Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4462

Appeal PA22-00127

Ministry of the Solicitor General

November 29, 2023

Summary: An individual made a request under the *Act* to the ministry for access to all information about himself held by the Ontario Provincial Police, including records relating to allegations of him being a member of any motorcycle clubs. Citing section 14(3) of the *Act*, the ministry 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 ministry's decision to refuse to confirm or deny the existence of records under section 14(3).

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

OVERVIEW:

[1] This appeal arises from a request for information containing allegations that the requester is a member of a motorcycle club. The requester is seeking this information because he believes that such records exist and are preventing him from traveling outside Canada's border.

[2] The Ministry of the Solicitor General (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for all information about the requester held by the Ontario Provincial Police (the OPP), including records containing:

- information about [the requester's] name, date of birth, and other identifying information;
- information about allegations of membership in any motorcycle clubs, including the Red Devils, the Hell's Angels, etc., including allegations about when [the requester] joined or left such groups;
- information provided to or received from Interpol or any other law enforcement agencies outside of Canada about [the requester], including in respect of Interpol's "Project Rockers" program;
- information provided by the OPP or the Ministry of the Solicitor General to any other entities or government departments; and
- any and all information about [the requester] that is maintained about him in the Canadian Police Information Centre database.

[3] The time period for the records sought by the request was identified as from January 1, 2008 to December 22, 2021.

[4] The ministry issued a decision advising that the existence of the requested records could not be confirmed or denied in accordance with section 14(3) of the *Act*.

[5] The requester, now the appellant, appealed the ministry's decision to the Office of the Information and Privacy Commissioner (the IPC).

[6] During mediation, the ministry advised the mediator that it maintains its decision to refuse to confirm or deny the existence of the requested records.

[7] As no further mediation was possible, the appeal was transferred to the adjudication stage of the appeal process, where I decided to conduct an inquiry under the *Act*. I invited and received representations from the ministry and the appellant.[1]

[8] In this order, I uphold the ministry's decision to refuse to confirm or deny the existence of responsive records under section 14(3) of the *Act*. I dismiss the appeal.

DISCUSSION:

[9] The sole issue to be decided in this appeal is whether the ministry is entitled to refuse to confirm or deny the existence of any records responsive to the request, pursuant to section 14(3) of the *Act*.

[10] Section 14(3) states:

[1] The parties' representations were shared in accordance with the confidentiality criteria in the IPC's *Practice Direction 7* and section 7.07 of the IPC's *Code of Procedure*.

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

[11] 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.[2]

[12] 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.[3]

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

[13] The ministry submits that the exemption at section 14(1)(g)[4] would apply to any responsive records (if they exist). Section 14(1)(g) reads:

> 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;

[14] The term "law enforcement" is used in several parts of section 14, including in 14(1)(g). It is defined in section 2(1) as follows:

> "law enforcement" means,
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> (a) policing,
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> (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

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[2] Orders P-255 and PO-1656.
[3] Order PO-1656.
[4] The ministry also relies on sections 14(1)(a), 14(1)(b), 14(1)(e) and 14(1)(l). As I have found that the records (if they exist) would qualify for exemption under section 14(1)(g) it was not necessary for me to consider the other law enforcement exemptions.

(c) the conduct of proceedings referred to in clause (b).

[15] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[5]

[16] 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.[6] The institution must show that the risk of harm is real and not just a possibility.[7] However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.[8]

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

[17] For section 14(1)(g) to apply, there must be a reasonable basis for concluding that disclosure of the information at issue could be expected to interfere with the gathering of or reveal law enforcement intelligence information.

[18] The term "intelligence information" has been defined in the caselaw as:

> 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.[9]

[19] In this appeal, the request is for information about the appellant, including records relating to allegations that he was a member of a motorcycle gang, such as the Hells Angels or the Red Devils. As well, the request includes information where the appellant is referenced in records related to Interpol's program "Project Rockers".

[20] The ministry submits that part one of the test has been met.

