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

ORDER M-58

Appeal M-910243

London Board of Commissioners of Police

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ORDER

BACKGROUND:

The London Board of Commissioners of Police (the Police) received the following request under the Municipal Freedom of Information and Protection of Privacy Act (the Act):

> I want to know whether I was subject to any investigation by the London Police Department from Oct. 1985 to Oct. 1989. If such a file exists, the information contained therein should state the names of the officers participating in the investigation(s) as well as the names of people questioned and the use of any covert techniques (i.e. electronic surveillance).

The Police responded by advising the requester that the existence of any records could neither be confirmed nor denied in accordance with section 8(3) of the Act. The requester appealed this decision.

Mediation was not possible in the circumstances, and notice that an inquiry was being conducted to review the decision was sent to the appellant and the Police. Written representations were received from both parties.

For the purposes of this appeal, I have divided the requested records into two categories: records which relate to the interception of private communications, commonly known as "wiretap application records"; and other records relating to any investigations which may have been undertaken by the Police during the timeframe identified by the request.

As far as any wiretap application records are concerned, in Order P-344 I found that the doctrine of federal legislative paramountcy operates so as to exclude requests for wiretap application records from the scope of the provincial Freedom of Information and Protection of Privacy Act. In my view, this finding applies equally to the municipal Act, and I similarly find that the doctrine of federal legislative paramountcy operates so as to exclude requests for wiretap application records from the scope of the municipal Act.

The rest of this order will deal only with non-wiretap investigation records.

The sole issue in this appeal is whether the Police have properly exercised discretion under sections 8(3) and 38(a) of the Act in refusing to confirm or deny the existence of non-wiretap investigation records.

In Order P-255, I outlined some general comments about the provincial equivalent of 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 my view, section 14(3) provides institutions with a significant discretionary power and it is extremely important that discretion under this section is carefully considered and properly exercised.

In Order P-344, I elaborated by stating:

> 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 [see also Order P-338].

These views about section 14(3) of the provincial statute apply equally to section 8(3) of the municipal Act.

The representations provided by the Police in this appeal, as they relate to non-wiretap investigation records, contain what can best be described as generalized references to possible interference with the investigative process, such as the following:

> Disclosing the existence with access or without access to an investigatory file will communicate information to the requester which would and could frustrate an ongoing investigation process.

The Police do not provide details as to how disclosure of the existence of non-wiretap investigative records would "frustrate" an ongoing investigation, either in the abstract or, more importantly, in the particular circumstances of this appeal.

As I pointed out in Order P-344:

> In considering whether or not to apply sections 14(3) and 49(a) [8(3) and 38(a) of the municipal Act], a head must be governed by the principles that information should be available to the public; that individuals should have access to their own personal information; and that exemptions to access should be limited and specific. Further, the head must consider the individual circumstances of the request.

In my view, the Police have not established that any of the circumstances enumerated in sections 8(1) or (2) exist in the circumstances of the appellant's request, and I find that section 8(3) of the Act does not apply.

If responsive non-wiretap investigation records had existed in this case, I would have proceeded to consider whether these records qualified for exemption under the Act. However, no such records are in existence.

In disposing of this appeal, it was necessary for me to confirm that no non-wiretap investigation records exist. However, I want to make it clear that this decision in no way confirms or denies the existence of wiretap application records; as stated earlier in my order, requests for wiretap application records fall outside the scope of the Act.

ORDER:

1. In this order, I have disclosed the fact that no non-wiretap investigation records exist. Because the Police may apply for judicial review, I have decided to release this order to the Police in advance of the appellant. The purpose for doing this is to provide the Police with an opportunity to review this order and determine whether to apply for judicial review.

2. If I have not been served with a Notice of Application for Judicial Review within fifteen (15) days of the date of this order, I will release this order to the appellant.

Original signed by: November 6, 1992
Tom Mitchinson

Assistant Commissioner