Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

# INTERIM ORDER PO-3521-I

Appeal PA14-381

Ministry of Community Safety and Correctional Services

August 13, 2015

**Summary:** The ministry applied section 14(3) to refuse to confirm or deny the existence of records relating to any surveillance undertaken by the OPP of a First Nation over a seven-year period. The ministry argued that any such records, if they exist, are exempt from disclosure under section 14(1)(g) and that disclosing the very existence of records would reveal information that qualifies for exemption under that section. In this decision, the adjudicator upholds the ministry's decision to apply section 14(3) to any responsive records, if they exist. He goes on to order the ministry to exercise its discretion regarding the decision to apply section 14(3) to any responsive records, if they exist.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 14(1)(g) and 14(3).

## OVERVIEW:

[1] The Ministry of Community Safety and Correctional Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "any and all records in the possession or control of the Ontario Provincial Police (the OPP) with respect to surveillance of KI First Nation in the period from 2007 to the present." Attached to the request was an article from the *Toronto Star* dated December 4, 2011 relating to an Aboriginal Joint Intelligence Group within the RCMP Criminal Intelligence Group. The ministry issued an access decision advising that the existence of the requested information cannot be confirmed or denied in accordance with section 14(3) of the *Act.*

[2] The requester (now the appellant) appealed the decision of the ministry to this office and enclosed a copy of the *Toronto Star* article, explaining that:

> To put the request in context, the enclosed article from the Toronto Star, dated December 4, 2011, reports that the federal government "created a vast surveillance network in 2007 to monitor protests by First Nations," including KI First Nation. The essence of the information requested is an inquiry into whether the OPP was involved in these targeted surveillance activities.

[3] During mediation, the ministry advised that, in conjunction with section 14(3), it was relying on the discretionary exemptions in sections 14(1), (a), (c), (d), (e), (g), (i) and (l) of the *Act* to withhold any records that may be responsive to the request, if they exist. The parties were unable to resolve the appeal through mediation and the appeal was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the ministry and the appellant, complete copies of which were shared in accordance with *Practice Direction 7* and section 7 of the IPC *Code of Procedure.* I also sought and received reply representations from the ministry.

[4] In this decision, I uphold the ministry's decision to refuse to confirm or deny the existence of records that would be responsive to the appellant's request under section 14(3) of the *Act*.

## DISCUSSION:

[5] The sole issue for determination in this appeal is whether the ministry is entitled to refuse to confirm or deny the existence of responsive records under section 14(3) of the *Act*. Section 14(3) states:

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

[6] This section acknowledges the fact that in order to carry out their mandates, law enforcement agencies must sometimes have the ability to withhold information in answering requests under the *Act*. However, it is the rare case where disclosure of the mere existence of a record would frustrate an ongoing investigation or intelligence-gathering activity.[1]

[1] Orders P-255 and P-1656.

[7] 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 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.[2]

[8] 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)

[9] The term "law enforcement" has covered the following situation:

- a police investigation into a possible violation of the *Criminal Code*.[3]

[10] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[4]

[11] It is not enough for an institution to take the position that the harms under section 14 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.[5] The institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much

---

[2] Order P-1656.
[3] Orders M-202 and PO-2085.
[4] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[5] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences. [6]

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

[12] The ministry relies on the application of the discretionary exemption in section 14(1)(g) to exempt any records which may be responsive to the request, if they exist. This section 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;

[13] It adopts that definition of the term "intelligence information" which was set out in the Notice of Inquiry and stated to mean:

> 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.[7]

[14] With respect to the first part of the test under section 14(3), the ministry argues that records relating to the gathering of intelligence information through the use of surveillance are part of its law enforcement activities, which are mandated by section 5(1)(b) of Regulation 3/99 made under the *Police Services Act*. It submits that the appellant has clearly requested intelligence-based records relating to an entire First Nation and any individuals associated with it which may be held by any branch of the OPP over a seven year period. The ministry also notes that the request does not relate to any specific occurrence or investigation. For these reasons, it argues that the request seeks records which may be properly described as "intelligence-based records."

