Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-498

Appeal P-9200806

Ministry of the Solicitor General and Correctional Services

Appeals P-9200807, P-9200808, P-9200809, P-9200810 and P-9200811

Ministry of the Attorney General

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

ORDER

BACKGROUND:

The Ministry of the Solicitor General (now the Ministry of the Solicitor General and Correctional Services) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for:

1. Full details of the Solicitor General's involvement in funding decisions and analysis of the Niagara Regional Police Force and/or the Green Ribbon Task Force investigating the murder of [a named individual].

2. Any reports, correspondence, and/or memos on this issue between the Policing Services Division of the Solicitor General's Office and the following bodies. The Attorney General's ministry; Premier's Office; Treasury Department; O.P.P.; Niagara Regional Police; Green Ribbon Task Force. This should [include] any cost benefit analysis etc.

3. Any correspondence on this issue between the Solicitor General's Office and any federal government agency.

4. All internal correspondence, documents or memos within the Solicitor General's (SG) Office, the SG's Policing Services Division, or any part of the Ministry relating to the funding or operation of the [named individual's] murder probe.

The Ministry of the Solicitor General treated these requests collectively and responded that "the existence of [any responsive records] cannot be confirmed or denied in accordance with subsection 14(3) of the Act."

The Ministry of the Attorney General received a similar request from the same individual for access to:

1. A full breakdown of funding by the Attorney General's Ministry of the Niagara Regional Police Force and/or the Green Ribbon Task Force investigating the murder of [a named individual]. This should include funding of other Forces assisting in the investigation, namely, Halton, Hamilton-Wentworth, London City Police, Metro Toronto and the OPP. It should cover the full gamut of billing for wages, overtime, car rentals, telephone rentals, computer purchases, building rent and associated cost, pager rentals etc.

2. Any correspondence, memos or documents relating to financing, policy, philosophy, day to day operations, or any other monetary relationship between the Attorney General's Ministry and/or Niagara Police; the Green Ribbon Task Force; Treasury Department; Premier's Office; Solicitor General's Office; Solicitor General's Police Services Branch and the O.P.P.

3. All internal correspondence, memos or documents of the Attorney General's Ministry concerning the funding of the [named individual's] murder investigation.

4. All correspondence, reports or memos to the Attorney General's Ministry that in any way deals with the Green Ribbon Task Force, its funding and its mandate.

5. Any correspondence on this issue between the Attorney General's office and any federal government agency.

The Ministry of the Attorney General responded to each of these requests separately. In each case, it indicated that "the existence of the records cannot be confirmed or denied in accordance with subsection 14(3) of the Act."

The requester appealed the decisions of the two Ministries to refuse to confirm or deny the existence of the records. The appeal involving the Ministry of the Solicitor General was designated as Appeal P-9200806. The appeals relating to the Ministry of the Attorney General were recorded as Appeals P-9200807, P-9200808, P-9200809, P-9200810 and P-9200811, respectively. Because the appellant is the same individual in each case and because the subject matter of the appeals is similar, I have chosen to decide these appeals in the same order.

Efforts to mediate these appeals were unsuccessful and notice that an inquiry was being conducted to review the decisions of both institutions was sent to the appellant and to the two Ministries involved. All parties provided representations.

ISSUE:

The sole issue to be determined in these appeals is whether the heads of the two Ministries properly applied section 14(3) of the Act to refuse to confirm or deny the existence of records of the type requested.

THE INTERPRETATION OF SECTION 14(3) OF THE ACT:

Section 14(3) of the Act states that:

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

A number of previous orders have dealt with the application of section 14(3) of the Act. It would be helpful to review how this provision has been interpreted in the past.

In general terms, these orders have addressed two separate issues regarding the interpretation of section 14(3). First, the test which an institution must meet before it can rely on this provision to refuse to confirm or deny the existence of a record. Second, where this initial test has been satisfied, whether the head of the institution has properly exercised his or her discretion to apply section 14(3) in the circumstances of the case.

A review of these orders indicates that the interpretation of section 14(3) has evolved over time. In earlier orders, section 14(3) was interpreted literally. In other words, where an institution was able to establish that either sections 14(1) or 14(2) of the Act applied, the head of the institution could, on this basis, exercise discretion to also apply section 14(3) to the record (see Orders 102, 106, 148, 170, 195, P-254, P-255 and P-262). I will refer to this test in the remainder of the order as the "threshold test" for the interpretation of section 14(3).

