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

ORDER PO-2040

Appeal PA-010264-1

Ministry of Community, Family and Children's Services

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NATURE OF THE APPEAL:

The Ministry of Community, Family and Children's Services (formerly the Ministry of Community and Social Services) (the Ministry), received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for "copies of all reviews, audits or investigations carried out by [the Ministry] related to transfer payment agencies, which deliver either residential, day program or workshop services for people with developmental handicaps." The requester also asked for the audit on a particular agency (the agency), which had been denied to him in response to an earlier request under the *Act*.

The Ministry issued a decision granting access to a number of responsive records, and denying access to portions of other records on the basis of section 21(1) (invasion of privacy). As far as records relating to the particular agency were concerned, the Ministry identified that three audits existed, and denied access to them on the basis of the exemption in section 14(1)(a) of the *Act* (interference with a law enforcement matter).

The requester, now the appellant, appealed the Ministry's decision.

The appeal was not resolved through mediation, and it was transferred to the adjudication stage. I sent a Notice of Inquiry to the Ministry, and received representations in response. In the Ministry's representations it identified that a police service (the Police) was involved in the law enforcement matter that raised the section 14(1)(a) issue. I then sent a copy of the Notice to the Police, and received representations. Finally, I sent the Notice to the appellant, along with the representations provided by both the Ministry and the Police, and he submitted representations on the various issues raised in the Notice.

RECORDS:

There are three records at issue in this appeal. They are:

Record 1 - a 50-page "Financial Review" of the agency conducted by the Ministry, dated December 1997

Record 2 - an undated 59-page "Financial Review (Additional Information)" of the agency conducted by the Ministry

Record 3 - a 32-page "Final Report – Financial Management Audit – Phase II" of the agency conducted by the Ministry, dated October 1998

DISCUSSION:

The Ministry's sole basis for denying access to the three records is section 14(1)(a) of the *Act*, which reads as follows:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > interfere with a law enforcement matter;

The purpose of the section 14(1)(a) exemption is to provide an institution with the discretion to preclude access to records in circumstances where disclosure could reasonably be expected to interfere with an **ongoing** law enforcement matter. The institution bears the onus of providing evidence to substantiate that, first, a law enforcement matter is ongoing and second, that disclosure of the records could reasonably be expected to interfere with the matter (See Orders P-324, P-403 and M-1067).

In Order PO-1747, Senior Adjudicator David Goodis stated the following with respect to the words "could reasonably be expected to" in the law enforcement exemption:

> The words "could reasonably be expected to" appear in the preamble of section 14(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

In order for a record to qualify for exemption under this section, the matter to which the record relates must first satisfy the definition of the term "law enforcement" found in section 2(1) of the *Act*. This section states:

> "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 Ministry submits that at the time the appellant made his request, the agency informed the Ministry that a "police investigation was ongoing and that the documents sought by the appellant formed part of that ongoing investigation". After receiving the Notice of Inquiry in this appeal, the Ministry states that it confirmed with the local police force "that the legal activities regarding this case remain active. The police indicate that the investigation has been concluded and that charges have been laid and are pending before the courts". The Ministry does not indicate who has been charged or the nature of the charges.

In responding to the question of whether or not portions of the records could be severed and provided to the appellant without disclosing any portions subject to the section 14(1)(a) exemption claim, the Ministry submits:

> The Ministry is not in a position to consider if part(s) of the records could be severed without disclosing the portions that would be exempt. [The agency] initiated the police investigation into potential wrongdoing of one of their employees. The agency provided several documents, including the ministry audits, to the police at the beginning of their investigation. The ministry is not aware of the details of the investigation and subsequent court action and, therefore, cannot determine which, if any, portions of the records are germane to the legal proceedings.

The Police confirm that criminal charges were laid as a result of its investigation, and that a trial has been scheduled for October 2002. The investigating officer also confirms that the records at issue in this appeal form part of the Crown brief and have been entered as exhibits to be introduced at the trial.

