



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-267

Appeal M-9300370

Metropolitan 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/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

ORDER

BACKGROUND:

The Metropolitan Toronto Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to:

1. information gathered by the Police in relation to an investigation of a named entity;
2. information concerning what is described by the requester as a police radio frequency.

The Police responded by refusing to confirm or deny the existence of any record responsive to the requests in accordance with section 8 of the Act. The requester appealed the decision to the Commissioner's office.

Mediation was not successful and notice that an inquiry was being conducted to review the decision of the Police was sent to the appellant and the Police. Representations were received from the Police only.

In their representations, the Police indicate that, if records of the nature requested exist, they would qualify for exemption under sections 8(1) and (2) of the Act.

ISSUES:

The issues arising in this appeal are as follows:

- A. Whether records of the nature requested, if they exist, would qualify for exemption under sections 8(1) and/or (2) of the Act.
- B. Whether section 8(3) of the Act applies in the circumstances of this appeal.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether records of the nature requested, if they exist, would qualify for exemption under sections 8(1) and/or (2) of the Act.

The Police submit that, if records of the sort requested exist, they would qualify for exemption under sections 8(1)(a), (b), (g), (l) and 8(2)(a). These sections state that:

- (1) A head may refuse to disclose a record if 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;
 - ...
 - (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.
 - ...
- (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;

In order for records of the type requested, if they exist, to qualify for exemption under these sections, the matter which would generate the records must satisfy the definition of the term "law enforcement" as found in section 2(1) of the Act. This provision reads:

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b).

The purpose of the exemptions contained in sections 8(1)(a) and (b) is to provide the Police with the
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discretion to preclude access to records in circumstances where disclosure of the records could reasonably be expected to interfere with an ongoing law enforcement matter or investigation. The Police bear the onus of providing sufficient evidence to substantiate the reasonableness of the expected harm(s) and, in my view, the Police discharge this onus by establishing a clear and direct linkage between the disclosure of the specific information and the harm alleged (Orders 188, P-534 and P-542).

The Police submit that records of the sort requested in the first part of the request, if they exist, would relate to a Police investigation into a violation of law which may result in criminal proceedings being instituted against individuals or other entities. The Police further provide evidence as to how the disclosure of such records would interfere with this type of law enforcement investigation.

Having reviewed the representations of the Police, I am satisfied that records of the type requested in the first part of the request, if they exist, would relate to a law enforcement matter, as that term is defined in section 2 of the Act. I am also satisfied that, insofar as the first part of the request is concerned, the disclosure of records of the type requested, if they exist, could reasonably be expected to interfere with a law enforcement matter or investigation as contemplated by sections 8(1)(a) and (b) of the Act. Accordingly, I find that records of the type referred to in the first part of the request, if they exist, would qualify for exemption under sections 8(1)(a) and (b) of the Act.

The second part of the appellant's request concerns information relating to what is described by the appellant as a possible police radio frequency. The Police indicate that records relating to this portion of the request, if they exist, would be exempt from disclosure under section 8(1)(l) of the Act. I have not been provided with sufficient evidence, however, to establish that the disclosure of information relating to this part of the request, if it exists, could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. I am not satisfied, therefore, that records responsive to the second part of the appellant's request, if they exist, would qualify for exemption under section 8(1)(l) of the Act.

ISSUE B: Whether section 8(3) of the Act applies in the circumstances of this appeal.

In its representations, the Police state that they are relying on section 8(3) of the Act to refuse to confirm or deny the existence of records responsive to the appellant's request.

Section 8(3) of the Act states that:

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

In my discussion of Issue A, I found that records of the type requested in the first part of the appellant's request, if they exist, would qualify for exemption under section 8(1)(a) and (b) of the Act. Section 8(3) cannot, however, apply to records which may be responsive to the second part of the appellant's request as

I have found that such records, if they exist, would not be exempt from disclosure under section 8(1)(l) of the Act.

In Order P-542, Inquiry Officer Asfaw Seife articulated the following test to determine the appropriateness of the application of section 14(3) of the Provincial Freedom of Information and Protection of Privacy Act, which is the equivalent of section 8(3) of the Act.

An institution relying on section 14(3) of the Act 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). The institution must establish that disclosure of the mere existence or non-existence of such a record would communicate to the requester information that would fall under either section 14(1) or (2) of the Act.

I adopt this test for the purposes of this appeal.

In their representations, the Police maintain that disclosure to the appellant of the fact that records responsive to the first part of the request do or do not exist, would reveal information which falls within sections 8(1) or (2) of the Act. Having carefully reviewed the representations of the Police, and all of the circumstances of the appeal, I am satisfied that confirmation of the existence or non-existence of records responsive to the first part of the request would communicate to the appellant information which would fall under either sections 8(1) or (2) of the Act.

I find, therefore, that in the circumstances of this appeal, section 8(3) of the Act is applicable to the first part of the appellant's request.

In any case in which the head has exercised his/her discretion and refused to confirm or deny the existence of a record, I look very carefully at the manner in which discretion has been exercised. Provided that it been exercised in accordance with established legal principles, in my view, it should not be disturbed on appeal.

The Police have provided detailed submissions regarding the exercise of discretion to refuse to confirm or deny the existence of a record responsive to the first part of the appellant's request. After reviewing these submissions, I am of the view that this determination should not be disturbed on appeal.

ORDER:

1. I uphold the decision of the Police to refuse to confirm or deny the existence of records responsive to the first part of the appellant's request.

2. In this order, I have not upheld the application of sections 8(1)(l) and 8(3) of the Act to the records, if they exist, which would be responsive to the second part of 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 this order and determine whether to apply for judicial review.
3. 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.
4. Following the expiration of the 15-day period described in Provisions 2 and 3 of this order, if judicial review proceedings have not commenced by the Police, I order the Police to issue to the appellant a decision letter within thirty (30) days of the date of this order concerning the second part of the appellant's request.
5. In order to verify compliance with this order, I order the Police to provide me with a copy of the decision letter issued to the appellant with respect to Provision 4, **only** upon request.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ February 14, 1994