] The Adjudicator distinguished the SOURCE and FATE databases in his consideration of the “intelligence information” exemption in s. 14(1)(g) on the basis that the former is not assembled in a covert manner and is primarily the performance of a statutory duty under the *Police Services Act*.

It was not initiated by the police as part of a strategy to detect, prosecute or prevent crime. Furthermore, it is a record of specific occurrences and includes firearms that have nothing to do with crimes, such as the voluntary surrender of a firearm by an owner for disposal. SOURCE database could be used for a broader police purpose, but there was no specific evidence of that.

[24] The Adjudicator then examined s. 14(1)(a), which deals with interference with “a law enforcement matter”. He held that the “matter”, in question, must be a specific, ongoing law enforcement matter, adopting the scope and meaning of the word “matter”, as set out by another adjudicator in Order MO-1578. Because the Adjudicator found that the records at issue did not relate to any specific, ongoing law enforcement matter, he concluded s. 14(1)(a) did not apply to the SOURCE database.

[25] The Adjudicator distinguished the SOURCE database information from “investigative techniques and procedures”, “intelligence information” and information that “hampers the control of crime”, on the basis that these are broader categories addressing future events or matters in general. The adjudicator concluded that if “a law enforcement matter” was given the same broad interpretation as these other exemptions in s. 14(1)(c) and (e), it would exclude virtually all information.

[26] As for section 14(1)(c), which deals with whether the data reveals “investigative” techniques and procedures, the Adjudicator found that the section does not apply to “enforcement” techniques or procedures. The Adjudicator was not satisfied that the information in SOURCE database, or the maintenance of that database, would reveal any investigative techniques or procedures.

[27] The Adjudicator then examined section 14(1)(l), and whether the release of the information in the SOURCE database could be expected to “facilitate the commission of an unlawful act or hamper the control of crime”. The SOURCE database does not reveal the names, municipal address or other information regarding owners when firearms are returned to those owners. The Adjudicator was not persuaded that the revelation of the locations of the storage of the firearms or other particulars would do this. He found that the general public is aware that firearms are stored at police detachments and that even with the release of descriptions of the firearms stored there, the prospect of them being stolen to commit a crime was “... too remote to qualify as a ‘reasonable expectation’”, under the wording of the section. He found that the Ministry’s predictions of harm, which would follow if such disclosure was made, to be speculative, lacking “detailed and convincing” evidence.

[28] The Adjudicator alluded to the difficulty of predicting future events and the potential use of the information by persons with criminal intentions to facilitate a crime or get away with one. Though he found the Ministry’s concerns were “not persuasive” on the prospect of guns being stolen from police detachments, he also found that the location and description of those guns could “facilitate unlawful acts or hamper the control of crime” if the full serial number was part of the information released. He then used the severance provisions of s. 10(2) of FIPPA to order disclosure with redacted serial numbers.

[29] The Adjudicator found that while the FATE database was fully exempt under s. 14(1)(g) of FIPPA, none of the exemptions claimed by the Ministry applied to the SOURCE database, once the partial deletion was made of the serial number on the weapons.

The Standard of Review

[30] It is the Ministry's position that the standard of review which must be applied to the Adjudicator's decision is that of correctness on questions of statutory interpretation and on questions of fact is reasonableness. It relied *inter alia* on *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*.²

[31] The Star says that the appropriate standard is *reasonableness simpliciter*. It rejects *Monsanto, supra*, as being a case of general application. Instead, the Star says that the standard is determined in each case through the application of the functional and pragmatic test, relying on the decision of the Divisional Court, upheld by the Court of Appeal, of *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*.³ The Star says that the exemptions in FIPPA fall, "... squarely within the expertise of the Adjudicator," despite the fact that there is no privative clause and no right of appeal from the decision.

