Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3921

Appeal PA18-71

Ontario Securities Commission

January 25, 2019

Summary: The appellants made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to any records relating to allegations of securities law violations by the appellants. The appellants assert that they have reason to believe that responsive records are held by the Ontario Securities Commission (OSC). Citing section 14(3) of the *Act*, the OSC refused to confirm or deny the existence of records on the basis that any records, if they exist, would be exempt under law enforcement exemptions in the *Act*. The adjudicator upholds the OSC's decision under section 14(3).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, as amended, section 14(3); General, RRO 1990, Reg 460, Schedule.

OVERVIEW:

[1] The Ontario Securities Commission (the OSC) conducts investigations involving potential violations of Ontario securities law that are sometimes prompted by tips and complaints received from members of the public through the OSC's complaint process, including its Whistleblower Program introduced in July 2016. Aimed at targeting serious and hard-to-detect violations of Ontario securities law, the Whistleblower Program provides compensation of up to $5 million to individuals who voluntarily come forward with tips that lead to enforcement action resulting in monetary sanctions of over $1 million. As described in more detail below, a key component of the Whistleblower Program, and of the OSC's complaints process more generally, is the confidentiality protection afforded to complainants.

[2] Through legal counsel, the appellant corporations made a request to the Ministry of Finance (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records created, received or sent over a defined period that relate to any allegations made by any person against the appellants, or their employees or agents, concerning a breach of Ontario securities law or the public interest, including information provided to the OSC by any person under the OSC's Whistleblower Program. The appellants indicated in their request that they understand responsive records exist in the custody or control of the OSC and/or the Joint Serious Offences Team.[1] It is the appellants' assertion that the existence of individuals who have filed complaints about the appellants with the OSC is already known.

[3] The appellants also asked that the request be treated as a request for continuing access, under section 24(3) of the *Act*, to any records sent, created or received for two years from the date of the request.

[4] The ministry responded on behalf of the OSC, which is an agency of the ministry and itself an institution under the *Act*.[2] For ease of reference, in this order, I will refer to actions taken by the ministry on behalf of the OSC as actions of the OSC.

[5] The OSC refused to confirm or deny the existence of records responsive to the request, citing section 14(3) of the *Act*. Section 14(3) permits an institution to refuse to confirm or deny the existence of a record to which one or more of the law enforcement exemptions at section 14(1) or (2) would apply.

[6] The appellants appealed the OSC's decision to this office.

[7] During the mediation stage of the appeal process, the appellants challenged the OSC's refusal to confirm or deny the existence of records on the ground that the existence of individuals who have filed complaints about the appellants with the OSC is already known.

[8] As the matter could not be resolved through mediation, the appeal was transferred to the adjudication stage, where I decided to conduct a written inquiry under the *Act*. In addition to addressing the two-part test for the application of section 14(3), which I describe below, I asked the parties to address the relevance, if any, of the appellants' claim that they are already aware of the existence of complainants in this matter.

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[1] The Joint Serious Offences Team is an enforcement partnership between the OSC, the Royal Canadian Mounted Police's Financial Crime Program and the Ontario Provincial Police Anti-Rackets Branch that conducts investigations and prosecutions under the Ontario *Securities Act* and the federal *Criminal Code*.
[2] Schedule to Regulation 460 under the *Act*. The OSC is a designated institution, with the Minister of Finance designated as its head for the purposes of the *Act.*

[9] The OSC provided representations, which I shared with the appellants in accordance with this office's *Code of Procedure* and *Practice Direction 7*. Among other things, the OSC clarified that the refusal to confirm or deny the existence of responsive records is based on the claim that responsive records, if they exist, would be exempt under sections 14(1)(a), (b) and (d) and section 14(2)(c) of the *Act*.

[10] The appellants declined to provide representations.

[11] The OSC then contacted me to report that its enforcement branch had closed its investigation pertaining to the appellants, with no further action being taken. The OSC confirmed that the appellants had been aware of the non-public investigation involving them, and have been informed that the investigation file is closed. In light of this development, the OSC acknowledged that it can no longer claim that disclosure of responsive records, if they exist, would interfere with the investigation against the appellants as an ongoing law enforcement matter or ongoing law enforcement investigation, as required by sections 14(1)(a) and (b) of the *Act*. As a result, the OSC withdrew these claims as a basis for its refusal to confirm or deny the existence of records under section 14(3). The OSC maintains, however, that this development does not affect its other submissions in support of its section 14(3) claim.

[12] In this order, I uphold the OSC's decision to refuse to confirm or deny the existence of responsive records. Among other reasons, I accept that even though the OSC's investigation of the appellants is closed, confirming or denying the existence of responsive records in this case could reasonably be expected to compromise the effectiveness of the law enforcement activities of the OSC more generally. I dismiss the appeal.

DISCUSSION:

Has the institution properly applied section 14(3) in the circumstances of this appeal?

[13] Section 14(3) states:

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

[14] 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.[3]

[15] 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.[4]

Part one: would the records (if they exist) qualify for exemption under sections 14(1) or (2)?

[16] Based on the nature of the appellants' request, I am satisfied that any responsive records, if they exist, would qualify for exemption under section 14(1)(d). This section states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to [...] 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[.]

