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

ORDER PO-2085

Appeal PA-010373-1

Ministry of the Solicitor General

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NATURE OF THE APPEAL:

This is an appeal from a decision of the Ministry of the Solicitor General (the Ministry) (now the Ministry of Public Safety and Security), made under the *Freedom of Information and Protection of Privacy Act* (the *Act*). As background, the requester (now the appellant) sought access to the notes, photographs and final reports prepared by the Office of the Fire Marshal (the OFM), in connection with a specific fire.

The requester is an engineering firm retained by an insurance company, and is engaged in an investigation of a fire at a residential property in March of 2001, which resulted in the death of the owner.

The Ministry located a number of records and denied access to them in their entirety, relying on the discretionary exemption in sections 14(1)(a) and (b) (interference with law enforcement) and the mandatory exemption in section 21(1) of the *Act* (unjustified invasion of personal privacy), with reference to the presumption in section 21(3)(b) and the criterion in section 21(2)(f).

The appellant appealed from the Ministry's decision. During the course of mediation, the appellant agreed to narrow the records at issue in the appeal, so that the ones remaining at issue are those described below.

I sent a Notice of Inquiry to the Ministry and to the Toronto Police Service (the Police), an affected party in the appeal, inviting them to submit representations on the facts and issues raised by the appeal. The appellant was sent the non-confidential portions of the representations of both, and was also invited to and has submitted representations in response.

RECORDS:

There are approximately 71 pages of records in dispute, plus a number of photographs, all generated by the OFM. Apart from the photographs, the records consist of various memoranda, reports, forms, notes and photograph logs.

DISCUSSION:

Introduction

Because of my conclusion that sections 14(1)(a) and (b) apply to exempt the records from disclosure, it is unnecessary to consider the application of the exemption under section 21(1) of the *Act*.

Sections 14(1)(a) and (b) of the *Act* provide:

> A head may refuse to disclose a record where 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;

The exemptions contained in sections 14(1)(a) and (b) of the *Act* provide an institution with the discretion to deny access to records in circumstances where disclosure of the records could reasonably be expected to interfere with an ongoing law enforcement matter or investigation: see, for instance, Order M-1067. The institution bears the onus of providing evidence to substantiate that first, a law enforcement matter or investigation is ongoing and second, that disclosure of the records could reasonably be expected to interfere with the matter or investigation.

In order to establish that the particular harm in question under section 14(1)(a) or (b) "could reasonably be expected" to result from disclosure of the records, the Ministry must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [Order PO-1772; see also 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.)].

Further, in order for a record to qualify for exemption under sections 14(1)(a) or (b), the matter to which the records relate must first satisfy the definition of the term "law enforcement", found in section 2(1) of the *Act*, which 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);

Representations

The Ministry submits that the OFM and the Police, in investigating the circumstances of the fire and the death of the owner of the home, were engaged in "law enforcement" activities, as defined in section 2(1). The Ministry relies on prior decisions of this office, as well as the provisions of the *Fire Protection and Prevention Act* (*FPPA*), the *Police Services Act* and the *Criminal Code*.

With respect to sections 14(1)(a) and (b), the Ministry submits that disclosure of the records at issue would interfere with an ongoing law enforcement matter, in that they are relevant to a matter currently under investigation by the OFM and the Police, which may ultimately result in a future law enforcement proceeding. Release of the records would convey to the appellant (and anyone else it chooses to share the information with) confidential information about the source of the fire, the spread of the fire and the nature and extent of potential evidence that has been compiled by the OFM and the Police.

The Ministry made more detailed representations relating to the interference it submits could reasonably be expected to result from the disclosure of the information in the records. Because of the nature of the submissions made by the Ministry on this issue, I am unable to discuss them in further detail.

The Police also submit that the investigations conducted by both the OFM and the Police are law enforcement investigations. It is said that the fire is being "jointly investigated" by the OFM and the Police Homicide Squad.

