

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3653

Appeal PA15-515

Ministry of Natural Resources and Forestry

September 27, 2016

Summary: The appellant requested information about the location of Ministry of Natural Resources and Forestry wildlife research cameras in a provincial park. The ministry disclosed some information but withheld detailed location information on the basis that disclosure would facilitate the commission of an unlawful act, specifically theft or vandalism of the cameras, under section 14(1)(l) of the *Freedom of Information and Protection of Privacy Act*. The ministry has not established the likelihood of harm and the link between disclosure of the information and the harm to the required standard for section 14(1)(l) to apply. The information is ordered disclosed.

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

Orders Considered: PO-3105.

Cases Considered: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31.

OVERVIEW:

[1] The appellant made a request to the Ministry of Natural Resources and Forestry (the ministry) under the *Freedom of Information and Protection of Privacy Act (Act)* for access to any and all information related to remote wildlife monitoring cameras in provincial parks.

[2] After consultation with the ministry, the appellant narrowed his request to the location of each camera, the date placed, the intended targets and who is responsible for each camera in Michipicoten Island Provincial Park (the park).

[3] The ministry issued a decision granting partial access to the responsive record. Access to some of the responsive record was denied pursuant to section 14(1)(l) of the *Act* (disclosure could facilitate the commission of an unlawful act or hamper the control of crime).

[4] The appellant appealed the ministry's decision. Mediation was unsuccessful and the appeal proceeded to adjudication. The ministry and the appellant provided representations, which were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[5] For the reasons below, I find that section 14(1)(l) does not apply to the withheld information. I therefore order the withheld information disclosed.

RECORD:

[6] The record at issue is a table titled "Wildlife Monitoring Trail Cameras on Michipicoten Island Provincial Park; intended for long-term monitoring of mid- to large-sized mammals in a remote location." The ministry disclosed columns titled "Device Name & contact", "Date Deployed" "Date Retrieved" and "Location." The ministry withheld information in a column titled "GPS Coord" and narrative descriptions of the exact location of the cameras in a column titled "Comments" (the location information).

ISSUES:

- A. Does the section 14(1)(l) exemption apply to the withheld information?
- B. Did the ministry properly exercise its discretion in applying section 14(1)(l) to the withheld information?

DISCUSSION:

A. Does the section 14(1)(l) exemption apply to the withheld information?

[7] Section 14(1)(l) allows the ministry to withhold information "where the disclosure could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime."

[8] Section 14 is titled "law enforcement." Section 14(1)(l) has typically been raised by institutions involved in law enforcement such as police,¹ frequently in the context of withholding police codes contained in records.²

[9] However, section 14(1)(l) has been applied to information withheld by institutions whose primary purpose is not law enforcement, where a clear link is established between disclosure of the information and the likelihood of an unlawful act. For example, in Order PO-3105 Adjudicator Haly found that disclosure of the Ministry of Health and Long-Term Care's rules governing the assessment of health insurance claims could be withheld under section 14(1)(l).

[10] It is common ground between the parties that the cameras are not deployed for a law enforcement purpose but for the purpose of conducting research about large mammals. As I have outlined, this does not mean section 14(1)(l) cannot apply to the information. The significance of the camera's purpose is relevant to considering whether section 14(1)(l) applies and I will discuss it further below.

[11] In relation to the "reasonably be expected to" language contained in section 14(1)(l), the Supreme Court of Canada in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*,³ stated:

This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.

[12] I will therefore adopt this approach in considering whether the information can be withheld under section 14(1)(l).

Ministry's representations

[13] The ministry's position is that disclosure of the withheld information could

¹ For example, Order M-552, M-761, M-781.

² See for example Order PO-1665.

³ 2014 SCC 31 at para. 54.

reasonably be expected to facilitate the commission of an unlawful act, specifically vandalism or theft of the cameras in the park.

[14] The essence of the ministry's argument is that the withheld information allows the cameras to be easily located. The ministry says that if the location information is disclosed, it would have no control over its dissemination. It also states that by necessity, the cameras are relatively unattended; thus revealing the location of the cameras renders them vulnerable to the harm of theft or vandalism.

Analysis

[15] I accept that disclosure of the information at issue may make locating the cameras incrementally easier, and that this in turn may also make the risk of an unlawful act (such as planned vandalism or theft) involving the cameras incrementally higher.