[32] The Commissioner⁴ agrees with the Star that the standard of review to be applied is *reasonableness simpliciter*. The Commissioner also relies on the *Ministry of Transportation supra*, in support of this position. In addition, the Commissioner also relies on *Ontario (Ministry of Health and Long Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*⁵ where Goudge J.A. set out the pragmatic and functional analysis test by which the Court has determined that reasonableness is the appropriate standard.

[33] In our view, the Adjudicator must apply the correct legal test but determinations of fact or mixed fact and law demand deference unless they are unreasonable.

[34] The issue before the Adjudicator on both Applications was to balance the public's right to disclosure with the protection of the private and public interests set out in s. 14(1) of FIPPA. The issue for the court is whether the Adjudicator's interpretation of it, and his conclusions, were reasonable or unreasonable. We adopt the conclusion in *Ontario (Attorney General) v. Fineberg*⁶ that "the interpretation of s. 14 lies at the heart of the specialized expertise of the Information and Privacy Commissioner" and "this Court will not intervene where the Commissioner has accorded interpretation to the exemptions in s. 14(1) which they can reasonably bear".

² [2004] 3 S.C.R. 152 at p. 159-163

³ [2004] O.J. No. 224 (Div. Ct.) at para. 44; aff'd [2005] O.J. No. 4047 (C.A.), see paras. 6-17.

⁴ The Commissioner made extensive written and oral submissions on all issues in support of the decision and reasoning of the Adjudicator. We will consider only those submissions dealing with the standard of review. The issues are otherwise joined by the applicant and the respondent.

⁵ [2004] O.J. No. 4813 OCA at paras. 25-39

⁶ (1994), 19 O.R. (3d) 197 (Div.Crt.) para.7.

The parties' positions on the Judicial Review Applications

(a) On the Ministry's Application

(i) Position of the Ministry

[35] The first issue is the appropriate standard of proof. The Adjudicator held that the s. 14(1) exemptions "... are to be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context." See: *Fineberg, supra*. While the Adjudicator found that the Ministry must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm", the Ministry says that s. 14(1) requires only that it establish that one of the listed harms "... could reasonably be expected to result" from the release of the information requested. The Ministry says while the Adjudicator acknowledges the ruling in *Fineberg, supra*, he applied too demanding a standard.

[36] The Ministry says that the Adjudicator failed to follow the Court of Appeal's rejection of a requirement for proof of the higher degree of "probable harm", and says that effectively he read the word "probable" into the general requirement of s. 14(1). The Ministry relies on *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Ministry of Labour, Office of the Worker Advisor)*.⁷

[37] The Ministry points to the fact that there has been an amendment to the French version of the Act, where the word "probable" in s. 14(1) was replaced by the word "raisonnable". The Ministry says that the Adjudicator should have found "a reasonable basis for believing that ..." harm would arise in the circumstances of this case, or the Adjudicator should have found that a reasonable expectation of harm, would occur if the SOURCE database was released to the requester.

[38] The Ministry says that the Adjudicator's application of the s. 14(1) exemptions was not consistent with the purpose of access to information, since once disclosure is made, as ordered, it is available to all members of the public, including criminals, in whose interest it may be to know what weapons are stored for safe-keeping in what locations. The Ministry emphasizes its view that the dangers of disclosure are very real.

[39] The Ministry points to the fact that it has already released considerable information to the requester. It is the Ministry's view that the Adjudicator did not consider whether disclosure of details of locations where seized weapons are stored would further the fundamental purpose of the Ontario access to information regime. The Ministry says there is a reasonable expectation that listed harm will be caused by such disclosure.

[40] The Adjudicator, says the Ministry, adopted too narrow an interpretation of the word "matter" in saying that the matter must be a "specific, ongoing matter", and that he gave too narrow an interpretation to the definition of "law enforcement" prescribed by the Act. What he should have held, says the Ministry, is that a "law enforcement matter", includes broader police activities directed

⁷ (1999), 46 O.R. (3d) 395 (C.A.)

towards preserving the peace and preventing crimes. In the Ministry's view, the Adjudicator failed to consider all the objectives and uses of the SOURCE database, as a whole, as relating to an ongoing law enforcement matter.