On the expectation of harm, the Police submit that the premature release of the records could reasonably be expected to have a detrimental effect on the investigation, the ultimate laying of charges, if such charges become warranted, and the eventual prosecution of the arrested individual(s). It states that should a suspect or involved party to the investigation become aware of the extent or specific contents of information already in the possession of the OFM and the Police, they could flee the jurisdiction. The disclosure could also reveal information that could tip an involved party or suspect as to the direction of the investigation. Premature release of information could provide an opportunity for the suspect to tamper with evidence which the Police and the OFM would have uncovered at a later time. The suspect could also "muddy the waters" of the investigation by providing false information to misdirect the investigation. In other words, it is said, premature release could allow suspects the opportunity to cover their tracks and evade charges.

The Police emphasize that the investigation into the circumstances of the fire and the sudden death of the deceased remains an active investigation. As with the Ministry, the Police provide more detail about the harm that it anticipates could ensue from the release of the information in the records. The Police provide specific information about the state of the investigation and the direction of the investigation in their representations. As with portions of the Ministry's representations, I am unable to discuss these submissions in greater detail.

The appellant submits that the Ministry does not act as a law enforcement agency and is not responsible for the laying of charges, criminal or otherwise. Although the OFM may provide assistance to police when requested, they are not charged with the responsibility of policing. It is said that although it is the OFM's policy to investigate all fires that involve fatalities and/or life threatening injuries or gas explosions when requested, they are required by the *FPPA* to do so. The appellant relies on certain orders of this office which have concluded that fire investigations conducted by the OFM are not law enforcement investigations for the purposes of sections 14(1)(b) and (f) (such as Order PO-1833).

The appellant states that the insurance company and in particular all of the stakeholders that pay for insurance premiums are victims of fraudulent insurance claims. The appellant assists those stakeholders by providing an independent and professional engineering opinion on the cause and origin of fires. The appellant states that the insurance company and in particular all of the stakeholders that pay for insurance premiums are victims of fraudulent insurance claims. The appellant assists those stakeholders by providing an independent and professional engineering opinion on the cause and origin of fires. The appellant submits that the Ministry and the Police suggest that the *Criminal Code* supersedes civil law. However, it is said, the consequences of losing a civil case are far more hurtful than receiving a "suspended sentence" for breaking a criminal law such as "arson".

The appellant also states that disclosure of the records is a "principle of fundamental justice" which has been referenced many times in case law. It provides a copy of *R. v. Bero*, [2000] O.J. No. 4199, a decision of the Ontario Court of Appeal setting aside certain criminal convictions on the basis of a breach of the accused's constitutional rights. The appellant also provides the decision in *Hanes v. Ontario [re R. v. Gagne]*, [1998] O.J. No. 4386, in which a judge of the Ontario Court of Justice (General Division) granted an application under the *Criminal Code* allowing an "interested party" to examine documents seized by police during an investigation.

The appellant also submits that disclosure of records would allow further scrutiny, which ensures that justice is seen to be done. The appellant states that access to the "information to obtain search warrant" is provided freely and contains much of the information in the records.

Finally, the appellant also submitted a copy of an endorsement in an application to the Ontario Superior Court of Justice under section 490(15) of the *Criminal Code*, brought by an insurance company seeking access to certain information for the purposes of making a decision on coverage (*Optimum Frontier Insurance Co. v. Ministry of the Solicitor General, et al.* (September 26, 2002), Cobourg Doc. No. 5671/02).

More recently, the appellant has provided me with further representations, which I have also considered in my deliberations. It is unnecessary to address the appellant's arguments in those representations about the correctness of Order PO-2066, issued recently and dealing with similar circumstances, as Order PO-2066 was decided under section 21(1) of the *Act*, and did not consider the application of section 14(1). Further, to the extent that the appellant raises, for the first time, the application of section 23 of the *Act* (the "public interest override"), that section does not operate to override the exemption in section 14(1).

