



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER MO-1942**

**Appeal MA-040378-1**

**Toronto Police Services Board**



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## **NATURE OF THE APPEAL:**

The Toronto Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) for access to records relating to a report that was made between February 2, 2003 and February 26, 2003 alleging that the requester was in possession of a loaded firearm.

In their decision, the Police refused to confirm or deny the existence of a record, pursuant to section 8(3) of the Act.

The requester (now the appellant) appealed the decision of the Police. Mediation was not successful and the matter was moved to the adjudication stage of the appeals process.

I sought and received the representations of the Police, initially. I then provided the appellant with a Notice of Inquiry, soliciting his submissions on the issues in the appeal. Because of the confidential nature of the submissions made by the Police, I also provided the appellant with a summary of their contents. The appellant provided me with representations, which were shared with the Police, who then made additional submissions by way of reply.

## **DISCUSSION:**

### **REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF A RECORD**

#### **General principles**

Section 8(3) states:

A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) applies.

This section acknowledges the fact that in order to carry out their mandates, in certain circumstances, law enforcement agencies must have the ability to be less than totally responsive in answering requests for access to information. However, it would be the rare case where disclosure of the existence of a record would communicate information to the requester that would frustrate an ongoing investigation or intelligence-gathering activity [Orders P-255, P-1656].

For this provision to apply, an institution must provide detailed and convincing evidence to establish that disclosure of the mere existence of records would convey information that could compromise the effectiveness of a law enforcement activity [P-344].

For section 8(3) to apply, the institution must demonstrate 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 itself convey information that could reasonably be expected to compromise the

effectiveness of an existing or reasonably contemplated law enforcement activity.

[Order P-1656]

### **Representations of the parties**

As noted above, the Police provided me with representations supporting their contention that the records, if they exist, fall within the ambit of section 8(3). The Police indicate that records of the sort requested, if they exist, would be exempt from disclosure under sections 8(1)(b), (c), (d), (e), (g) and (l). Because of their confidential nature, I am unable to describe those representations in greater detail in this order. However, I am able to summarize their contents as follows:

- records of the sort requested, if they exist, may contain information that would fall within the ambit of one of the exemptions in sections 8(1) or (2);
- the very acknowledgment of the existence or non-existence of responsive records would disclose information that would fall within the ambit of one of the exemptions in sections 8(1) or (2).

The appellant submits that over the past several years, he and others driving his vehicles have been stopped and searched by police officers. He also indicates that on those occasions, he has been advised by police officers that “the basis for the search is a report that he is in possession of a loaded firearm.” The appellant submits that he has never been the subject of a search warrant and that:

The [P]olice therefore have no basis of having any investigation compromised as [the appellant] has been searched more than 15 times in the past two years without results. There is no basis for an investigation and we should not rely on their word without a satisfactory basis.

Under the test the Police must meet they must demonstrate that disclosure of the existence of the fact the records exist would itself convey information which would compromise an investigation. They have not done anything in this case but merely parrot a statement with no foundation. In effect the [P]olice could block any question regarding a record by claiming [that] divulging the existence of a record will in itself provide information that would compromise the effectiveness of a law enforcement activity.

I note that the appellant was provided with only my summary of the Police representations, which more fulsomely described the position they have taken with respect to the application of section 8(3) to any responsive records, if they exist.

## **Findings**

### ***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)(b), (c), (d), (e), (g) and/or (l). I will begin by considering whether section 8(1)(g) applies to records containing the type of information sought by the appellant, if they exist. Section 8(1)(g) states:

A head may refuse to disclose a record if the disclosure could reasonably be expected to

interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons

With respect to section 8(1)(g), the Police make reference to the definition of “intelligence” articulated by former Adjudicator Asfaw Seife in Order M-202. In that order, Adjudicator 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.

As noted above, the Police have also provided additional submissions which, because of their confidential nature, I am unable to reproduce in this order. In my view, the Police have provided sufficient evidence to establish that records of the nature requested, if they exist, would contain intelligence information, and that the disclosure of the records, if they existed, would interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons. Accordingly, I conclude that records of the nature requested, if they existed, would be exempt under section 8(1)(g).

Since I have found that section 8(1)(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 section 8 exemptions claimed by the Police. In conclusion, I find that the part one of the test under section 8(3) has been established by the Police.

### ***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 very 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.

Again, I am unable to describe in detail the representations of the Police on this aspect of the test under section 8(3). However, based on the representations of the Police, I am satisfied that the 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 a law enforcement activity which may exist or may be reasonably contemplated. I am unable to elaborate on this finding any further in this order owing to the confidential nature of the Police representations.

Accordingly, I conclude that 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), the equivalent provision to section 8(3) in the provincial *Act*:

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.

On the basis of the confidential submissions of the Police and the circumstances of this appeal, I am satisfied that the Police properly considered all of the relevant circumstances in accordance with the guidelines set out in Order P-344 and exercised their discretion appropriately.

### **ORDER:**

I uphold the decision of the Police.

Original signed by: \_\_\_\_\_

Donald Hale  
Adjudicator

July 19, 2005 \_\_\_\_\_