[41] The Ministry says that the Adjudicator erred in applying and finding the American case, *City of Chicago v. United States Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, No. 01-2167* to be persuasive, given the different wording of our statute and given that the American statute is not analogous. Our legislation uses the words, "a law enforcement matter", whereas the American statute uses the words "enforcement proceeding". The Ministry says that the American wording is much narrower than our wording. Further, the U.S. Court of Appeal set aside the order to disclose and clarified the wording, making it closer to our wording.

[42] The Ministry says the Adjudicator further erred in rejecting without explanation the Ministry's concern as to the reasonable expectation of harm associated with the release to the public of the location and description of the seized firearms. The Adjudicator did not refer to the fact that criminals and criminal gangs could use the information or make similar requests of their own in the future. Further, the Adjudicator never explained why he rejected the Ministry's representation that disclosure of this information threatens public safety.

[43] Last, the Ministry says that the Adjudicator erred in his interpretation of the severance provision in s. 10(2) of FIPPA, in ordering the release of half of each serial number from each seized firearm, because such a severance does not redress or remedy the anticipated harm.

(ii) The position of the Star

[44] The Star says that the Adjudicator was right to reject the Ministry's assertion that disclosure of the SOURCE database could reasonably cause harm, as any prospective harm is "speculative in the extreme." The Star takes the position that the Adjudicator did not apply a standard of proof of "probable" harm under the exemptions. He simply found that the Ministry must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm" and that speculation of harm is not sufficient to exclude the requester from receiving all of the information.

[45] As for the "detailed and convincing" evidence test, the Star says that the Court's findings in *Ontario (Attorney General) v. Pascoe*⁸, and *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*⁹, affirm that this test applies to exemptions under FIPPA and the Adjudicator properly applied the exemptions.

[46] The Star says that the Ministry's definition of "a law enforcement matter" is overly broad and would, if allowed, "effectively create an unlimited exemption". It says that there must be convincing evidence of a nexus to a specific matter to find a reasonable prospect of harm. The Star dismisses as "fanciful", the prospect of criminals storming police detachments to steal weapons.

⁸ [2002] O.J. No. 4300 (QL), 22 C.P.R. (4th) 447 (C.A.)

⁹ [2004] O.J. No. 224 (Div. Ct.); aff'd [2005] O.J. No. 4047 (C.A.)

[47] For the SOURCE database, the Adjudicator examined each of the 4 subsections of s. 14(1) in question, and found that disclosure of the information could not reasonably be expected to interfere with the gathering of “intelligence information”, nor could it interfere with a law enforcement matter.

[48] The release of the SOURCE database could not be expected to reveal investigative techniques or procedures, says the Star, because the Adjudicator found that even the disclosure of the descriptions of weapons located in a particular police detachment, would not lead to a reasonable expectation that this information would hamper the control of crime, nor would it lead to the prospect that these firearms would cause someone to break into the police detachment and steal them, as argued by the Ministry.

[49] As for the severance of serial numbers on recovered weapons, the Star says that while it would prefer to have the full number, it takes no issue with a redacted number, as ordered.

(b) The Star’s Application

(i) The Star’s Position

[50] The Star says that the Adjudicator erred in denying it any access to the FATE database. The Star asserts that the Adjudicator’s decision is unreasonable in its conclusion that all data in that database falls under the “intelligence information” exclusion in s. 14(1)(g) of FIPPA¹⁰. The Star argued that he erred in applying too broad a definition of “intelligence information” when he excluded all the information in the FATE database from the requester.

[51] The Star says that there is a legitimate public interest in accessing information about how law enforcement authorities are “responding to the growing problem of gun crime,” and sees no real harm in making the information available to the public at large. Its position is there is public interest in knowing as much as possible about illegal weapons seized by the police since weapons are “... increasingly used in crimes against innocent civilians.”