In Order P-255, then Assistant Commissioner Tom Mitchinson, in a Postscript to the order, made some general comments about the interpretation of section 14(3) and the type of evidence required to support a claim for the application of the section. He stated, in particular, that:

> Section 14(3) of the Act is unusual, in that it permits a head to refuse to confirm the existence or non-existence of a record, provided that the type of record sought by a requester would satisfy the requirements of the discretionary exemptions provided by sections 14(1) or 14(2).
>
> By including section 14(3), the Legislature has acknowledged that, in order to carry out their mandates, certain institutions involved with law enforcement activities must have the ability, in the appropriate circumstances, to be less than totally responsive in answering requests for access to government-held information. However, as the members of the Williams Commission pointed out in Volume II of their report entitled Public Government for Private People, The Report of the Commission on Freedom of Information and Protection of Privacy/1980 at page 301, it would be a rare case in which the disclosure of the existence of a file would communicate information to the requester which may frustrate an ongoing investigation or intelligence-gathering activity.
>
> A requester in a section 14(3) situation is in a very different position than other requesters who have been denied access under the Act. By invoking section 14(3), an institution is denying the requester the right to know whether a record exists, even when one does not. In my view, section 14(3) provides institutions with a significant discretionary power and it is extremely important that discretion under this section is carefully considered and properly exercised.
>
> Whenever this office is faced with an appeal involving section 14(3), the head will be required to provide **detailed and convincing** reasons as to why this section was claimed, in order for the Commissioner/Assistant Commissioner to

> ensure that the head's decision was made in full appreciation of the facts of each case and upon proper application of the principles of law [emphasis added].

In Order P-262, Assistant Commissioner Mitchinson reiterated the key points made in his Postscript to Order P-255 regarding the nature of the exemption and the quality of evidence required to support both the application of section 14(3) and the head's exercise of discretion not to disclose the existence of the record.

In Order P-338, Assistant Commissioner Mitchinson accorded section 14(3) of the Act a more restrictive interpretation. He described the test for the application of this provision in the following fashion:

> In my view, an institution relying on section 14(3) must do more than merely indicate that records of the nature requested, if they exist, would qualify for exemption under sections 14(1) or (2). An institution must provide detailed and convincing evidence that disclosure of the mere existence of the requested records would convey information to the requester which could compromise the effectiveness of a law enforcement activity.

It should be noted that, in the context of Order P-338, the institution only relied on the paragraphs of sections 14(1) and (2) which relate to law enforcement activities. These two sections of the Act, however, also protect other kinds of interests (e.g. the right of a person to have a fair trial or impartial adjudication).

Taking this point into account and having considered the evolution of these orders, I believe that the test set out in Order P-338 is most consistent with the intent and purposes of the Act. I would, however, make a slight adjustment to this test to ensure that it takes into account the full ambit of exemptions contained in sections 14(1) and (2) of the Act. The test to be applied is, thus, the following:

> For an institution to claim the application of section 14(3) of the Act to a particular record, the institution must establish that disclosure of the mere existence of the record would communicate information to a requester which would fall under either sections 14(1) or (2) of the Act.

I will refer to this test in the remainder of this order as the "purposive test" for the application of section 14(3).

SUBMISSIONS AND FINDINGS:

I will now focus my discussion on the present appeals. Because of the approach which I will take to resolving these cases, I can state at this stage that there are five records which are responsive to the request. These are:

(1) A proposal dated May 1992 made by several police forces for the funding of the Green Ribbon Task Force.

(2) A supplementary proposal dated October 1992 for similar funding.

(3) A letter from an official of the Ministry of the Solicitor General dated May 19, 1992 which requests that the necessary funding be granted.

(4) A memorandum from an employee of the Ministry of the Attorney General which provides advice on whether the funding request should be accepted.

(5) A Certificate for Funding dated May 14, 1992 issued by the Ministry of the Attorney General pursuant to section 9(1) of the Ministry of Treasury and Economics Act (the Treasury Act).

The appellant in these cases states that:

> The information I have sought access to relates solely to funding issues. I have not sought any information that could prejudice any investigation. Surely, the public is entitled to know how **its** tax dollars are being spent.

In its representations, the Ministry of the Attorney General submits that the sole issue raised in these appeals is whether that Ministry properly exercised its discretion under section 14(3) to refuse to confirm or deny the existence of the records. The Ministry then takes the position that the records in question are all subject to the exemptions contained in sections 14(1)(a), (b), (f) and (l) of the Act. These representations do not focus, however, on how disclosure of the mere existence of the records would communicate information to a requester which would fall under section 14(1) or (2) of the Act.