[15] The ministry goes on to submit that disclosing intelligence records, including any surveillance records that may exist, could reasonably be expected to "create significant harm to intelligence operations, and the ongoing gathering of intelligence based records." It points out that revealing the existence of such records "is contrary to the purpose for which it is being gathered" and that disclosing records of this nature could

---

[6] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

[7] Orders M-202, MO-1261, MO-1583 and 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.).

have "serious repercussions for undercover officers, confidential informants and other confidential sources of information", as well as the possible disclosure of the personal information of these individuals.

[16] In addition, the disclosure of records relating to the gathering of intelligence would "reveal whether the First Nation, including its members, have been subject to surveillance, and therefore, intelligence gathering operations. Individuals who might be the subject of these operations could use this information to modify their behaviour in order the avoid attracting further attention from law enforcement officials. This could cause significant harm to any existing law enforcement operations."

[17] Finally, the ministry submits that disclosure could reasonably be expected to interfere with "the ongoing working relationship between the OPP and intelligence operations in other law enforcement agencies, which must be built on the premise that confidential intelligence information must not be disclosed." It submits that any responsive records may include information provided to the OPP by other law enforcement entities.

[18] With respect to the second part of the test under section 14(3), the ministry submits that "confirming the existence or non-existence of the requested records would reveal to the appellant whether or not a First Nation, including its residents, have been the subject of surveillance over more than seven years." It argues that revealing this very fact would disclose information which would harm OPP law enforcement operations in the manner contemplated by section 14(1)(g).

[19] The appellant refers to an article in the *Toronto Star* dated December 4, 2011 which reported that "the Aboriginal Joint Intelligence Group of the RCMP collected and distributed information regarding First Nation communities, including KI First Nation, who were engaged in protest activity or civil disobedience." The article went on to indicate that "this intelligence unit reported weekly to law enforcement, government, and 'industry partners' in the energy and private sectors." The appellant clarified in his representations that he is not seeking access to records relating to "legitimate criminal investigations against particular individuals who happen to be members of KI First Nation." Rather, he states that the records sought in this appeal "relate to prospective surveillance of the community, along the lines identified in the Toronto Star article."

[20] The appellant acknowledges that records relating to "the prospective surveillance of a community may be classified as intelligence information", but suggests that such surveillance is not similar to the type of criminal activity being monitored about a biker gang or crime syndicate. He argues that intelligence gathering is not a designated law enforcement activity for the purposes of section 14(1)(g) if it does not relate to the "detection and prevention of crime." Rather, the appellant is of the view that this "vast surveillance network" described in the newspaper article he refers to operates to "blur the line between crime prevention and one level of government spying on another

without lawful excuse. He concludes this portion of his representations by stating the "[S]ignificant concerns have been raised by First Nations regarding the political labeling of peaceful political expression as criminal activity" and refers to the land tenure rights of First Nations which are derived from the treaties they are signatory to. The appellant further submits that the ministry has not provided any evidence regarding its lawful authority to monitor First Nation communities.

[21] With respect to the second part of the test under section 14(3), the appellant argues that the privacy interests and other legal rights of First Nation residents are adversely affected if systematic surveillance has taken place. He submits that in order to understand the implications of such surveillance, it must first be determined if it occurred. As a result, the very existence of responsive records "goes to the heart of the Appellant's request."

[22] Again, the appellant recognizes that "confirming the existence or non-existence of the requested records would reveal whether KI First Nation has been the subject of surveillance over the past seven years", as argued by the ministry. However, the appellant goes on to submit that "acknowledging the *existence* of general surveillance records would not necessarily convey any information about individual KI First Nation residents." The appellant concludes this portion of his representations with:

> However, a refusal to disclose if they exist at all utterly frustrates all three purposes under section 1 of FIPPA: that information should be available to the public, exemptions to access should be narrow, and disclosure decisions should be independently reviewed. Instead, it blocks access based on a blanket rule that prevents oversight.

## ***Analysis and findings***

[23] Both parties to this appeal agree that records that may be responsive to this request, if they exist, would qualify as "intelligence information" for the purposes of the definition referred to above, which forms the basis for a finding that section 14(1)(g) might apply to them. In my view, information contained in any responsive records would have been gathered in a covert manner by a law enforcement agency "with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violations of law". This is the nature of intelligence information in the law enforcement context.

