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

ORDER PO-2507

Appeal PA-060021-1

Ministry of Community Safety and Correctional Services

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received a request under the *Freedom of Information of Protection of Privacy Act* (the *Act*) for access to the following information:

- A copy of all records including computerized data, pertaining to investigations on [the requester] including 1998 and including the Combined Forces Special Enforcement Unit.
- Confirmation as to whether [three named individuals] were OPP [Ontario Provincial Police] officers during 1998.

The request was subsequently clarified by the requester to identify where records may exist. The requester identified three OPP detachments that may have responsive records, and also specified that the following branches of the OPP may have responsive records:

- Intelligence Bureau
- Provincial Anti-Terrorism Section
- Special Services Section
- Drug Enforcement Section
- Anti-rackets
- Organized Crime

The appellant's clarified request also stated:

> I am interested in the period in or about January 1996 to the present. I am specifically interested in any ongoing investigations which were occurring in the Spring and Summer of 1998.

The Ministry responded to the clarified request by letter which stated:

> Your [letter of clarification] indicates that you believe three Ontario Provincial Police Detachments and six OPP bureaus or sections possess records concerning yourself. Please be advised that the existence of the requested information cannot be confirmed or denied in accordance with sections 14(3) [law enforcement records] and 21(5) [invasion of privacy] of the *Act*.

In its decision letter, the Ministry also referred the requester to the Royal Canadian Mounted Police for information relating to the Combined Forces Special Enforcement Unit, as that unit "falls under the purview of the [RCMP]".

The requester (now the appellant) appealed the Ministry's decision.

Mediation did not resolve any of the issues in this appeal, and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the Ministry, initially, identifying the issues in this appeal and inviting the Ministry to provide representations in support of its position. In addition, I identified that, as the request is for information relating to the requester, the possible application of sections 49(a) and (b) of the *Act* was raised in this appeal. Accordingly, I included the possible application of these exemptions as issues in the Notice of Inquiry.

The Ministry responded to the Notice of Inquiry by providing representations on the issues. I then sent the Notice of Inquiry, along with a complete copy of the Ministry's representations, to the appellant, who also provided representations in response.

DISCUSSION:

PRELIMINARY MATTER

Scope of the Request

As a preliminary matter, in her representations the appellant refers to additional information relating to certain events in 1998 which was not referred to by her in her initial request or the subsequent clarification of the request. The appellant then states that the clarification of her request which she provided to the Ministry in some ways made her request broader, and she takes the position that the Ministry, in refusing to confirm or deny the existence of responsive records, is doing so based on the clarified request. The appellant states that "her initial request should have provided the [Ministry] with enough information to retrieve information". As I understand her submissions, the appellant appears to be taking the position that I should not refer to her clarified request, as she ought not to have clarified her request in the first place.

I do not accept the position of the appellant. In this appeal, the appellant clarified her request and specifically identified the detachments, branches and timeframes covered by her request. This clarified request was the basis upon which the Ministry made its decision, which resulted in this appeal. The clarified request was also referred to by the mediator in the Mediator's Report, which the appellant was invited to comment on. She chose not to do so, and the clarified request is referred to in the Notice of Inquiry I sent to the parties. The Ministry made its representations based on the clarified request, and now that the Ministry's representations are shared with the appellant, the appellant appears to be arguing that her request ought not to have been clarified in the first place.

In my view, in the circumstances of this appeal, it is too late for the appellant to take the position that she ought not to have clarified her request. Although she could have taken issue with the Ministry's invitation to her to clarify her request when that invitation was first made, or could have raised this as an issue in the course of the mediation of this appeal, to raise this issue at this point in the appeal would require the appeal to be revisited from the start, in order to determine whether the clarification has any impact on the outcome of this appeal. In my view, to allow the appellant to re-characterize her request at this stage of the process would compromise the integrity of the appeals process itself by allowing a party to unilaterally frustrate the timely resolution of the issues raised in the appeal.

As a result, I will consider the issues in this appeal taking the appellant's request as it was specifically clarified by her.

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF A RECORD UNDER SECTION 14(3)

General principles

Section 47(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 47(1) is not absolute; section 49 provides a number of exceptions to this right. In particular, under section 49(a), a head may refuse to disclose to the individual to whom the information relates personal information where, among others, section 14 would apply to the disclosure of that information.