The Ministry of the Solicitor General, for its part, claims that sections 14(1)(a), (b), (c), (f), (g) and (l) as well as section 14(2)(a) of the Act apply to the records at issue. This Ministry further indicates that, in making the decision to invoke section 14(3), it examined the following factors:

(1) The nature and content of the records.

(2) The fact that the requester is a member of the media.

(3) The harm which could result to police intelligence operations if information used during an ongoing investigation is disclosed.

(4) Media interference which makes the investigation more difficult to conduct.

In my view, these submissions more appropriately pertain to the Ministry's reasons for not disclosing all or parts of the records at issue in these appeals. They do not establish that the disclosure of the mere existence of the records would communicate information to a requester which would fall under either sections 14(1) or (2) of the Act.

The Ministry of the Attorney General makes the following additional submissions with respect to its decision to apply section 14(3) of the Act to the documents at issue in these appeals:

> Disclosure of the mere existence of s. 9(1) certificate funding would indicate to the requester that a particular individual was ... the target of a Joint Police Forces Operations investigation ... [T]his disclosure could compromise not only the effectiveness of law enforcement activity by causing the target to curtail his criminal activities, destroy evidence, flee the jurisdiction or warn his confederates if the documents exist, it could place peoples' lives in jeopardy if they are undercover operatives being used ... For these reasons, the Ministry is invoking s. 14(3) of the Act in this case, and intends to do so in every case touching s. 9(1) certificate funding, so long as the Privacy Commissioner is satisfied that the discretion was exercised properly.
> ...
> In order to satisfy the Commissioner that the head's discretion was properly exercised under this section, the Ministry is developing a set of criteria which it intends to use when responding to requests touching on s. 9(1) certificate funding.

The Ministry of the Attorney General then states that:

> In the circumstances of this case, it is respectfully submitted that the Ministry's discretion was properly exercised. First, the records in issue were reviewed. Second, the investigation here is ongoing, involves extremely serious criminal behaviour, and is the subject of intense public interest and speculation that could jeopardise the fair trial interests of the accused. Third, while the main suspect, [a named individual], has been arrested on some charges, there are other suspects who could benefit from knowing about the existence of this investigation.

The Ministry of the Solicitor General makes the following submissions:

> In considering [section 9(1) of the Ministry of Treasury and Economics Act], the Ministry felt that any untimely release of information in reference to this ongoing highly publicized and pressurized investigation would effectively undermine the purpose of this action and possibly impede its use in the future.

> As well, the Ministry considered that [everyone] is not generally aware of the use of s. 9 or that detailed proposals requesting funding exist. The Ministry feels that a potential for harm would occur if ... a series of access requests [are made] for funding proposals or other information related to the monitoring of the funds provided. It would be easy to determine the extent of police knowledge about an individual, a group or organization simply by monitoring the response to these requests.
>
> By making an access request, [someone] could determine if the police had records about ... [an] individual/organization or his/its activities. If the Ministry routinely refused access to the records and cited the appropriate exemptions, the individual/organization would have knowledge of police interest in him/it and may receive information about the records through the exemptions. In the case of funding proposals/operational plans which represent the extraordinary case, individuals/organizations would determine that the police are very interested and have elevated the scale of the investigation. The issue of denying the existence of records was discussed in the MacDonald Commission (Volume I at page 48) and the Williams Commission Report (Volume 2 at page 301). In each of these reports, it was recognized that there is a need for law-enforcement agencies to have the ability to refuse to disclose the existence of a record in response for investigative material. ...

A key argument advanced by the two Ministries, therefore, is that, unless the Government is able to rely on section 14(3) of the Act in cases where requests are made for funding under section 9(1) of the Treasury Act, requesters could, through the process of issuing individual or successive requests, learn indirectly whether a particular individual or organization is subject to investigation. In my view, this argument addresses the question of whether the head of an institution has properly exercised his or her discretion to apply section 14(3) of the Act in the circumstances of the case. The submissions do not focus on the threshold issue of whether the disclosure of the mere existence of the records **in these appeals** would communicate information to a requester which would fall under either sections 14(1) or (2) of the Act.

