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

ORDER M-450

Appeal M-9400641

Guelph Police Services Board

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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The Guelph Police Services Board (the Police) received a request for access to all information pertaining to any investigations conducted by the Police into the operation of any computer bulletin board services.

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

A Notice of Inquiry was sent to the Police and the appellant. Representations were received from the Police only. In their representations, the Police state that if records of the nature requested existed, access to them would be denied pursuant to sections 8(1)(a), (b), (l) and 8(2)(a) of the Act.

DISCUSSION:

REFUSAL TO CONFIRM OR DENY EXISTENCE OF A RECORD

In an appeal from a decision to refuse to confirm or deny the existence of a record, the correctness of the decision is an issue to be determined on appeal (Order 148).

In this appeal, I have reached the conclusion that section 8(3) of the Act is not applicable and I have decided to state this conclusion at the beginning to facilitate a more comprehensive explanation of the reasons for my decision. Accordingly, I confirm that records exist which are responsive to the appellant's request.

The records which have been identified by the Police as being responsive to the request consist of a general occurrence report with attached documentation.

The Police submit that sections 8(1)(a), (b), (l) and 8(2)(a) of the Act apply to the records. These sections provide that:

> 8(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;
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.
>
> 8(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 the records to be considered for exemption under sections 8(1)(a) and (b) and 8(2)(a), the matter which generated 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 section 8(1) is to provide the Police with the discretion to preclude access to records in circumstances where disclosure of the records could reasonably be expected to result in one of the harms set out in this section. The Police bear the onus of providing sufficient evidence to establish 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 P-534 and P-542).

In their submissions, the Police indicate that the investigation has been concluded and that charges have been laid and are pending before the courts. In this context, section 8(1)(b) cannot apply as this exemption contemplates that the investigation is still ongoing (Orders P-295, P-316 and P-403).

However, having reviewed the records and the representations of the Police, I am satisfied that the Police have provided sufficient evidence to establish that disclosure of the records could reasonably be expected to interfere with a law enforcement matter as the case is still before the courts. Therefore, I find that section 8(1)(a) of the Act applies to the records. Accordingly, I need not consider the application of sections 8(1)(l) and 8(2)(a).

As I have previously indicated, I have found that the Police have not properly applied section 8(3) of the Act in the circumstances of this appeal. Section 8(3) provides:

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

A requester in a section 8(3) situation is in a very different position than other requesters who have been

denied access under the Act. By invoking section 8(3), the Police are denying the requester the right to know whether a record exists, even when one does not. This section provides the Police with a significant discretionary power which I feel should be exercised only in rare cases.

In Order P-542, former 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.

The representations of the Police provide extensive details on how merely acknowledging to the appellant that records exist in response to his request could have interfered with the investigation that was being conducted into the operation of a computer bulletin board service. They indicate that, at the time of the request, the investigation had just commenced with only the records at issue in this appeal having been generated. They have explained how the integrity of the investigation could have been compromised had they not used their discretion to claim section 8(3). I agree. In my view, the Police have made a persuasive argument that section 8(3) was properly applied **at the date of the request**.

However, I do not agree with the submission of the Police that the Commissioner's office must determine whether the decision of the Police was correct, given the facts in existence at the time the decision was made.

In Order 167, former Commissioner Sidney B. Linden considered the same argument put forth by another institution. He concluded that such a restrictive view of the authority to review the head's decision is at variance with the purposes of the Act as set out in section 1(a).

He explained:

> It is my view that it would be unreasonable to adopt a position whereby the Commissioner or his delegate would be prohibited from taking into consideration facts and developments which have arisen subsequent to the head's decision. In order to give effect to the purposes of the Act, it is essential that all relevant facts and developments that arise prior to the date of an Order be considered. I note parenthetically that the head is also free, during the course of an appeal, to take notice of a change of circumstances which might affect the application of the Act, and to change his/her decision in respect of the appeal accordingly. For example, where certain events which have prompted an exercise of discretion in favour

> of not disclosing a record have passed, a head might alter the original decision and the appeal might be settled.

I agree with this approach and note that it is especially important to consider the purposes of the Act in the context of the extraordinary discretionary powers of an institution under section 8(3). Therefore, in my view, in the circumstances of this appeal, my responsibility is to determine whether section 8(3) applies when the matter is before me, based on a consideration of all relevant facts and developments.

The laying of criminal charges is a public process. In my opinion, given that the investigation has now concluded and individuals have been charged, the mere confirmation of the existence or non-existence of responsive records would not communicate information to the appellant which would fall under sections 8(1) or (2) of the Act, in the circumstances of this appeal.

Therefore, I find that section 8(3) is not applicable.

There is one further matter which I would like to address. The Police have requested that, in the event that I find that section 8(3) is not applicable, they be given the opportunity to submit further representations on the application of sections 8(1)(a), (b), (l) and 8(2)(a) of the Act. They have also indicated that there are some personal privacy arguments under section 14(1) that they would like to make.

In the alternative, they wish to provide the appellant with a further response letter denying access.

In this order, I have upheld the application of section 8(1)(a) of the Act to deny access to the records. Therefore, I do not believe that it is necessary for the Police to provide any further representations on this matter or to issue another decision letter to the appellant.

ORDER:

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

2. I uphold the decision of the Police not to disclose the records.

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 this order and determine whether to apply for judicial review.

4. 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: January 25, 1995
Anita Fineberg
Inquiry Officer