ORDER MO-2034

Appeal MA-040267-1

Ottawa Police Services Board

NATURE OF THE APPEAL:

Under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), the Ottawa Police Services Board (the Police) received a request from an individual for the following:

> All information on or pertaining to the undersigned collected, used or held by the Police, particularly the Biker Enforcement Unit and other units of the Police, including but not limited to, photographs, recordings, notes, e-mails, memos, reports, correspondence, etc.

In their initial decision, the Police granted partial access to some records, relying on the exemptions in sections 8(1)(i) (endanger security of a building or vehicle), 14(1) in conjunction with 14(3)(b) (personal privacy), and 38(a) (individual's own personal information) in conjunction with section 8(1)(i), to sever the information they withheld.

The Police also stated in their decision that the existence of any record used or held by the Biker Enforcement Unit could not be confirmed or denied in accordance with section 8(3) of the *Act*. At that stage the Police did not identify which specific parts of section 8 would apply to those records, if they existed.

The requester (now the appellant) appealed the decision.

During mediation the issues in the appeal were narrowed considerably. The appellant agreed that he was not interested in certain witness information and in a subsequent decision letter, the Police decided to release all CPIC records, relying only on the exemption in section 8(1)(l) of the *Act* to sever the police codes. The appellant indicated he no longer sought the codes. As a result, the application of the exemptions set out in sections 8(1)(i) and 8(1)(l) of the *Act* are no longer at issue.

Also during mediation the Police issued a final decision letter reiterating their position that they were refusing to confirm or deny the existence of any records held by the Biker Enforcement Unit under section 8(3) of the *Act* but if any such records did exist, the Police would rely on the exemption in section 8(1)(g) (reveal law enforcement intelligence) of the *Act* to deny access.

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

When this appeal was referred to adjudication, the Ontario Court of Appeal was considering a similar "refuse to confirm or deny" provision of the provincial *Freedom of Information and Protection of Privacy Act* (*FIPPA*) found in the personal privacy exemption at section 21 of that statute. 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 Police, initially, seeking representations on the issues in the appeal. The Police provided representations in response but asked that portions be withheld due to confidentiality concerns. I then sent the Notice of Inquiry, along with the severed representations of the Police, to the appellant, who provided representations in response. As the appellant's representations raised issues to which I determined the Police should be given an opportunity to reply, I sent the representations along with a covering letter to the Police. The Police filed representations in reply.

DISCUSSION:

The Biker Enforcement Unit (BEU)

I note that the appellant made a related request to the Ministry of Community Safety and Correctional Services (the Ministry), and the Ministry's response is the subject of appeal file PA-040324-1. That appeal gave rise to Order PO-2459.

In appeal PA-040324-1, the Ministry's representations set out a description of the BEU. Those representations were sent to the appellant, who filed joint representations with respect to both matters. As the Ministry's description of the BEU provides helpful context, I am setting them out in these reasons. In my view, doing so in these circumstances causes no prejudice to the appellant.

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

Introduction

Section 36(1) of the *Act* provides individuals with a general right of access to their own personal information held by 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.

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 8, including section 8(3), would be in the context of section 38(a). To simplify this discussion, however, I will focus on section 8 itself, and will not refer to section 38(a) again.

The Police rely on section 8(3) of the *Act* as the basis for their decision to refuse to confirm or deny whether any responsive records exist.

Section 8(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 8] applies.

Section 8(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 8(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 *FIPPA*, which is an equivalent provision to the one under consideration in this appeal:

> 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 8(3) is one of a small number of "refuse to confirm or deny" provisions in the *Act*. A similar provision appears within the personal privacy exemption at section 14 (being section 14(5) of the *Act*). This personal privacy exemption also has an equivalent in *FIPPA*, namely section 21(5) of that statute.

In the *Minister of Health* case cited above, the Court of Appeal for Ontario considered the interpretation of section 21(5) of *FIPPA*. The Court held that in order to exercise its discretion to invoke section 21(5) of *FIPPA*, 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 *FIPPA* 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 8(3). Therefore, an institution may exercise its discretion to invoke section 8(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 8(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 8(3):

1. the record (if it exists) would qualify for exemption under sections 8(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 8(1) or (2).

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 Police have 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 36(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 8(3).

The appellant also refers to parts of sections 28, 29 and 31 of the *Act*, which regulate the collection and use of personal information by the Police. These sections are not determinative in the context of section 8(3).

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

Representations of the Police

The Police rely 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 Police. They submit that information that would be contained in the record, if it existed, is "intelligence information" which relates to "policing" and to investigations they conduct.

The Police submit that this information is routinely gathered by intelligence units of police services and used for the maintenance of law and order. The Police state that gathering this type of information allows them to take a pro-active approach with respect to law enforcement.

The Police submit that the content of an intelligence file is highly confidential and extremely sensitive. They also submit that such a file typically contains information of other individuals than the one who may be targeted.

The Police submit that, in a general sense, disclosure of information collected during intelligence gathering, if it exists, could have a number of consequences. This would include identifying informants, infiltrators and individuals who are being monitored. According to the Police, this would result in individuals and/or groups taking steps to conceal their activities or their associates, affecting the way that the Police do their investigations and hamper the control of crime. On this basis, the Police say that disclosure of the records, if they existed, would interfere

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

The Police further submit that just confirming the existence of records would interfere with the gathering of or reveal law enforcement intelligence information. They submit 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. They submit 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. This, the Police say, may provide individuals with more opportunity to avoid apprehension on the basis that it would allow them to determine, if such records existed, that they were under surveillance. It would also enable them to assist any other "targets" who they may be associating that the Police have an interest in to avoid detection or apprehension.

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

Analysis

The Police rely on section 8(1)(g) of the *Act* to support their position. That section reads:

> 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.

Part One: Would the Records (if they exist) qualify for exemption under section 8(1)(g)?

Definition of Law Enforcement

In order to qualify for exemption under section 8(1)(g), the Police 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 Police clearly have a law enforcement mandate and engage in law enforcement activities. The Police submit that if the records exist, they relate to these activities. In my view, the collection of intelligence information in the manner discussed by the Police 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 8(1)(g)

The purpose of section 8(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 Siefe had the occasion to consider six of the exemptions contained in section 8(1) of the *Act*. He stated with respect to 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 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). Part 1 of the test under section 8(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 8(1) or (2) interest

Under part two of the test, the Police 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 8(1) or (2).

Again, I am unable to describe in detail the confidential 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 and disclosure of that information could reasonably be expected to harm one of the interests sought to be protected by sections 8(1) or (2), and in particular, the interest protected by section 8(1)(g). 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 both requirements for section 8(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 *FIPPA* (the equivalent provision to section 8(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.

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 and exercised their discretion appropriately.

Final Comment

As referred to previously, the appellant suggests in his representations that section 8(3) somehow operates to deny his entitlement to verify the accuracy of information (if it exists) or, I assume, to correct information (if it exists) under section 36(2) of the *Act*. On this basis the appellant asserts that section 8(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 36(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 Police.

Original Signed By
Steven Faughnan
Adjudicator

March 23, 2006