For the purposes of my analysis below, and given the nature of the first part of the request, which is for information "pertaining to the requester", I will assume that some responsive records, if they existed, would contain the appellant's personal information. In that situation, the analysis of section 14, including section 14(3), would be made in the context of section 49(a). With respect to records, if they existed, which would not contain the appellant's personal information, the analysis would simply be conducted under section 14 alone. To simplify this discussion, however, I will focus on section 14 itself, and will not refer to section 49(a) again.

The Ministry relies on section 14(3) of the *Act* as the basis for its decision to refuse to confirm or deny whether any responsive records exist. That section reads as follows:

> A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) [of section 14] applies.

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

> 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.

Section 14(3) is one of two "refuse to confirm or deny" provisions in the *Act*. The other appears at paragraph (5) of the section 21 personal privacy exemption.

In a recent decision, the Court of Appeal for Ontario considered the interpretation of section 21(5) [see *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)* (2004), 73 O.R. (3d) 321 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 95]. The Court of Appeal held that to exercise its discretion to invoke section 21(5), the institution must show that disclosure of the mere existence of the record would itself be an unjustified invasion of personal privacy. The effect of this interpretation is that the

institution may not invoke section 21(5) where disclosure of the mere existence of the record would not itself engage a privacy interest.

In keeping with that court decision and previous orders of this office, similar considerations apply regarding section 14(3) (see Order PO-2450). Therefore, an institution may exercise its discretion to invoke section 14(3) only where disclosure of the mere existence of the record itself could reasonably be expected to harm one of the interests sought to be protected by section 14(1) and (2).

Accordingly, an institution must provide sufficient evidence to establish both of the following requirements before it may be permitted to exercise its discretion to invoke section 14(3):

1. the record (if it exists) would qualify for exemption under sections 14(1) or (2); and

2. disclosure of the fact that the record exists (or does not exist) would in itself convey information to the requester, and disclosure of that information could reasonably be expected to harm one of the interests sought to be protected by sections 14(1) or (2).

Part One: Would the records (if they exist) qualify for exemption under section 14(1)?

In support of section 14(3), the Ministry relies on a number of the sections set out in section 14(1), including 14(1)(g) which reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

> "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)

Generally, the law enforcement exemption 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 (Div. Ct.)].

Except in the case of section 14(1)(e), where section 14 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

Section 14(1)(g): law enforcement intelligence information

The term "intelligence information" has been defined in previous orders 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 violations of law. It is distinct from information compiled and identifiable as part of the investigation of a specific occurrence [Orders M-202, MO-1261, MO-1583].

The Ministry states that, with respect to section 14(1)(g), disclosure of the requested records, should they exist, would interfere with the gathering of or could reveal law enforcement intelligence information respecting organizations or persons. The Ministry then states:

> In Order M-202 former Inquiry Officer Asfaw Seife, referred to … Volume II of *Public Government for Private People, the Report of the Commission on Freedom of Information and Protection of Privacy/1980* at pages 298-99 as characterizing intelligence information, in part, as follows:
>
> > … intelligence information may be distinguished from investigatory information by virtue of the fact that the former is generally unrelated to the investigation of the occurrence of specific offenses. For example, authorities may engage in surveillance of the activities of persons whom they suspect may be involved in criminal activity in the expectation that the information gathered will be useful in future investigations. In this sense, intelligence information may be derived from investigations of

> previous incidents which may or may not have resulted in trial and conviction of the individual under surveillance. Such information may be gathered through observation of the conduct of associates of known criminals or through similar surveillance activities.
>
> The bureaus/sections listed by the appellant in her request include the OPP Intelligence Bureau, Provincial Anti-Terrorism Section and Organized Crime Section. …

The Ministry then provides supporting background information identifying the types of law enforcement activities undertaken by the bureaus listed by the appellant, and then states:

> Intelligence information and evidence on substantive criminal offences is gathered for purposes relating to the maintenance of law and order and for ensuring the safety of communities. The gathering of intelligence information helps police agencies to take a pro-active approach in regard to persons of interest, and criminal activities of interest. Such information is treated as highly confidential, and is disclosed within the law enforcement community on an absolute need to know basis.
>
> Intelligence information is a valuable police tool. Intelligence information is used by law enforcement agencies to develop appropriate strategies to make communities safe and secure. For example, the identification of the substance of, or sources of intelligence information, could have serious … repercussions for police officers and/or confidential informants, agents and other sources of information. Release of such information could result in those sources no longer providing such information out of concern for the possibility of reprisals in some circumstances. This would interfere with the ability of the OPP to continue gathering valuable intelligence information. Maintaining the confidentiality of law enforcement intelligence information provided by or supplied to sources is essential to the ongoing partnership between the OPP and other law enforcement partners.

