Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3853

Appeal PA17-544

Ministry of Community Safety and Correctional Services

June 7, 2018

Summary: The appellant requested Ontario Provincial Police records relating to a suggestion that the appellant was the victim of criminal offending. The Ministry of Community Safety and Correctional Services (the ministry) refused to confirm or deny the existence of the requested records, citing section 14(3) of the *Act*. The ministry has not established that disclosing the existence or non-existence of responsive records would reveal information that ought to be withheld under the *Act*. The ministry is ordered to respond to the request without relying on section 14(3).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 49(a), 14(3).

Cases Considered: *R. v. Durham Regional Crime Stoppers Inc.,* 2017 SCC 45, [2017] 2 SCR 157; *R. v Leipert, [1997] 1 SCR 281.*

OVERVIEW:

[1] The appellant made a request under the *Freedom of Information and Protection of Privacy Act (*the *Act)* to the Ministry of Community Safety and Correctional Services (the ministry) for Ontario Provincial Police (OPP) records relating to a call the appellant states the OPP made to her. In particular, the request stated:

> I received a phone call from the Campbellford OPP concerning a complaint. Someone phoned the Campbellford OPP (or notified them) that

> I was being abused. I would like a copy of the full complaint along with who issued this complaint as it is entirely false. The phone call that I received from the OPP was made to me on October 6, 2017. I would also like a copy of the OPP report.

[2] The ministry's response to the request advised the appellant that in accordance with section 14(3) of the *Act*, the ministry would not confirm or deny the existence of the requested records.[1]

[3] The appellant appealed the ministry's decision. The appeal was not resolved during mediation so proceeded to adjudication, where an inquiry is conducted.

[4] I have considered the ministry's representations on the issues I set out in a Notice of Inquiry. I note that the ministry opposed sharing the substance of those representations with the appellant. Because I did not consider it necessary to seek representations from the appellant, I did not address the ministry's request. I refer to the ministry's arguments in this order where necessary to provide reasons for my decision.

[5] I find that the ministry has not established that it can rely on section 14(3) to respond to the request. The ministry is ordered to issue a new response to the request that does not rely on section 14(3) of the *Act*.

DISCUSSION:

[6] The sole issue in this appeal is whether I should uphold the ministry's reliance on section 14(3) of the *Act* to refuse to confirm or deny the existence of records responsive to the appellant's request.

[7] Section 14(3) states:

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

[8] Sections 14(1) and (2) state:

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[1] Given the nature of the request, the ministry's response citing section 14(3) should properly cite section 49(a) in conjunction with section 14(3). The scope of the appellant's request means that any responsive records would include the appellant's personal information. Section 49(a) is the provision in the *Act* that allows the ministry to apply various exemptions, including section 14(3), to withhold a requester's personal information. An institution, in exercising its discretion under section 49(a), must take into account that the request is for the requester's own personal information. Because I do not uphold the ministry's decision in this appeal, I do not need to consider its exercise of discretion under section 49(a).

(1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,

(a) interfere with a law enforcement matter;

(b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

(c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

(d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

(e) endanger the life or physical safety of a law enforcement officer or any other person;

(f) deprive a person of the right to a fair trial or impartial adjudication;

(g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

(h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;

(i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

(j) facilitate the escape from custody of a person who is under lawful detention;

(k) jeopardize the security of a centre for lawful detention; or

(l) facilitate the commission of an unlawful act or hamper the control of crime.

(2) A head may refuse to disclose a record,

(a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

> (b) that is a law enforcement record if the disclosure would constitute an offence under an Act of Parliament;
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> (c) that is a law enforcement record if the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability; or
>
> (d) that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority.

[9] Section 14(3) recognizes that law enforcement agencies may sometimes need to withhold information when answering requests under the *Act* in order to carry out their mandate. However, it is rare that merely disclosing the existence of a record would frustrate an ongoing investigation or intelligence-gathering activity.[2]

[10] 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
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> 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).[3]

[11] I will discuss Part 2 first.

Part 2: Would disclosing that records exist or do not exist convey information that could reasonably be expected to harm one of the interests sought to be protected by sections 14(1) or (2)?

[12] In the Notice of Inquiry I sent to the ministry, I noted that it appeared, based on the appellant's request, that the appellant knew (from her contact with the OPP) that information from a third party was the catalyst for the OPP's contact with the appellant. I asked the ministry to address whether, in light of the appellant's apparent state of knowledge, Part 2 of the section 14(3) test was met.

[13] The ministry's representations did not address the appellant's state of knowledge. Rather, the ministry's representations submit that confirming the existence or non-existence of the requested records would reveal to the appellant that the OPP

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[2] Orders P-255 and PO-1656.
[3] PO-2459.

received a certain type of information. I cannot describe further the ministry's submissions, except that they submit that such a disclosure would risk infringing the common law rule of informer privilege, as recently discussed by the Supreme Court of Canada in *R. v. Durham Regional Crime Stoppers Inc.*[4]

[14] I will first address the argument about informer privilege. As the ministry's representations state, informer privilege protects the identity of a complainant or informant in court. The ministry's representations do not explain how confirming or denying the existence of records in response to the appellant's request could infringe upon informer privilege. I note that in both *R. v. Durham Regional Crime Stoppers Inc* and another Supreme Court of Canada (SCC) case considering informer privilege, *R. v Leipert,*[5] the parties knew that an informer (in those cases via a Crime Stoppers tip) was involved prior to the criminal charges that arose. Informer privilege applied (or did not apply on the facts of the *Durham* decision) to the *identity* of the informer where it might be revealed by the content of the related records. Mere knowledge of the existence of a record or records of an informer was not a concern in the cases above. The ministry has not established that confirming or denying the existence of records would reveal that they received information from a certain type of informer, let alone that it could reveal the identity of any informer in a manner that infringes upon informer privilege.

[15] The ministry has therefore not established that informer privilege provides a basis for refusing to confirm or deny the existence of records in this appeal. The cases cited above establish that informer privilege co-exists with knowledge of the existence of records, even when those records reveal the existence of an informer.

[16] The ministry's representations state that confirming the existence or non-existence of the requested records would reveal to the appellant specific information about the source of the information provided to the police. The ministry does not explain or establish how the mere act of confirming or denying the existence of the requested records could disclose this information.

[17] I am satisfied that the ministry has not established how the act of confirming or denying the existence of the requested records would reveal the information it submits would be revealed.

[18] I find that the ministry has not established Part 2 of the requirements for section 14(3) to apply. The ministry cannot therefore rely on section 14(3) to respond to the appellant's request for records.

[19] As I do not uphold the ministry's refusal to confirm or deny the existence of responsive records, I will order the ministry to issue a decision to the appellant under

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[4] 2017 SCC 45, [2017] 2 SCR 157.
[5] [1997] 1 SCR 281.

the *Act*. In its decision, the ministry must identify whether any responsive records exist, as well as any applicable grounds for withholding all or parts of any such records.

[20] To preserve the ministry's rights to seek judicial review of this order, I will not send this order to the appellant for 21 days from the date of this order.

ORDER:

1. I do not uphold the ministry's response to the appellant that relies on section 14(3) of the *Act*.

2. I order the ministry to issue a decision to the appellant responding to the appellant's request that does not rely on section 14(3), treating the date of this order as the date of the request.

3. If the ministry has not notified me that it has applied for judicial review of this order by **June 28, 2018**, I will send a copy of it to the appellant.

Original Signed by: June 7, 2018

Hamish Flanagan
Adjudicator