[52] The Star wants disclosure of all the fields and all information in FATE, except personal information: what weapons are used in the commission of what crimes in Ontario, and where these weapons come from. It further wants to know what the government and police are doing to prevent importation of illegal weapons, and it wants information about U.S. gun dealers and wants to trace information and history about illegal firearms registered outside Canada.

[53] The Star says that the Adjudicator adopted a “mechanistic approach” in not severing any of the information in the FATE database.

[54] The Star says the Adjudicator erred in accepting the Ministry’s position that the potential harm, which the Ministry said would come about if any of the FATE database was released to the

¹⁰ The Star also submitted that the Adjudicator failed to consider the public interest override in s. 23 of FIPPA. As indicated above, we heard no submissions on this point.

public, was “... generalized, speculative, and in some cases absurd.” The Star says the two reports from the Criminal Intelligence Service Canada, which were presented to the Adjudicator by the Ministry, are not cogent or worthy of much evidentiary weight.

(ii) The position of the Ministry

[55] The Ministry says the decision of the Adjudicator to uphold the Ministry’s denial of access to the FATE database was “reasonable in the result”. The Ministry submits that the Adjudicator’s interpretation of s. 14(1) of the Act was incorrect, but that had he applied the correct interpretation, he would have arrived at the same result.

[56] Since the Ministry has already released certain information to the requester about the SOURCE database, it says this is more than sufficient to meet the public interest test. FATE is used to track illegal weapons, and to trace all firearms that are not registered in Canada. Therefore, the Ministry says the Adjudicator properly found that the release of any such data fell within the exemption under s. 14(1)(g), as the information is used by PWEU for purposes of intelligence analysis and to initiate specific investigations, and to ensure compliance with relevant firearms legislation.

[57] The release of any information in FATE, says the Ministry, would alert criminals to the nature and extent of this highly confidential information held by the PWEU. Therefore, the Adjudicator adopted the correct interpretation of “intelligence information”, as used in s. 14(1)(g), relying on other such Orders made interpreting the term, and was reasonable in his findings.

[58] Since severance in the FATE database was not initially requested, says the Ministry, the Star is now shifting its position by now saying part could be severed, and it should not be allowed to do so.

[59] The Ministry says that if the Star’s Application is allowed, the Court should refer the matter back to the Commissioner, since the Adjudicator did not decide on whether the other exemptions under s. 14(1) did or did not apply respecting the FATE database.

Analysis

(a) *The Standard of Proof*

[60] We accept the Ministry’s position that the expectation of harm, when applying the exemptions, must be reasonable, but that it need not be “probable”. See: *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Ministry of Labour, Office of the Worker Advisor)*¹¹ and *Schiller v. Mitchinson*¹². We agree that if the Legislature does not include the word “probable” in its legislation, it should not be read into the legislation.

¹¹ (1999), 46 O.R. (3d) 395 (C.A.) at pp. 401-402

¹² [2005] O.J. No. 1522 (Div.Crt.)

[61] The Adjudicator gave careful consideration to the representations of the Ministry accurately summarized at pages 7 - 8 of his reasons. The Adjudicator did not err in requiring “detailed and convincing evidence”. He recognized that all predictions of future harm are by their nature speculative, and made it clear that the words “detailed and convincing” were not used to describe a higher standard of proof, but rather the quality and cogency of the evidence required to establish a reasonable expectation of harm.

(b) *“Law Enforcement” Definition*

[62] “Law enforcement” is a common denominator for the exemptions in s. 14 of FIPPA. Before dealing with each specific exemption, we consider the decision of the Adjudicator on the meaning of that phrase.

[63] The Adjudicator, in our view, correctly concluded that the creation and maintenance of both the SOURCE and FATE databases fall within the wide ambit of “policing”, as defined in s. 2(1) of FIPPA. Whether the information within those databases is exempt from disclosure depends upon whether it falls within one or more of subsections 14(1)(a)(c)(g) or (l) of the Act.

