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

ORDER PO-2985

Appeal PA11-15

Ministry of Natural Resources

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NATURE OF THE APPEAL:

The appellant submitted a request to the Ministry of Natural Resources (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the total number of public complaints to the Ministry that pertain to him.

Prior to issuing a decision, the Ministry clarified with the appellant that he was seeking information about public complaints relating to waterfowl hunting from 1992 to the present.

The Ministry refused to confirm or deny the existence of any records in accordance with section 14(3) (refuse to confirm or deny) of the *Act*.

The appellant appealed the Ministry's decision.

During mediation, the appellant confirmed that he is seeking access only to the number of complaints received by the Ministry about him.

Mediation did not resolve the appeal and the file was forwarded to the adjudication stage of the appeal process. I sought, and received, representations from the Ministry, and shared them with the appellant in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction* number 7. Although provided with an opportunity to make submissions, the appellant did not respond to the Notice of Inquiry.

It is apparent that the appellant is seeking information about himself. The Ministry did not claim the application of section 49(a) (refuse to disclose appellant's own information) in addition to refusing to confirm or deny the existence of such records. If records exist, it appears likely that they would contain the appellant's personal information. Accordingly, I included the possible application of section 49(a) and the definition of personal information as issues in this appeal.

RECORDS:

If records exist, they would contain written or a description of any verbal complaints received by the Ministry about the appellant.

ISSUES:

Issue A: **If a record exists, would the record contain "personal information" as defined in section 2(1) and, if so, to whom would it relate?**

Issue B: **Would the discretionary exemption at section 49(a) in conjunction with the section 14 exemption apply to the information at issue, if it exists?**

DISCUSSION:

Issue A: If a record exists, would the record contain "personal information" as defined in section 2(1) and, if so, to whom would it relate?

In order to determine which sections of the *Act* may apply, it is necessary to decide whether a record, if it exists, contains "personal information" and, if so, to whom it would relate.

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual. To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225]. Nevertheless, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R- 980015, PO-2225].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The Ministry acknowledges that if a record exists it would contain the appellant's personal information. I agree. The appellant has clearly requested information about himself, specifically, complaints that have been made against him. Accordingly, I find that if a record that is responsive to the request exists, it would contain the appellant's personal information and my analysis of the application of section 14(3) will be conducted under Part III of the *Act*.

Issue B: Would the discretionary exemption at section 49(a) in conjunction with the section 14 exemption apply to the information at issue, if it exists?

Introduction

Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

Section 49(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information [Order M-352].

Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

In this case, the Ministry relies on section 49(a) in conjunction with section 14(3). The Ministry indicates that it is relying on the discretionary exemption in section 14(1)(g) as the basis for claiming section 14(3).

Section 14(3): Refusal to confirm or deny the existence of a record

Section 14(3) states:

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

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 14(3) to apply, the institution must demonstrate that:

1. the records (if they exist) 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)

[Order PO-2450]

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

General principles

Section 14(1)(g) states:

> 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, or
> >
> > (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*].

The term "intelligence information" refers to 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, PO-2751; see also Order PO-2455, confirmed in *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.)].

The Ministry's submissions on the application of this exemption are contained in its confidential representations, and I am, therefore, unable to refer to them in this order. However, I am satisfied that if records exist, they would relate to law enforcement. Moreover, given the nature of the law enforcement work undertaken by Ministry staff and the explanations provided by it in its confidential representations, I am satisfied that disclosure of the existence of responsive records could reasonably be expected to interfere with the gathering of, or reveal intelligence information.

Accordingly, I find that section 14(1)(g) applies to the information requested. I find further that disclosure of the fact that the record exists (or does not exist) would in itself convey information to the appellant, and disclosure of that information could reasonably be expected to harm the interests sought to be protected by section 14(1)(g). Consequently, I find that section 14(3) also applies in the circumstances of this case.

Exercise of Discretion

The section 49(a) and 14(3) exemptions are discretionary, and permit an institution to disclose (or reveal the existence of) information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

In its non-confidential representations the Ministry states:

> The Ministry has been mindful of its role under the Act to balance the rights of individuals with the need to effective[ly] investigate violations of law. In this instance, any information relating to the requester would be contained in a document, if it existed, which would be related to an investigation into violations of law. Balancing the appellant's privacy rights with the need to effectively

> enforce the law, the Ministry would have exercised its discretion under subsection 49[a]a to exclude such records, if they existed, from disclosure to the requester.

In its confidential representations, the Ministry expands on its decision to exercise its discretion to claim the application of sections 14(1)(g) and 14(3).

Based on the Ministry's confidential and non-confidential representations, I am satisfied that its decision to apply section 14(3) was made in good faith and that it took into account relevant considerations. Moreover, although the Ministry did not initially consider the application of the discretionary exemption at section 49(a), it subsequently reviewed its exercise of discretion taking into consideration that a record, if it existed, would contain the appellant's personal information. I find nothing improper in the Ministry's exercise of discretion. Accordingly, I find that the Ministry has properly exercised its discretion in refusing to confirm or deny the existence of records that would be responsive to the appellant's request, if they existed.

As a result of my findings above, I find that sections 14(3) and 49(a) apply in the circumstances of this appeal.

ORDER:

I uphold the Ministry's decision.

Original signed by: July 21, 2011
Laurel Cropley
Adjudicator