[17] The request is for records relating to allegations made by any person against the appellants or related parties about breaches of Ontario securities law or the public interest, including information provided to the OSC under its Whistleblower Program. The IPC has confirmed in a number of past orders that investigations of complaints by the OSC under the provisions of the *Securities Act* qualify as "law enforcement matters" within the meaning of the section 14 exemptions.[5] I have no trouble accepting that records responsive to the request could reasonably be expected to contain or to reveal the identity of complainants to the OSC, or information provided only by them in support of their allegations, or both.

[18] There is also clear evidence of the OSC's general practice of maintaining the confidentiality of this information. The OSC explains that confidentiality is a critical part of its process for dealing with tips and complaints received from the public, particularly those received through the Whistleblower Program, because protection of a complainant's identity removes one of the principal impediments to a whistleblower's coming forward. Risks to whistleblowers include retaliation, reprisals, exposure to civil litigation and diminished employment opportunities.

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[3] Orders P-255 and PO-1656.
[4] Order PO-1656.
[5] Among others, see Orders 30, P-548 and PO-1883.

[19] In order to encourage reporting, the OSC aims to minimize these risks through policies and practices underscoring the importance of maintaining the confidentiality of complaint information where possible. For example, the OSC's online complaint form informs potential complainants that the information they provide will be treated in confidence and will not be disclosed except as required by law or as necessary to investigate the complaint. This is also reflected in public guidance provided by the OSC, including OSC Policy 15-601 (Whistleblower Program), and OSC Staff Notice 15-703 (Guidelines for Staff Disclosure of Investigations), which sets out guidelines used by the OSC to determine when to depart from its general rule of not publicly disclosing information about an ongoing or closed investigation. These documents indicate that the OSC treats as confidential not only the identity of complainants (and information that could reasonably be expected to reveal the identity of complainants), but also the mere existence of an investigation in most cases.

[20] The appellants' contention that they are aware of the existence of complainants in this matter does not alter my conclusion. There is no evidence that the appellants already know the identities of any complainants who may have come forward to the OSC, or information that any such complainants may have provided. The OSC would be entitled under section 14(1)(d) to refuse to disclose any responsive records that could reasonably be expected to confirm the identities of complainants that the OSC has maintained in confidence, or to reveal information provided by those complainants, or both.

[21] As I accept that any responsive records, if they exist, would be exempt under section 14(1)(d), it is unnecessary for me to consider the OSC's other claims under this part of the test.

Part two: would disclosure of the fact that records exist (or do not exist) itself convey information that could reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity?

[22] To meet the second part of the test, I must be persuaded of a reasonable connection between disclosure of the mere fact that records exist or do not exist and potential harm to an existing or reasonably contemplated law enforcement activity. The requirement that the potential harm be linked to an "existing or reasonably contemplated" law enforcement activity gives effect to the legislature's intention to limit the scope of section 14(3) to cases of potential harm to ongoing investigation or

intelligence-gathering activities.[6]

[23] In this case, the OSC has confirmed not only that its investigation involving the appellants has been closed, but also that no further action will be taken. This eliminates the possibility that confirming or denying the existence of records responsive to the appellants' request could prejudice that particular investigation, which is closed. Nevertheless, in view of the critical importance of confidentiality to the OSC's work, I accept that confirming or denying the existence of records in this case could reasonably be expected to have a chilling effect on the OSC's ability to carry out its law enforcement activities more generally.

[24] I accept the OSC's evidence that its confidential treatment of complaint information is a key element of the success of its complaints and investigation process. Given the risks to prospective whistleblowers, I find it reasonable to believe that the OSC's explicit public commitments to maintain the confidentiality of this information is a significant factor in the decision to come forward with complaint information. Confirming or denying the existence of complainants in a particular matter would undermine these public commitments, which could damage the OSC's credibility with existing or potential complainants. Confirming the existence of complainants in a particular matter could also lead to attempts to identify them, increasing the risks of reprisal and retaliation against them.

[25] I accept that these are reasonably foreseeable harms of disclosing the existence of public complaints in matters being investigated by the OSC. These harms could reasonably be expected to have a deterrent effect on existing or prospective complainants' willingness to provide investigatory assistance to the OSC. Confirming or denying the existence of responsive records in this case would amount to revealing whether complaints exist in an OSC matter, giving rise to the potential harms identified above; these harms could reasonably be expected to compromise the OSC's ability to carry out its law enforcement activities in furtherance of its investor protection mandate. This is the type of harm contemplated by part two of the section 14(3) test.

[26] As a result, I conclude that both parts of the section 14(3) test have been met.

[27] I am also satisfied that the OSC exercised its discretion under section 14(3), and did so in a proper manner. It took into account relevant factors, including the importance of maintaining public confidence in the OSC's complaints and investigation process, and the protection of complainants, whose cooperation enhances the OSC's ability to carry out its mandate under the *Securities Act*. There is no evidence to

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[6] Order P-255, citing the Williams Commission, Public Government for Private People, The Report of the Commission on Freedom of Information and Protection of Privacy/1980 (Toronto: Queen's Printer, 1980), Volume II at page 301.

suggest that the exercise of discretion was based on irrelevant factors.

[28] For all these reasons, I uphold the OSC's refusal to confirm or deny the existence of records under section 14(3) of the *Act*.

ORDER:

I uphold the OSC's refusal to confirm or deny the existence of records under section 14(3). I dismiss the appeal.

Original signed by | January 25, 2019

Jenny Ryu
Adjudicator