[24] Further, I find that the disclosure of the contents of any records that might be responsive to the request could reasonably be expected to interfere with its gathering or would reveal law enforcement intelligence information respecting either individual members of the KI First Nation or some organization which might include its members. If individuals were made aware of the fact that they were the subject of covert surveillance, they may choose to curtail these activities or to better conceal them in

order to avoid detection. In this way, I find that disclosure of the responsive records, if they exist, could reasonably be expected to interfere with the gathering of intelligence information. Any responsive records would, accordingly, by definition qualify for exemption under section 14(1)(g) as disclosure would reveal the intelligence information itself or would interfere with its gathering by law enforcement entities. As a result, I find that the first part of the test under section 14(3) has been satisfied.

[25] For similar reasons, I find that the second part of the test under section 14(3) has also been met by the ministry. I conclude that disclosure of the very fact that surveillance of members of the KI First Nation may or may not have taken place would reveal intelligence information that would qualify for exemption under section 14(1)(g). By simply revealing the existence of responsive records, the subjects of the intelligence gathering, if it took place, would be alerted to the fact that their activities were under surveillance and would take steps to avoid and lessen its impact. This action in response to the disclosure of the fact that surveillance had taken place would result in interference with the gathering of intelligence information or could reasonably be expected to reveal the information itself. Accordingly, I find that both parts of the test for section 14(3) have been satisfied by the ministry.

## EXERCISE OF DISCRETION

[26] The section 14(3) exemption is discretionary. An institution must exercise its discretion and decide whether or not to disclose the information sought, even if it qualifies for exemption. On appeal, the Commissioner may determine whether the institution failed to do so.

[27] In its representations, the ministry indicates that it did not exercise its discretion not to disclose any responsive records, if they exist, under section 14(1) as it was invited to do in the Notice of Inquiry provided to it. In response to this statement by the ministry, the appellant argues that:

> Subsection 14(1) of FIPPA permits an institution to disclose information even if it is not legally required to do so, where such disclosure serves the purposes of the Act. If it were determined that disclosure of the requested records would harm an interest protected by subsection 14(1)(g) that would not end the decision-making process. The institution still has to consider other interests at stake in the context of the access to information regime and the particular circumstances of the request. FIPPA requires the institution to exercise that discretion.
>
> A lawful exercise of discretion requires the institution to make disclosure decisions in good faith, taking into account relevant considerations, and not taking into account irrelevant considerations. MCSCS observes that it did not exercise its discretion pursuant to subsection 14(1). A failure to

> exercise discretion means that the circumstances of the case did not have to be considered and good faith did not have to be exercised. Given the public interest dimensions of the Appellant's request, the failure to undertake a conscientious, reviewable exercise of discretion undermines the public interest and further frustrates the purposes of FIPPA.

[28] The ministry declined the opportunity to submit reply representations.

[29] Section 14(3) of the *Act* operates as a discretionary exemption which enables an institution to refuse to confirm or deny the existence of a record which is exempt under any of the enumerated exemptions in sections 14(1) and (2). In the present appeal, the ministry has declined to exercise its discretion or to provide me with an explanation as to the considerations it chose to reflect upon when it made its decision to refuse to confirm or deny the existence of responsive records. In the absence of any representations on this issue from the ministry, I find that I am unable to determine whether it has properly exercised its discretion. Accordingly, I will remit the matter back to the ministry for an exercise of discretion, based on proper considerations.

## INTERIM ORDER:

1. I find that the ministry is entitled to apply the discretionary exemption in section 14(3) and refuse to confirm or deny the existence of responsive records.

2. I order the ministry to exercise its discretion under section 14(3) based on proper considerations and to provide both the appellant and me with an explanation of the factors it considered in doing so by **September 11, 2015.**

3. I remain seized of this matter in order to address any issues stemming from the ministry's exercise of discretion.

Original signed by: August 13, 2015
Donald Hale
Adjudicator