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

ORDER MO-1754

Appeal MA-030060-1

Halton Regional Police Services Board

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NATURE OF THE APPEAL:

This appeal concerns a decision of the Halton Regional Police Services Board (the Police) made pursuant to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) submitted the following request to the Police:

> Please confirm nature and extent of surveillance, if any, concerning me, our premises above, and otherwise during the past 5+ years.

In their response, the Police, pursuant to section 8(3) of the *Act*, refused to confirm or deny the existence of responsive records.

The appellant appealed the Police's decision.

During the mediation stage of the appeal process the Police stated that if records do exist they would qualify for exemption under sections 8(1) or 8(2) (law enforcement) of the *Act*; they cited the possible application of paragraphs (c), (d), (e), (g) and (l) of section 8(1) and paragraph (a) of section 8(2).

No further progress was made during mediation.

I first sought and received representations from the Police. In addition to making submissions on the application of the above paragraphs, the Police also raised for the first time the application of paragraphs (a) and (b) of section 8(1). The non-confidential portions of the Police's representations were shared with the appellant who was then given an opportunity to make submissions. The appellant chose not to submit representations.

DISCUSSION:

REFUSAL TO CONFIRM OR DENY EXISTENCE OF RECORDS AND THE LAW ENFORCEMENT EXEMPTION

Introduction

Section 36(1) of the *Act* provides individuals with a general right of access to their own personal information in the custody or under the control of an institution. However, this right of access under section 36(1) is not absolute; section 38 provides a number of exceptions to this right. In particular, under section 38(a), a head may refuse to disclose to the individual to whom the information relates personal information where, among others, section 8 would apply to the disclosure of that information.

The Police rely on section 8(3) of the *Act* as the basis for its decision to refuse to confirm or deny whether any responsive records exist. Section 8(3) of the *Act* permits an institution to refuse to confirm or deny the existence of a record to which section 8(1) or (2) applies. In this case, the Police claim that paragraphs (a), (b), (c), (d), (e), (g) and (l) under section 8(1), and paragraph (a) of section 8(2) are applicable to records of the nature requested, should they exist.

In Order P-255 Assistant Commissioner Tom Mitchinson made some general comments about the purpose and application of section 14(3) of the *Act* [section 14(3) is the provincial *Act* equivalent of section 8(3)]:

> By including section 14(3) the legislature has acknowledged that, in order to carry out their mandates, certain institutions involved with law enforcement activities must have the ability, in the appropriate circumstances, to be less than totally responsive in answering requests for access to government-held information. However, as the members of the Williams Commission pointed out in Volume II of their report entitled Public Government for Private People, The Report of the Commission on Freedom of Information and Protection of Privacy/1980 at page 301, it would be a rare case in which the disclosure of the existence of a file would communicate information to the requester which may frustrate an ongoing investigation or intelligence-gathering activity.

In Order P-344, Assistant Commissioner Mitchinson stated the following with respect to the interpretation and application of section 14(3):

> A requester in a section 14(3) situation is in a very different position than other requesters who have been denied access under the Act. By invoking section 14(3), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power which I feel should be exercised only in rare cases.
>
> In my view, an institution relying on section 14(3) 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). An institution must provide detailed and convincing evidence that disclosure of the mere existence of the requested records would convey information to the requester which could compromise the effectiveness of a law enforcement activity.

I adopt the principles set out in the above-cited decisions of Assistant Commissioner Mitchinson for the purpose of this appeal. In my view, before the Police may be permitted to exercise their discretion to invoke section 8(3), they must provide sufficient evidence to establish that:

1. The records (if they exist) would qualify for exemption under sections 8(1) or (2); and

2. Disclosure of the fact that records exist (or do not exist) would in itself convey information to the appellant that could compromise the effectiveness of a law enforcement activity that may exist or may be reasonably contemplated.

Part one: disclosure of the records (if they exist)

Under part one of the section 8(3) test, the Police must demonstrate that the records, if they exist, would qualify for exemption under section 8(1), paragraphs (a), (b), (c), (d), (e), (g) and/or (l), and/or under section 8(2)(a).