[21] The ministry submits that because the appellant's request is for OPP records for a time period covering 13 years, he is clearly seeking access to intelligence-based records. It also submits that the requested information is about the appellant's alleged

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[5] *Ontario* (*Attorney General*) *v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[6] Order PO-2040 and *Ontario* (*Attorney General*) *v. Fineberg*, cited above.
[7] *Merck Frosst Canada Ltd. v. Canada* (*Health*), [2012] 1 S.C.R. 23.
[8] Ontario (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), 2014 SCC 31 (CanLII) at paras. 52-54; *Accenture Inc. v. Ontario* (*Information and Privacy Commissioner*), 2016 ONSC 1616.
[9] Orders M-202, MO-1261, MO-1583 and PO-2751; see also Order PO-2455, confirmed in *Ontario* (*Community Safety and Correctional Services*), 2007 CanLII 46174 (ON SCDC).

membership in the Hell's Angels and the Red Devils,[10] both of which are considered by the courts and law enforcement agencies alike to be motorcycle gangs engaged in criminal activities, [11] subject to intelligence gathering. Finally, the ministry submits that the appellant also requested information that has been disclosed to or received from other law enforcement agencies about him, including in respect of Interpol's program to prevent motorcycle gangs, known as "Project Rockers".

[22] The ministry explains that because of their involvement in criminal activities, organizations such as the Hells Angels or the Red Devils could be subject to covert police intelligence operations, which is a part of law enforcement. The ministry submits that for this reason any records that would be responsive to the appellant's request, if they exist, would contain the kind of information that police share confidentially amongst each other to facilitate effective covert policing operations and its disclosure could interfere with the gathering or reveal law enforcement information.

[23] The appellant submits that part one of the test has not been met. In the brief portions of his representations that can be said to relate to part one, he submits that the ministry has failed to demonstrate convincing evidence of a risk of harm that is well beyond the merely possible and speculative if the records sought were disclosed or even confirmed to exist.

[24] I find that the ministry has provided me with sufficient evidence to conclude that the records (if they exist) would qualify for exemption under section 14(1)(g).

[25] To begin, I accept the ministry's position that information that would be contained in any responsive records (if they exist) would have been gathered in a covert manner by a law enforcement agency (either the OPP or another law enforcement agency including Interpol) "with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violations of law".

[26] I also accept the ministry's submission that the Hells Angels have been recognized by the Ontario courts as a "criminal organization dedicated to the facilitation or commission of serious offences." I further accept that the Red Devils motorcycle club is affiliated with the Hells Angels. In light of this, I find that the disclosure of any responsive records, if they exist, could reasonably be expected to interfere with the gathering of or reveal law enforcement intelligence information respecting those motorcycle clubs or individuals affiliated with them.

[27] As such, I find that any responsive records, if they exist, would qualify for exemption under section 14(1)(g). As a result, I find that part one of the test for section 14(3) has been met.

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[10] The ministry explains that the Red Devils are a motorcycle club that is affiliated with the Hell's Angels. http://www.cbc.ca/news/canada/thunder-bay/thunder-bay-biker-gangs-1.6506885

[11] 751809 Ontario Inc. (Famous Flesh Gordon's) *v.* Alcohol and Gaming (Registrar), 2014 ONSC 6707 (CanLII) at paragraph 5. See also *R. v. Hells Angels Motorcycle Corporation*, 2009 CanLII 53152 (ON SC).

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?

[28] 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.[12]

[29] The ministry submits that confirming the existence or non-existence of the requested records would potentially reveal a significant amount of sensitive law enforcement information, including whether or not the appellant is the subject of intelligence-gathering. 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).

[30] In particular, the ministry submits that confirming the existence of such records would create harm to intelligence operations, and ongoing gathering of intelligence-based records, not just by the OPP but by other law enforcement agencies with whom the OPP has formed close partnerships. The ministry goes on to explain that intelligence information, is by definition, information gathered in a covert manner. 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 have "serious repercussions for undercover officers, confidential informants and other confidential sources of information", including the threat of reprisals to these individuals.

[31] In addition, the ministry submits the disclosure of the existence of responsive records relating to the gathering of intelligence would reveal whether the appellant has been subject to intelligence gathering operations. It submits that the appellant could use this information to modify his behaviour in order the avoid attracting further attention from law enforcement officials This could cause significant harm to any existing law enforcement operations.

[32] The ministry also submits that disclosure of the existence of responsive records could reasonably be expected to interfere with "the ongoing working relationship between the OPP and intelligence operations in other law enforcement agencies, such as Interpol, which are built on the premise that confidential intelligence information must not be disclosed except for law enforcement related reasons." It submits that the

[12] 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.

fact the appellant has specifically requested law enforcement records provided by other law enforcement agencies means that he is interested in records that, if they were revealed, could harm these working relationships.