In response to the Ministry's representations, the appellant submits that the information she is seeking relates only to an investigation. She provides some additional information about a specific incident, and then states that the information she is seeking is identifiable as part of the investigation of a specific occurrence. Later in her representations, the appellant again suggests that the focus of her request relates to information about an incident which occurred a number of years ago.

I do not accept the position taken by the appellant. As identified above, the appellant's own clarified request provided the Ministry with the scope of the information sought by the appellant. This request is for a very wide range of information held by the OPP covering the period from 1996 to the date of the request, a period of almost 10 years, and includes information held by the

OPP's Intelligence Bureau, Provincial Anti-Terrorism Section, Special Services Section, Drug Enforcement Section, Anti-rackets and Organized Crime sections. In my view, a request of this nature cannot be characterized as a request for information "compiled and identifiable as part of the investigation of a specific occurrence", but rather may include a wide range of records covering that period.

I find that the Ministry has 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, could reasonably be expected to 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 14(1)(g). Part 1 of the test under section 14(3) is therefore met.

Part Two: Disclosure of the fact that records exist (or do not exist) would in itself convey information to the appellant and this could harm a section 14(1) or (2) interest

Under part two of the test, the Ministry must demonstrate that disclosure of the mere fact that a record exists (or does not exist) would in itself convey information to the requester, and disclosure of that information could reasonably be expected to harm one of the interests sought to be protected by sections 14(1) or (2).

The Ministry submits:

> To disclose that intelligence information exists or does not exist in certain law enforcement contexts, could frustrate ongoing law enforcement activities, and benefit those who are the subjects of such activities. To reveal the existence of such information would provide an opportunity for individuals to cease their activities, disappear, or to introduce false information which could be intercepted by law enforcement agencies, resulting in a waste of investigative resources.

In support of its position, the Ministry also refers to Order P-106, in which former Commissioner Sidney B. Linden upheld the application of section 14(3) to intelligence information responsive to a request for records covering a time span of a number of years.

Later in its representations, the Ministry also states:

> Merely confirming the existence or non-existence of the requested … records would reveal to the appellant whether or not she is a person of ongoing interest to the OPP. An individual could use this information to modify his/her behaviour, associations, activities, etc. in order to avoid attracting either further or future attention from law enforcement officials.

The appellant takes the position that the Ministry's representations in support of its application of section 14(3) are not sufficiently detailed to support a finding that section 14(3) ought to apply in the circumstances.

Based on the representations of the Ministry, 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, and disclosure of that information could reasonably be expected to harm one of the interests sought to be protected by sections 14(1) or 14(2); in particular, the interest protected by section 14(1)(g). Accordingly, I conclude that the Ministry has established both requirements for section 14(3), subject to my findings below under "exercise of discretion".

Exercise of discretion

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

The Ministry has identified the factors it considered in exercising its discretion to apply section 14(3) in this appeal. These factors include the broad nature of the information requested, the lack of a contextual basis for the appellant's request, the uncertainty as to the "ongoing investigations" referred to by the appellant, and the historic practice of the Ministry when considering requests for this type of information. The Ministry also identifies that it exercises its discretion to apply section 14(3) "very rarely" in the context of the large number of requests it receives every year.

Although she does not provide documentation supporting her position, nor outlining the nature of the requests she has made, the appellant indicates that she has made requests of other institutions and that none of the other institutions has refused to confirm or deny the existence of records. The appellant also states her concern that the Ministry could misuse the discretionary exemption in section 14(3) and apply it to all manner of requests.

On my review of the representations provided by the parties and in the circumstances of this appeal, particularly the broad nature of the information requested by the appellant and the nature

of the bureaus and sections of the OPP referenced by her in her request, I am satisfied that the Ministry properly considered all of the relevant circumstances and exercised its discretion appropriately. Accordingly, I uphold the Ministry's decision to refuse to confirm or deny the existence of records on the basis of the exemption in section 14(3) of the *Act*.

Having found that section 14(3) applies, it is not necessary for me to review the possible application of section 21(5) or section 49(b) of the *Act* in this appeal.

ORDER:

I uphold the decision of the Ministry.

Original signed by: September 27, 2006
Frank DeVries
Adjudicator