Analysis

On the basis of the evidence and representations before me, I am satisfied that there is an ongoing law enforcement investigation by the Police, which could result in charges under the *Criminal Code*. It is not necessary for me to decide whether the investigations of the OFM and the Police are indeed being conducted on a "joint" basis (which is disputed by the appellant) and, if they are, whether this would be sufficient to characterize what are otherwise non-law enforcement related activities by the OFM (see PO-1833), as law enforcement matters for the

purpose of section 14(1). The investigation by the Police is certainly a law enforcement investigation, and the information before me establishes that this investigation is "ongoing".

In determining whether the disclosure of OFM records could reasonably be expected to interfere with that law enforcement investigation, the provisions of section 14(1)(a) or (b) do not require that the OFM be the agency conducting the investigation. I am satisfied that disclosure of the records could reasonably be expected to interfere with the law enforcement investigation by the Police. I find that the representations of the Police and of the Ministry provide detailed and convincing evidence establishing a reasonable expectation of probable harm. Although, as I have indicated, I am unable to describe these representations in full, the information provided as to the nature and state of the investigation is compelling on this issue.

In sum, I conclude that the records meet the requirements for exemption under sections 14(1)(a) and (b) of the *Act*.

As I have indicated, section 14(1) is a discretionary exemption. Although I have rejected the appellant's arguments against the application of section 14(1), some of them may be relevant to the exercise of discretion by the Ministry under section 14(1). The appellant, suggests, for instance, that the Ministry should not assume that criminal law interests are more important than civil law interests, by shielding information relevant to a criminal investigation from parties (such as itself) engaged in the resolution of civil claims. In addition to its representations on this issue, the appellant has provided a copy of a recent court endorsement (*Optimum Frontier Insurance Co.*, above) which discusses the competing criminal and civil interests engaged by (in that case) an arson investigation. In that decision, the court applied section 490(15) of the *Criminal Code*, which provides:

> Where anything is detained pursuant to subsections (1) to (3.1), a judge of a superior court of criminal jurisdiction, a judge as defined in section 552 or a Provincial court judge may, on summary application on behalf of a person who has an interest in what is detained, after three clear days notice to the Attorney General, order that the person by or on whose behalf the application is made be permitted to examine anything so detained.

In the application before the court, the insurance company wished to have access, under section 490(15), to information seized during a criminal investigation. The court agreed with the insurer that it should not be expected to wait indefinitely for a criminal investigation to be completed, before making its decision on coverage. It granted some relief to the insurance company, but adjourned the balance of the application to allow the police to complete their investigation uncompromised. I have no information before me as to the specific nature of the relief granted to the insurer.

The effect of a denial of access under the *Act* on the ability of an insurer to fulfil its responsibilities under the *Insurance Act* may be a relevant consideration to the exercise of discretion under section 14(1). However, the availability of another avenue to obtain information

relating to the investigation, through an application under section 490(15) of the *Criminal Code*, may well provide a countervailing consideration.

With respect to the appellant's submissions on "fundamental justice", I am not convinced that they are relevant here. An accused's rights to have disclosure of the Crown's case are quite distinct from the interests being advanced by the insurer in this appeal.

The appellant also submits that the "information in support of the search warrant" is provided freely and contains much of the information in the records. If indeed some of the information in the records is publicly available, as suggested by the appellant, this might also be a consideration relevant to the exercise of discretion under section 14(1). However, the appellant has provided no evidence in support of this contention.

The Ministry has made submissions supporting its decision to exercise its discretion against providing access. In all of the circumstances, having regard to the Ministry's submissions on this issue as well as the facts of this case, I am satisfied that it has exercised its discretion appropriately in refusing access to the records.

ORDER:

I uphold the Ministry's decision.

Original signed by: December 11, 2002
Sherry Liang
Adjudicator