[16] However, considering the nature of the information at issue and the probability and seriousness of the consequences, ultimately I am not satisfied that the ministry has provided sufficient evidence to withhold the location information under section 14(1)(l). Based on my review of the parties' representations and the record at issue, I find that the ministry has not established that disclosure of the record at issue could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime pursuant to section 14(1)(l) of the *Act*. Two factors lead to this conclusion:

1. The evidence to support the likelihood of the specified harm (the unlawful act of theft or vandalism) occurring; and
2. The evidence to support a link between disclosure of the location information and the specified harm.

[17] I will discuss each in turn.

Likelihood of harm

[18] I am not satisfied that there is detailed and convincing evidence in the ministry's representations of the likelihood of the harm the ministry cites as arising from disclosure of the information.

[19] The risk of harm the ministry identifies is theft or vandalism of the cameras. I note that the ministry's reference to vandalism, must refer to planned or premeditated vandalism rather than unplanned vandalism. Unplanned vandalism is by its nature, not premeditated, and therefore cannot logically be causally linked to any information disclosure.

[20] I accept that theft or planned vandalism is a possible harm. Common sense dictates that the theft or planned vandalism of a physical item in a public space is

always possible. However, the risk of harm by theft or vandalism exists for virtually any publically owned asset. This risk therefore cannot be the sole rationale for non-disclosure of location information of publically owned assets. Such an approach would mean large amounts of relatively innocuous information that is currently routinely disclosed would fall within the scope of section 14(1)(l). This would undoubtedly be contrary to the purposes of the Act set out in section 1(a) that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. In my view, something more than a baseline risk of harm from theft or vandalism is required for location information about a physical asset to fall within the section 14(1)(l) exemption.

[21] The ministry argues that the remote location of the cameras makes them particularly vulnerable to theft or vandalism. The appellant concedes that the cameras are in a remote location. The appellant explains that the park, though public, is not promoted as accessible to the public and has no infrastructure to facilitate visitor access, including no trails. He also says that visitor access is difficult because of both the sheer remoteness of the location, being an island in the large Lake Superior, which limits access to boat, float plane or helicopter. He explains that even using those modes of transport, access can be challenging due to weather and geography. The appellant estimates that approximately 100-150 person visits occur to the park per year.

[22] In my view, the remoteness of the locations of the cameras diminishes rather than elevates the likelihood of the harms the ministry raises. Accepting the ministry's logic, I appreciate that the camera's remoteness means an individual wishing to commit an unlawful act may have little fear of detection (putting aside physical and technological security measures that may be in place for the cameras, which I have no evidence about). However, this elevated risk is only a consideration once the cameras' remoteness is overcome by someone wishing to carry out an unlawful act. As the appellant's evidence illustrates, that hurdle of remoteness is a significant one, as demonstrated by very low visitor numbers to the park. Overall, in my view, this means the cameras are not at an elevated risk of theft or planned vandalism.

[23] Lastly, I note the ministry has not provided evidence that there has been any issue with vandalism or theft of cameras to date. The only evidence of theft or planned vandalism the ministry points to is a hearsay example mentioned in the appellant's evidence. The appellant refers to a radio interview he heard where an individual discussed the theft of a memory card from a wildlife camera on private property. There is no evidence of previous incidents, planned or unplanned, involving ministry wildlife cameras.

[24] I also note that there is also no evidence to suggest that anyone is interested or motivated to steal or has a premeditated desire to vandalize the cameras. This is where the purpose of the cameras is relevant. As noted above in discussing the application of section 14(1)(l), the parties agree that the cameras exist to conduct wildlife research and that they have no law enforcement function. The ministry's reply submission

outlines in some detail the steps it takes to ensure no human activities that may inadvertently be captured by the cameras are used or retained by the ministry. This distinguishes the cameras from most camera deployments, which are typically for surveillance purposes, set up to address an elevated or known risk, including previous unlawful acts. Consequently, there is no known individual or group whose interests in covertly conducting an unlawful act would motivate them to steal or vandalize the cameras to prevent the cameras from detecting a crime. There is no evidence of any group or individual being opposed to the purpose or function of the cameras. Even the appellant, whose representations exhaustively document his concerns regarding the operation of the cameras, does not object to the cameras existence or function, but only the ministry's method of camera deployment.

