ORDER PO-2459

Appeal PA-040324-1

Ministry of Community Safety and Correctional Services

NATURE OF THE APPEAL:

Under the *Freedom of Information and Protection of Privacy Act* (the *Act*), the Ministry of Community Safety and Correctional Services (the Ministry) received a request from an individual for the following:

> Any and all information about myself received and used by the Ontario Provincial Police which has been received by, from, or shared with, other agencies, in particular the Ottawa Police Service's Biker Enforcement Unit, such as correspondence, notes, e-mails, telex, data entries on CPIC/CRPQ, photographs, video recordings, voice recordings, memos, etc.

The requester made a related request to the Ottawa Police Services (the Police) and the response of the Police is the subject of Appeal file MA-040267-1.

In its decision letter in this appeal, the Ministry stated that the existence of any record used or held by the Biker Enforcement Unit could not be confirmed or denied in accordance with section 14(3) of the *Act* but if the requested information did exist it would be subject to the law enforcement exemptions at sections 14(1)(a) and (g) of the *Act*.

The requester (now the appellant) appealed the decision.

Mediation did not resolve the matter and it moved to the adjudication stage.

Section 14(3) is one of a small number of "refuse to confirm or deny" provisions in the *Act*. A similar provision appears at paragraph (5) of the section 21 personal privacy exemption.

When this appeal was referred to adjudication, the Ontario Court of Appeal was considering the interpretation of section 21(5). The Court's decision is reported in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813 (C.A.) (*Minister of Health*). Since the outcome of the Court of Appeal decision could impact the resolution of this appeal, I placed this appeal on hold pending the outcome of that case. After the Court of Appeal released its decision in *Minister of Health* and the Supreme Court of Canada dismissed an application for leave to appeal the Court of Appeal's ruling [2005 S.C.C.A. No. 95], this appeal was re-activated.

I then sent a Notice of Inquiry to the Ministry, initially, seeking representations on the issues in the appeal. The Ministry provided representations in response. I then sent the Notice of Inquiry, along with the complete representations of the Ministry, to the appellant, who provided representations in response. As the appellant's representations raised issues to which I determined the Ministry should be given an opportunity to reply, I sent the representations along with a covering letter to the Ministry. The Ministry filed representations in reply.

DISCUSSION:

The Biker Enforcement Unit (BEU)

The Ministry explains that the BEU is a joint Ontario police force unit with representatives from various Ontario police agencies. It states that the Organized Crime Section of the Ontario Provincial Police Investigation Bureau provides the overall management umbrella for the BEU. It says that the mandate of the BEU includes:

> Gathering intelligence and evidence on substantive criminal offences to support prosecutions under the *Criminal Code of Canada* relating to "Criminal Organization Offences".
>
> To create efficiencies in the way policing resources are utilized, by maximizing collective law enforcement efforts against "Outlaw Motorcycle Gangs" in Ontario.
>
> To conduct investigations into the illegal activities of "Outlaw Motorcycle Gangs", with a view towards criminal enforcement.

As set out in materials included in the Ministry's representations, the RCMP Gazette defines "Outlaw Motorcycle Gangs" as "any group of motorcycle enthusiasts who have voluntarily made a commitment to band together and abide by their organizations' rigorous rules enforced by violence, who engage in activities that bring them and their club into serious conflict with society and the law".

The Ministry states that in response to the activity of "Outlaw Motorcycle Gangs" in Ontario, the BEU continues to monitor and gather intelligence information on them. It says that the BEU often participates in "Road Checks" of individuals including members and associates of "Outlaw Motorcycle Gangs".

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF A RECORD

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 request, I will assume that 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 in the context of section 49(a). 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.

Section 14(3) of the *Act* 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.

Section 14(3) acknowledges the fact that in order to carry out their mandates, in certain circumstances, law enforcement agencies and other institutions must have the ability to be less than totally responsive in answering requests for access to records to which sections 14(1) or (2) apply. However, it would be the rare case where disclosure of the existence or non-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].

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.

As explained earlier, section 21(5) is a similar "refuse to confirm or deny" provision in the *Act*.

In the *Minister of Health* case cited above, the Court of Appeal for Ontario considered the interpretation of section 21(5) of the *Act*. The Court held that in order to exercise its discretion to invoke section 21(5), the institution must show that disclosure of the mere existence or non-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) of the *Act* where disclosure of the mere existence or non-existence of the record would not itself engage a privacy interest.