[33] Finally, the ministry submits that if it were revealed that there are no records responsive to this request it would also be harmful to intelligence operations. Specifically, the ministry submits that it would reveal weaknesses in intelligence gathering which could be exploited by the appellant or others to the detriment of intelligence operations.

[34] In response, the appellant disputes the ministry's position that disclosure of the existence of the requested records would interfere with the OPP's Project Coyote as this project post-dated the period stated in his request. He explains that Project Coyote began in January 2022 while his request was for records from January 1, 2008 to December 22, 2021. The appellant submits that, for these reasons, the ministry has not demonstrated that disclosure of the existence of responsive records will compromise an investigation that had yet to begin at the time of their creation.

[35] In addition, the appellant submits that the ministry's remaining arguments are speculative. Specifically, he submits that it is speculative for the ministry to conclude that disclosure of the existence of records that are nearly a year and a half old would result in individuals modifying their behavior, would interfere with the OPP's relationship with other law enforcement agencies or would reveal an intelligence weakness.

[36] For the reasons that follow, I find that the second part of the test under section 14(3) has also been met by the ministry.

[37] I accept the ministry's position that by simply revealing the existence of responsive records, the appellant could be alerted to the fact that he was (or may still be) the subject of intelligence gathering. As a result, I find that disclosure of the fact that responsive records may or may not exist could reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity, more specifically the gathering of intelligence information.

[38] I acknowledge the appellant's submission that his request post-dates the OPP's Project Coyote, a project that concluded in February 2023. However, in my view, this does not preclude the possibility that disclosure of the existence of responsive records could reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity, as well as the gathering of intelligence information. There may be other projects or investigations that the OPP is conducting that are not known to the public. I accept that disclosure of the fact that records responsive to the appellant's particular request may exist could reasonably be expected to compromise the effectiveness of those other investigation or projects and the intelligence information that is gathered, as a result.

[39] Accordingly, I find that the ministry has established that part two of the section 14(3) test has been met.

[40] As I have found that both parts of the test have been met for section 14(3) to apply, I must now consider whether the ministry's exercise of discretion to refuse to confirm or deny the existence of records under that section is appropriate.

Exercise of Discretion

[41] Section 14(3) is a discretionary exemption. As noted above, the IPC has found that the discretionary power to refuse to confirm or deny the existence of a record should only be exercised in rare cases. I must, therefore, review the ministry's exercise of discretion in deciding to rely on this section to refuse to confirm or deny the existence of responsive records.

[42] On appeal, the IPC may review the ministry's decision in order to determine whether the ministry exercised its discretion and, if so, whether it erred in doing so. I may send the matter back to the ministry for a re-exercise of discretion based on proper considerations if I determine that the ministry exercised their discretion in bad faith or for an improper purpose, considered irrelevant considerations, or failed to consider relevant considerations.

[43] The ministry submits that it exercised its discretion appropriately in refusing to confirm or deny the existence of records. It submits that confirming or denying their existence could compromise the effectiveness of law enforcement activities, specifically the gathering of intelligence information. The ministry submits that it has exercised its discretion in accordance with its usual practices, and in the interest of protecting public safety.

[44] In response, the appellant submits that the ministry improperly exercised its discretion. He submits that the ministry did not consider the following factors:

- individuals should have a right of access to their own personal information and exemptions from that right should be limited and specific;
- the requester's sympathetic and compelling need to receive the information (namely to pursue the ability to exercise his *Charter*-protected mobility rights to enter and exit Canada); and
- the age of the information (i.e. that it is no longer current information).

[45] In the circumstances of this appeal, based on the entirety of the representations before me and the nature of the information that any responsive records that might exist would contain, I am satisfied that in exercising its discretion the ministry considered relevant considerations and did not act in bad faith or for an improper purpose. I am not persuaded by the appellant's claim that the ministry did not consider

the above listed factors in exercising its discretion. From my review of the ministry's representations, it appears that the ministry considered those factors but exercised its discretion to refuse to confirm or deny the existence of responsive records to protect the gathering of intelligence information in its own operations as well as the operations of other law enforcement agencies. I accept that the ministry appropriately considered the nature of the information at issue and the purpose and importance of the law enforcement exemptions, particularly section 14(1)(g).

[46] Accordingly, I conclude that the ministry exercised its discretion appropriately in relying on section 14(3) to refuse to confirm or deny the existence of records responsive to the appellant's request, and I uphold the ministry's decision.

ORDER:

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

Original signed by: November 29, 2023
Lan An
Adjudicator