(c) *Section 14(1)(g) exemption: Interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons*

[64] Under s. 134(8) of the *Police Services Act*, R.S.O. 1990, c. P.15, the Chief of Police shall ensure that the police force keeps a “register of firearms” under the rules as specified in that subsection. These rules include the keeping of such data as the firearm’s location and description, when it ceases to be in the possession of the police or board, when it is returned to its owner, and the name, telephone number and address of the person to whom it is returned.

[65] Although s. 134(8) of the *Police Services Act* seems to contemplate each police force keeping its own local record and reporting annually to the Solicitor General on all firearms that come into police possession, the practice is for the Ministry to maintain a frequently updated central registry, the SOURCE database. The Ministry says that a main reason for this practice is to enable PWEU to use it for “intelligence” purposes. “Intelligence” information is aimed at not only the detection and prosecution of crime, but also proactive efforts to prevent crime. Tracking patterns and trends can help police anticipate criminal activity or even targets of criminal activity. Normally, this information is not released to the public. It is a central record for all police forces in the province and is used as part of the tracking of both legal and illegal weapons and export and import offences dealing with firearms and other weapons under the *Criminal Code*, R.S. 1985, c. C-46.

[66] In our view, the information gathered in both these databases, which comes about as part of a comprehensive federal and provincial statutory scheme regulating the possession of firearms, has a public safety objective. Despite the fact that such information, in the past, was treated as highly confidential, the Ministry has now provided as much information to the requester as it considers possible from the SOURCE database, without making the whole database open to the public.

[67] The Adjudicator found that intelligence information in FATE was being gathered in a covert manner by PWEU, with respect to ongoing efforts devoted to the detection and prosecution of crime. He further recognized that this information must be kept confidential and “... shared only in the law enforcement community on a ‘need to know’ basis.”

[68] The Adjudicator properly distinguished “intelligence information” and “investigatory information” in his consideration of s. 14(1)(g). After looking at the sample FATE database he concluded the exemption applied. We agree with the Adjudicator that the disclosure of information in the FATE database could reasonably be expected to reveal law enforcement intelligence information respecting organizations or persons.

[69] We find that the Adjudicator correctly decided that the whole of the FATE database fell within the exemption under s. 14(1)(g) of the Act. We examined the copies of part of that database, which were presented to us in a sealed envelope, and we agree with the Ministry’s position that it is “intelligence information”, which if released, could interfere with policing. We agree with his conclusion on that point.

[70] Furthermore, having examined the sample database ourselves, we agree there is no way of meaningfully severing the record so as to order partial disclosure. The Star contends that because some information in the FATE database is identical to information ordered to be released from the SOURCE database then some information in FATE is severable and ought to be produced. The Star contends that the blanket exemption of all information in FATE is too broad. In our view, the redundant information in the FATE database would be meaningless on its own, and we agree with the Adjudicator there is “no way of meaningfully severing that record”. Furthermore, it remains “intelligence information” by virtue of how it is gathered and used. It is reasonable to conclude that disclosure of any part of the FATE database could jeopardize PWEU’s partnership with American authorities and thereby undermine PWEU’s ability to meet its mandate.

[71] We find that the Adjudicator correctly decided that disclosure of information in the SOURCE database, on the other hand, would not “interfere with the gathering of, or reveal” intelligence information. We agree with his analysis.

(d) *Section 14(1)(a): Interfere with “a law enforcement matter”*

[72] Under s. 14(1)(a) of FIPPA, the Ministry may refuse to disclose a record where such disclosure could reasonably be expected to interfere with a law enforcement matter. We agree with the Ministry that the keeping of such data falls within the definition of “a law enforcement matter”. The plain and ordinary meaning of the word “matter” is very broad.¹³ We find that “matter” does not necessarily always have to apply to some specific on-going investigation or proceeding. The Adjudicator, in our view, erred in taking too narrow a view of the word “matter” in this particular case. (In any event, the information which goes into SOURCE database is both specific and on-going. It relates to “policing”, as already noted. It is “specific” because s. 134(8) of the *Police*

¹³ H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General), [2006] 1 S.C.R. 441 at para. 44.