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

The Representations of the Appellant

In his representations, the appellant states that he is seeking information relating to an occasion when he was stopped along with fellow motorcyclists by the BEU on an unspecified date in 2004. He recounts the events in an affidavit included with his representations. His position is that this was an arbitrary interception and detention. His request is for any information that was generated from that event.

He says that on that date he was videotaped. He also says that information from his driver's licence and motorcycle registration was recorded in writing and on videotape. He submits that at the moment of his interception and detention there was no specific criminal activity being committed or investigated. He also submits that if there was an ongoing criminal investigation there was no connection between himself and the subject of the investigation.

Although he recognizes the importance of steps to combat "Outlaw Motorcycle Gangs", it is the appellant's position that the purpose for which his personal information was obtained was not legitimate and its collection, use and disclosure contravenes the *Act* and the *Canadian Charter of Rights and Freedoms* (the *Charter*). The appellant submits that in accordance with the remedial provisions in section 24(2) of the *Charter*, the information collected that day should not be used or disclosed and should be deleted. Alternatively, the appellant submits that he should be allowed to access any personal information that the Ministry has so that he can verify its accuracy. He also submits that he cannot exercise his rights to verify the accuracy of information or, I assume, to correct information under section 47(2) of the *Act*, unless he knows whether the information exists in a record. I will address these arguments at the end of this order, after considering the application of section 14(3).

The appellant also refers to parts of sections 38, 39 and 41 of the *Act*, which regulate the collection and use of personal information by the Ministry. These sections are not determinative in the context of section 14(3).

The appellant submits that, in any event, the Ministry has not shown that identifying whether follow-up records exist would actually or seriously prejudice the effectiveness of law enforcement activity.

The Representations of the Ministry

The Ministry relies on section 4(2)2 of the *Police Services Act* which sets out that "law enforcement" is one of the core services provided by the BEU. The Ministry submits that information that would be contained in the record, if it existed, would have been received and used by the BEU in its ongoing law enforcement activities and is "intelligence information" which relates to "policing" and to investigations the BEU conducts. The Ministry submits that disclosure of the record, if it exists, would interfere with an ongoing law enforcement matter, namely the BEU's response to "Outlaw Motorcycle Gang" activity in Ontario. The Ministry says that any information, if it exists, would have been collected for the purpose of law enforcement in accordance with section 39(g) of the *Act*.

The Ministry further submits that, in accordance with its mandate, the BEU gathers intelligence information for the maintenance of law and order. The Ministry states that gathering this type of information helps police agencies to take a pro-active approach with respect to law enforcement.

The Ministry submits that the content of an intelligence file is sensitive and highly confidential and is disclosed within the law enforcement community only on an absolute need to know basis.

The Ministry submits that, in a general sense, disclosure of information collected during intelligence gathering, if it exists, could have a number of consequences. This would include health and safety repercussions for the police and/or their confidential sources, and sources no longer providing the information out of fear of reprisal. The Ministry submits that a reluctance of sources to share intelligence and investigative information would compromise the ability of the BEU to carry out its mandate and benefit those engaged in criminal activity.

The Ministry further submits that just confirming the existence of records would interfere with the gathering of or reveal law enforcement intelligence information. It submits that disclosure of the fact that a record exists (or does not exist) would in itself convey information to the appellant that would compromise the effectiveness of a law enforcement activity that may exist or may be reasonably contemplated. It submits that if the existence or non-existence of a record concerning individuals is confirmed then those same individuals could use this information to adjust their activities to avoid detection or provide counter-intelligence.

The Ministry also provided confidential representations in support of its position. Because of their nature I am unable to explain them in further detail.

Analysis

The Ministry relies on sections 14(1)(a) and (g) of the *Act* to support its position. Those sections read:

> 14(1) 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.

I will first address the application of the section 14(1)(g) exemption.

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

Definition of Law Enforcement

In order to qualify for exemption under section 14(1)(g), the Ministry must demonstrate that disclosure would either interfere with the gathering of or reveal "law enforcement" intelligence information respecting organizations or persons.

"Law enforcement" is defined in section 2(1) of the *Act* to mean:

> (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 appellant submits that the definition of policing should not be broadly construed as that would not be consistent with the privacy objectives of the *Act*.

