



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-402

Appeal M-9400393

Halton Regional Police Services Board



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NATURE OF THE APPEAL:

The Halton Regional 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 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 indicate that, if records of the nature requested exist, they would qualify for exemption under sections 8(1) and (2) of the Act.

DISCUSSION:

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF A RECORD

The Police submit that, if records of the nature requested exist, they would qualify for exemption under sections 8(1)(a), (b), (c), (d), (e), (f), (g), (l) and 8(2)(a) of the Act. These sections provide that:

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;
- (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
- (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
- (e) endanger the life or physical safety of a law enforcement officer or any other person;
- (f) deprive a person of the right to a fair trial or impartial adjudication;
- (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 sections 8(1)(a), (b), (c), (d), (g) and 8(2)(a), 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 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).

The Police submit that records of the sort requested, if they exist, would relate to a Police investigation into a violation of law which may result in criminal proceedings being instituted against an individual or individuals. The Police further provide evidence as to how 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, 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 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 requested, if they exist, would qualify for exemption under sections 8(1)(a) and (b).

I must now determine if, in the circumstances of this appeal, the Police properly applied 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 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 focus on the application of the exemptions in sections 8(1) and (2) which they claim would apply if records of the nature requested exist. It appears that the concerns of the Police relate to the harms that could occur as a result of the **disclosure** of such records, if they exist, **rather than the disclosure of their mere existence**. These submissions provide no information on how the disclosure of the mere existence or non existence of the requested record would communicate information that would fall under either section 8(1) or (2) of the Act.

The Police note that often a law enforcement matter is conducted in a highly confidential manner so as to preserve the integrity of the investigation. They maintain that the mere confirmation of such an investigation could disrupt the entire judicial process. While I have no doubt that this may be the case with respect to certain investigations, the Police have provided me with no evidence to indicate that such is the case with respect to the records requested in the particular circumstances of this appeal.

Having carefully reviewed the representations of the Police, I am not persuaded that merely confirming the existence or non existence of the records would 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) does not apply.

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

ORDER:

1. I do not uphold the decision of the Police to refuse to confirm or deny the existence of the records.
2. In this order, I have disclosed the fact that no responsive investigation records exist. 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.

Original signed by: _____
Anita Fineberg
Inquiry Officer

_____ October 13, 1994