I will begin by considering whether sections 8(1)(a) and/or (g) apply to the records, if they exist. Sections 8(1)(a) and (g) read:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to
>
> (a) interfere with a law enforcement matter
>
> (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons

The Police submit that if an investigation involving the appellant was underway disclosure of surveillance records created as part of that investigation could reasonably be expected to interfere with the investigation. The Police state further that confirming their existence would by its very nature interfere with the gathering of or reveal law enforcement intelligence information.

With respect to section 8(1)(g), the Police make reference to a definition of "intelligence" articulated by former Inquiry Officer Asfaw Seife in Order M-202. In that order, Inquiry Officer Seife stated:

> In my view, for the purposes of section 8(1)(g) of the *Act*, "intelligence" information may be described as information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violation of law, and is distinct from information which is compiled and identifiable as part of the investigation of a specific occurrence.

The Police state that information contained within a Police intelligence file is highly confidential and extremely sensitive. A file of this nature often includes surveillance and the personal information of individuals other than the target individual. In the Police's view, disclosure of the existence of surveillance or confidential sources of information would undermine the effectiveness of an investigation and jeopardize its final outcome and/or proceedings that might result from it.

In their representations, the Police make reference to portions of former Commissioner Sidney B. Linden's Order 106, involving a request for "OPP Criminal Intelligence Records". In that decision former Commissioner Linden states:

> The "OPP Criminal Intelligence Records" are records related specifically to police investigations. Disclosing the contents of such records could, for example, "interfere with a law enforcement matter", "interfere with an investigation", "reveal law enforcement intelligence information respecting organizations or persons" or reveal the contents of a "report prepared in the course of law enforcement, inspections or investigations".
>
> Based on the representations made by the institution regarding the nature and general content of such records, I am satisfied that if such a record relating to the appellant existed, access to the record could be refused by the head under either subsection 14(1) or (2) of the *Act*.

In my view, the Police have provided sufficient evidence to establish that records of the nature requested would constitute either law enforcement investigation or intelligence information, and that disclosure of the records, if they existed, would interfere with a law enforcement matter, or interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons. My finding is based, in part, on the principles outlined in Orders 106 and M-202 cited above. Accordingly, records of the nature requested would be exempt under sections 8(1)(a) and (g).

Since I have found that sections 8(1)(a) and (g) would apply to records of the nature requested, it is not necessary for me to make a finding with respect to the applicability of the remaining sections claimed by the Police.

Therefore, I find that the part one of the test under section 8(3) has been established.

Part two: disclosure of the fact that records exist (or do not exist)

Under part two of the test, the Police must demonstrate that disclosure of the fact that records exist (or do not exist) would in itself convey information to the appellant which could compromise the effectiveness of a law enforcement activity which may exist or may be reasonably contemplated.

Given the nature of the request and the principles cited above as derived from Orders 106 and M-202, and in light of the Police's representations, I am satisfied that disclosure of the fact that responsive records exist or do not exist would in itself convey information to the appellant which could compromise the effectiveness of any law enforcement activity which may exist or may be reasonably contemplated.

Accordingly, the Police have established the requirements for section 8(3), subject to any findings I may make below under "exercise of discretion".

Exercise of discretion

In his Order P-344, Assistant Commissioner Mitchinson stated the following with respect to the exercise of discretion under section 14(3):

> In considering whether or not to apply sections 14(3) and 49(a), a head must be governed by the principles that information should be available to the public; that individuals should have access to their own personal information; and that exemptions to access should be limited and specific. Further, the head must consider the individual circumstances of the request. These considerations would include whether an investigation exists or is reasonably contemplated, and if there is an investigation, whether disclosure of the existence of records would interfere with the investigation. If no investigation exists or is contemplated, the head must be satisfied that some other provision of sections 14(1) or (2) applies to the record, and must still consider whether disclosure would harm the interests protected under the specific provision of section 14.

Considering the Police's representations and all of the circumstances of this case, I am satisfied that the Ministry properly considered all of the relevant circumstances in accordance with the guidelines set out in Order P-344.

ORDER:

I uphold the decision of the Police.

Original Signed By: February 13, 2004
Bernard Morrow
Adjudicator