In my view, the BEU clearly has a law enforcement mandate and engages in law enforcement activities. The Ministry submits that if the records exist, they relate to these activities. In my view, the collection of intelligence information in the manner discussed by the Ministry falls within the definition of policing, and therefore "law enforcement" and would not be interpreting the definition of "policing" too broadly. I find that if the records exist, they relate to law enforcement and any information that may be in the records, if they exist, was collected for law enforcement purposes as defined in the *Act*.

Section 14(1)(g)

The purpose of section 14(1)(g) is to provide an institution with the discretion to preclude access to records in circumstances where disclosure would interfere with the gathering of or reveal law enforcement intelligence information.

In Order M-202, former Adjudicator Asfaw Seife had the occasion to consider six of the exemptions contained in section 8(1) of the *Municipal Freedom of Information and Protection of Privacy Act* (*MFFIPA*), which is an equivalent provision to the one under consideration in this appeal. He stated with respect to section 8(1)(g):

> In my view, in order for a record to qualify for exemption under section 8(1)(g) of the Act, the Police must establish that disclosure of the record could reasonably be expected to:
>
> (a) interfere with the gathering of law enforcement intelligence information respecting organizations or persons, or
>
> (b) reveal law enforcement intelligence information respecting organizations or persons.
>
> The term "intelligence" is not defined in the Act. The *Concise Oxford Dictionary, eighth edition*, defines "intelligence" as "the collection of information, [especially] of military or political value", and "intelligence department" as "a [usually] government department engaged in collecting [especially] secret information".
>
> The Williams Commission in its report entitled *Public Government for Private People, the Report of the Commission on Freedom of Information and Protection of Privacy/1980*, Volume II at pages 298-99, states:
>
> > Speaking very broadly, 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 offences. 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.

> 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.

I agree.

As explained in the definition quoted above, what can distinguish intelligence information from investigatory information is that intelligence information is generally unrelated to the occurrence of a specific event. While the appellant focuses on an event that occurred at one point in time, this may not be the focus of the gatherer of intelligence information.

As noted above, the Ministry has also provided additional submissions which, because of their confidential nature, I am unable to reproduce in this order. In my view, 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, 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 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).

Again, I am unable to describe in detail the confidential representations of the Ministry on this aspect of the test under section 14(3). However, 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), and in particular, the interest protected by section 14(1)(g). I am unable to elaborate on this finding any further in this order owing to the confidential nature of the Ministry's representations.

Accordingly, I conclude that the Ministry has established both requirements for section 14(3), subject to any findings I may make 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.

On the basis of the confidential submissions of the Ministry and the circumstances of this appeal, I am satisfied that the Ministry properly considered all of the relevant circumstances and exercised their discretion appropriately.

Final Comment

As referred to previously, the appellant suggests in his representations that section 14(3) somehow operates to deny his entitlement to verify the accuracy of information (if it exists) or, I assume, correct information (if it exists) under section 47(2) of the *Act*. On this basis the appellant asserts that section 14(3) should not be permitted to apply. This interpretation is inconsistent with the structure and scheme of the *Act*, which permits multiple exemptions to apply. The *Act* contains no wording to support the appellant's submission on this point.

Furthermore, while it is true that section 47(2) suggests that access must be given before any right to have personal information corrected can arise, I disagree with the appellant's apparent view that it is inappropriate to apply another section of the *Act* where an individual seeks to have a record (if it exists) corrected. Again, this is the scheme of the *Act*.

Finally, in his representations the appellant requests various types of relief under section 24(2) of the *Charter*. Based upon the characterization of the rights he alleges were infringed and his reliance on the decision of the Supreme Court of Canada in *R v. Mann* [2004] 3 S.C.R. 59 it appears that the appellant is referring to the alleged breach of his right to be "secure against unreasonable search or seizure" in section 8, the right on arrest or detention to be informed of the right to counsel in section 10(b) and the right of security of the person in section 7. That being said, his simple assertion that these rights were breached and his recounting of the events that took place on that particular day does not provide sufficient evidence to support any

infringement of sections 7, 8 or 10(b) or any other *Charter* rights. Leaving aside the appellant's failure to comply with the requirements of a Notice of Constitutional question under section 109 of the *Courts of Justice Act*, I find that, in the circumstances of this appeal, he has failed to establish the factual or legal foundation for his allegation of a breach of the *Charter*.

ORDER:

I uphold the decision of the Ministry.

Original Signed By
Steven Faughnan
Adjudicator

March 21, 2006