Summary: likelihood of harm

[25] The ministry points to a harm that, based on common sense, is possible. However, the ministry's evidence does not differentiate the risk of harm from that for other publically owned physical assets. If anything, the evidence suggests the risk is lower for the cameras than for other assets. There is no evidence that any individual or group is or has been motivated to carry out an unlawful act and the purpose of the cameras reduces the likelihood that such an individual or group exists.

The link between disclosure of the withheld information and the risk of an unlawful act

[26] The ministry's submits that the present appeal can be distinguished from *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*,⁴ where the court found there was not a clear link between the redacted information and the possible harm. However, I am not satisfied that the ministry has established a sufficient link between disclosure of the withheld information and the risk of the identified unlawful acts occurring.

[27] As discussed above, to establish the necessary connection between disclosure of the information and the specified harm, it is the risk of harm to the cameras arising from disclosure of the withheld information that is relevant. Unplanned unlawful acts such as spontaneous acts of vandalism are not part of the consideration. Unplanned vandalism is not predicated on knowledge of the location of the asset vandalized, so such acts could not be causally linked to disclosure of the information in issue.

[28] While common sense suggests that providing the precise location of the cameras will make it incrementally easier to locate the cameras to commit an unlawful act, there is insufficient evidence before me of a meaningful increase in the risk arising from disclosure of the withheld information.

⁴ cited above.

[29] In addition I note that the information in issue, the precise location information of the cameras, is information that may already be attained other than by the access request. This distinguishes this appeal from Order PO-3105, where there was clear evidence that the only source of the information in issue was the disputed record.

[30] The general location of the cameras has already been disclosed by the ministry in response to the request that gave rise to this appeal. Further, the appellants' representations contain examples of photos published in an online magazine article that are clearly identifiable as being taken by one of the cameras. The appellant explains how the photo's orientation and the geographic features in the photo provided sufficient information to enable him to quite accurately locate the camera that took the published photo. Given that the purpose of the cameras is to support research and the likelihood of dissemination of that research, for example in the article discussed above, I am satisfied that over time more photos taken by the cameras may make their way into the public domain, making locating the cameras progressively easier.

[31] Further if the cameras remain in place, and the ministry indicates most will, they will presumably eventually be located by members of the public despite their remote location. Again, this distinguishes the present appeal from Order PO-3105, where the information in issue was not, and would not but for disclosure, become publically available.

Summary

[32] The remote location of the cameras means that an individual would need to be particularly motivated to steal or vandalize them. The appellant has demonstrated that a motivated individual could utilize publically available information about the camera's general location to locate the cameras. Given this, I am not satisfied that disclosure of the specific location information withheld by the ministry has more than a minimal impact on the risk of harm. I am not satisfied that the link between disclosure of the information and the risk of harm meets the required standard.

[33] An individual who is suitably motivated to locate and steal or vandalize the cameras, has general location information, and the opportunity, limited only by their motivation, to locate the cameras. Disclosure of the specific location information may make locating the cameras incrementally easier, but I am not satisfied that the link between disclosure of the information and the harm is sufficiently established to meet the threshold for section 14(1)(l) to apply.

Conclusion

[34] I am not satisfied that the ministry has met the evidentiary standard for section 14(1)(l) to apply to the withheld information.

[35] The ministry raises a legitimate concern about the risk of an unlawful act. I also accept that the risk of that unlawful act may be incrementally greater if the information

is disclosed. However, I do not find that is sufficient to satisfy section 14(1)(l). Certainly I am not satisfied that the ministry has provided evidence that the risk of harm from disclosure of the information is "well beyond" or "considerably above" merely possible. I find that the ministry's evidence does not go beyond establishing that the occurrence of an unlawful act in relation to the cameras is merely possible. The ministry has also not established to the required standard a connection between disclosure of the information and the increased risk of an unlawful act.

[36] Given my finding that section 14(1)(l) does not apply to the withheld information, I do not need to consider the ministry's exercise of discretion.

ORDER:

For the reasons given above, I order the ministry to:

1. provide the appellant with a copy of the record by **November 2, 2016** and
2. copy me on its cover letter to the appellant.

Original Signed by: _____

Hamish Flanagan
Adjudicator

September 27, 2016 _____