As far as the requirements of section 14(1)(a) are concerned, the Police state that a prosecution under the *Criminal Code* clearly falls within the definition of "law enforcement" as policing activity, and go on to submit:

> The release of evidence to be adduced at trial to any person may be considered, as has been previously decided by the Commissioner's Office, a release to the world. There is no control over what happens to a record once released, and therefore it is possible that the requester might print the details of evidence to be adduced later at trial in a newspaper. Potential jurors in the case might read about the evidence and form an opinion based on what they read that would prejudice the Crown's case in a venue where there is no opportunity for cross-examination or rebuttal. That is the whole purpose of a trial, namely, for the evidence to be heard, examined and weighed by a jury for its credibility.

On the issue of whether any of the records could be severed and partially disclosed, the Police submit:

> In this case it is therefore a reasonable fear that release of any part of [the records] could interfere with the Administration of Justice by prejudicing the outcome of the trial. There is therefore no possibility that any portion of the record could be severed and released as the same argument applies to every portion of the record being introduced as evidence.

In his representations, the appellant points to the seriousness of his request and the extent to which his investigations into the quality of care provided by community living agencies that support people with developmental challenges has received media coverage and generated public debate. He also points to the limitations he has faced in his investigation of the particular agency

whose records are at issue in this appeal, due to the application of the section 14(1)(a) exemption claim by the Ministry.

The appellant submits that if the upcoming trial is by judge alone, the likelihood of disclosure of the records prejudicing the trial would be reduced, since judges "have a time honoured tradition of scrupulously avoiding media coverage of any issue relating to their cases". If it is a jury trial, the appellant acknowledges that "there may be a risk of tainting the jury pool so close to the trial". He goes on to express concern that had the documents been released to him at the time of his request (January 2001), the portions that "deal with the type of care, problems with care, and the ministry response" could have been disclosed without interfering with the pending law enforcement matter.

It is clear that the criminal prosecution matter to which the records relate satisfies the definition of the term "law enforcement" in section 2(1) of the *Act*, and that the law enforcement matter is ongoing. The only remaining issue is whether disclosure of the records, or any portion of them, could reasonably be expected to interfere with this matter.

The Divisional Court has held that, under sections 14(1)(a) and (f) (which is not at issue in this appeal), it is not sufficient for an institution to proceed as if the interference is "self-evident from the record", or to take the position that a request for records relating to a continuing law enforcement matter constitutes a "*per se* fulfilment of the relevant exemptions". However, it is also important to note that in the same judgement, the court made it clear that the section 14(1)(a) law enforcement exemption claim must "be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context" (*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 at 201-202 (Div. Ct.), upholding Order P-534). (See also *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 107 D.L.R. (4th) 454 (Ont. C.A.); leave to appeal to the S.C.C. refused 112 D.L.R. viii.)

I assume from the representations provided by the Police that the upcoming criminal matter will involve a jury trial. However, even if it is a trial by judge alone, in my view, the Police (supported by the Ministry) have provided the level of detailed and convincing evidence necessary to establish a reasonable expectation that disclosure of the records at issue in this appeal could interfere with that law enforcement matter. The Police indicate that the records themselves, in their entirety, have been included in the Crown brief and will be entered as evidence. In addition, the Police have turned their mind to the question of whether some portions of the records could be severed and disclosed without causing interference, and concluded that no such severance is possible in the circumstances, since all portions of the records will be used as evidence. As the Divisional Court points out, it is difficult to predict future events in a law enforcement context, and I accept the Police's position that severing and disclosing portions of any of the records is not feasible in the specific context of this law enforcement matter.

Therefore, I find that the records qualify for exemption under section 14(1)(a) of the *Act* and should not be disclosed prior to the upcoming criminal trial.

ORDER:

I uphold the Ministry's decision.

Original signed by: September 6, 2002
Tom Mitchinson
Assistant Commissioner