Services Act prescribes precisely the information to be kept. It is “ongoing” because the records must be regularly, if not constantly, updated.)

[73] Section 14(1)(b) specifically addresses interference with “investigations” and “proceedings”. The meaning of “a law enforcement matter” must, therefore, be broader, or it would be redundant. Furthermore, if “law enforcement” includes “policing”, then “a law enforcement matter” should include “a policing matter”. The SOURCE database is not only created, maintained and used by PWEU as part of its policing mandate, it is required to be maintained, in part, to “police the police” under s. 134(8) of the *Police Services Act*.

[74] Finally, the Adjudicator apparently failed to consider that legally registered weapons (only found in SOURCE, not FATE) can become crime guns. SOURCE database allows for tracing of information across different police jurisdictions, information that could clearly assist police and the PWEU in executing their responsibilities.

[75] In conclusion, we find that the Adjudicator’s conclusion that s. 14(1)(a) did not apply to the SOURCE database was unreasonable.

(d) *Section 14(1)(c): Reveal investigative techniques and procedures currently in use or likely to be used in law enforcement*

[76] The Ministry did not really challenge the Adjudicator’s conclusion that disclosure of the SOURCE database information could be ordered without revealing investigative techniques and procedures.

(e) *Section 14(1)(l): Facilitate the commission of an unlawful act or hamper the control of crime*

[77] In our view, the Ministry’s position that the release of the information will provoke thefts from police stations, is unrealistic. The Adjudicator properly found that the Ministry had failed to satisfy him that disclosure of the data in SOURCE database could be expected to facilitate the commission of an unlawful act or hamper the control of crime. We agree with his analysis and conclusion.

Conclusion:

[78] The Adjudicator held that none of the four exemptions applied to the SOURCE database. We agree that his decision on three of those exemptions was reasonable. We disagree with respect to s. 14(1)(a). Having concluded that this exemption applies, the Application for judicial review by the Ministry of Provision 1 of Order PO-2455 (SOURCE) made on February 28, 2006 by Adjudicator Faughnan, is allowed and an Order shall issue quashing Provision 1 of Order PO-2455 for the reasons as set out herein.

[79] Having concluded that the decision of the Adjudicator is reasonable with respect to the exemption in s. 14(1)(g), the Application for judicial review by the Star of Provision 2 of Order PO-2455 (FATE) is therefore dismissed, for the reasons as set out herein.

[80] The Ministry does not ask for costs against the Commissioner but does ask for Costs against the Star. If counsel are unable to agree on costs, we will receive brief written submissions on costs by the Ministry within 30 days of our decision, and from the Star within 10 days thereafter. The Ministry shall have 5 days after that within which to Reply, if desired.

ASHTON J.
GREER J.
KITELEY J.

Released: October 30, 2007

COURT FILE NO.: 164/06

COURT FILE NO.: 189/06

DATE: October 30, 2007

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

ASTON, GREER and KITELY JJ.

B E T W E E N:

MINISTRY OF COMMUNITY SAFETY AND
CORRECTIONAL SERVICES

- and -

INFORMATION AND PRIVACY COMMISSIONER,
and TORONTO STAR NEWSPAPERS LIMITED

- and -

B E T W E E N:

TORONTO STAR NEWSPAPERS LIMITED

- and -

INFORMATION AND PRIVACY COMMISSIONER,
and MINISTRY OF COMMUNITY SAFETY AND
CORRECTIONAL SERVICES

REASONS FOR JUDGMENT

Aston, Greer and Kiteley JJ.

Released: October 30, 2007