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

ORDER M-621

Appeal M_9500164

Sudbury Regional 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 Sudbury Regional Police Services Board (the Police) received a request for access to notes taken by a number of police officers in relation to an investigation involving the requester, his daughter and his son. The Police located records responsive to the request and disclosed some of them to the requester. The Police also denied access to a number of responsive records, claiming the application of the following exemptions contained in the Act:

- law enforcement - sections 8(1)(a) and (b)
- invasion of privacy - sections 14(1) and 38(b).

The requester appealed the decision to deny access. During the mediation of the appeal, additional records were disclosed to the appellant and a second decision letter was issued to him. In this letter, the Police advised the appellant that 126 of the 190 pages of responsive records are outside the jurisdiction of the Commissioner's office as the constitutional doctrine of federal legislative paramountcy applies to them. The parties agreed that this appeal would concern solely the issue of whether this office has jurisdiction to review the decision of the Police to deny access to the 126 pages of records for which the Police have claimed the doctrine of federal legislative paramountcy.

The notebook entries which are the subject of this appeal consist of notes taken in relation to the installation, maintenance and dismantling of the interception equipment used in the gathering of evidence through a legally-authorized interception authorization (wiretap).

A Notice of Inquiry was provided to the appellant and the Police. Representations were received from both parties.

DISCUSSION:

JURISDICTION TO REVIEW THE DECISION

In Order P-344, Assistant Commissioner Tom Mitchinson found that the doctrine of federal legislative paramountcy operates so as to exclude requests for wiretap **application** records from the scope of the Act. In Order P-625, Inquiry Officer Holly Big Canoe held that the doctrine also applied to include **transcripts** of the intercepted conversations which are in the custody of an institution, as well as the wiretap application records which are maintained by the courts.

The Police submit that "the police officers' notes in question comprise part of the wiretap record" which were "completed in accordance with the procedure and responsibilities dictated by the provisions of the (Criminal) Code" and that the Code prohibits the disclosure of such records. It further submits that the release of the notes to the appellant would disclose the existence of the interception of a private communication, which is prohibited by section 193(1)(b) of the Criminal

Code. The Police conclude that, following the reasoning of Assistant Commissioner Mitchinson in Order P-344, the provisions of the Code relating to wiretap records are operationally incompatible with the Act.

The appellant submits that Order P-344 did not apply the doctrine of federal legislative paramountcy to police officers' notes and that records of this sort were not intended to fall within its application.

The Police and the appellant have confirmed that he received the required notice under section 196 of the Criminal Code and that he is, accordingly, aware of the fact that such interceptions took place. Therefore, I find that the penalty provisions described in section 193(1)(b) of the Code have no application.

The records describe in great detail the efforts undertaken by the Police to secure evidence through the use of wiretaps. I find that regardless of the fact that the notes were taken in relation to the installation, operation and dismantling of a legally-authorized interception, they may not properly be characterized as "wiretap records" within the meaning of the Code. In my view, a "wiretap record" consists of:

1. The information compiled by the Police which is relied upon when an authorization for an interception is sought from the Court, including the application records. This information is sealed by the Court pursuant to the provisions of section 187 of the Code.

2. The information which is actually derived from the interceptions, in the form of tape recordings or transcripts of the intercepted communications. It does not include information which relates to the technical installation, operation and removal of the interception equipment.

As I have found that the records which are at issue in this appeal are not "wiretap records" within the meaning of the Code, the federal doctrine of paramountcy does not operate so as to preclude a request for these records under the Act. There does not, therefore, exist any operational incompatibility between the Code and the Act in relation to these records as they do not fall within the type of records protected from disclosure by the provisions of the Code relating to wiretaps. The Police must, therefore, render to the appellant a decision on access to both the 126 pages of records for which it claimed the doctrine and the remaining 64 pages of records which have not been disclosed to him.

ORDER:

I order the Police to render a decision regarding access to the 126 pages of records which are at issue in this appeal within thirty days (30) days after the date of this order and without recourse to a time extension under section 20 of the Act

Original signed by: October 19, 1995
Donald Hale
Inquiry Officer