I will, nonetheless, address the submissions which the Ministries have made. In Order P-344, Assistant Commissioner Mitchinson dealt with similar arguments raised by the Ministry of the Attorney General in relation to wiretap records. In that appeal, the Ministry argued that the Criminal Code requires that it invoke section 14(3) in every case where a request for wiretap application records is received, irrespective of the individual applicant, the circumstances of the case, or whether or not a record exists. To do otherwise would, according to the Ministry, permit a requester to draw an accurate inference as to the existence of records. In a Postscript to the Order, Assistant Commissioner Mitchinson stated:

> In my view, taking a "blanket" approach to the application of section 14(3) in all cases involving a particular type of record would represent an improper exercise of discretion. Although it may be proper for a decision maker to adopt a policy under which decisions are made, it is not proper to apply this policy inflexibly to

> all cases. In order to preserve the discretionary aspect of a decision under [section 14(3)] ..., the head must ... ensure that the decision conforms to the policies, objects and provisions of the Act.

I agree with the comments made by Assistant Commissioner Mitchinson and adopt them for the purposes of this order. While I accept that requests for funding made under the Treasury Act may involve sensitive matters, the two Ministries must, prior to deciding whether to invoke section 14(3) of the Act, examine the facts of each particular case. While there may exist certain categories of section 9(1) funding proposals where it could be appropriate for the Ministries to apply section 14(3) in a consistent manner, the reliance on this provision in all cases is contrary to the intent of the Act.

It should also be borne in mind that, in the present set of appeals, the appellant is seeking information about the funding of a well-publicized murder investigation. There is also no dispute that the public knows that the investigation is being undertaken jointly by a number of police forces. This is not the kind of request where the information sought relates to the investigation of a named individual or organization.

To summarize, the arguments which the Ministries have thus far presented have not persuaded me that the disclosure of the mere existence of the records would communicate information to a requester which would fall under either sections 14(1) or (2) of the Act.

The Ministry of the Attorney General has also advanced several policy arguments to support its reliance on section 14(3) of the Act. These will now be set out:

> Funding of this project was provided by way of a s. 9(1) certificate under the Ministry of Treasury and Economics Act. This rarely used funding mechanism guarantees, pursuant to s. 9(2) of the same Act, that even provincial auditors are precluded from knowing about the details of these financial arrangements.
>
> There are some very strong policy arguments to support the proposition that s. 9(1) certificate funding ought never to be subject to public disclosure. Traditionally, this type of funding has been used to support [several kinds of sensitive] law enforcement activities ... Section 9(1) certificates are used when the resources needed are beyond the fiscal allocation of the participating forces and beyond their routine police operations.

With respect to the treatment of policy arguments in general, the following comments made by Former Commissioner Sidney Linden in Order 148 are of significance:

> As compelling as these arguments may be, they are not couched in the language of any exemption contained in the Act. As stated above, one of the principles of the Act is that information should be available to the public and exemptions from

> the right of access should be limited and specific. To deny access to a record on a public policy basis, no matter how compelling, offends this principle unless that public policy has been addressed by the Legislature in the form of an exemption from disclosure. ...

I agree with Commissioner Linden's comments and adopt them for the purposes of this appeal.

As part of its policy based representations, the Ministry of the Attorney General submits that the contents of Funding Certificates issued under section 9(1) of the Treasury Act ought never to be the subject of public disclosure. In my view, this result could only be achieved if this provision were accorded the status of a confidentiality provision under section 67(2) of the Act. Since section 9(1) of the Treasury Act is not listed in section 67(2) of the Act and because the Treasury Act does not provide that section 9(1) of the Treasury Act prevails over the Act, it follows that information relating to certificate funding is subject to the Act.

I have carefully reviewed the records at issue in these appeals and the representations submitted to me. I find that the two Ministries have failed to provide sufficiently detailed and convincing evidence that disclosure of the mere existence of the records requested would communicate information to the requester which falls under either sections 14(1) or (2) of the Act.

In resolving these appeals, it has been necessary for me to confirm that the records in question do, in fact, exist and to describe them in general terms. Based on my findings, the next step is for the two Ministries to issue decision letters to the appellant under sections 26 and 29(1)(b) of the Act to indicate whether they are prepared to disclose the information contained in the records.

The basis for my decision in these appeals has turned on the application of the purposive test for the interpretation of section 14(3). Given the importance of the issues raised in these appeals, however, and in deference to the submissions made by the parties, I will also determine whether a different result would be achieved if the threshold test were applied to these records. To consider this test, I must, of necessity, make some preliminary findings as to whether the information contained in the records falls under sections 14(1) or (2) of the Act.

I have reviewed the two funding proposals and find, based on my preliminary analysis, that only some of the information contained in these records falls within the scope of the exemptions set out in sections 14(1) and (2) of the Act. In my view, other information relates purely to the funding of the task force infrastructure. Examples of this type of information are found in the parts of the proposals which deal with the rental of photocopiers and fax machines, wages and overtime for police personnel, fuel and maintenance costs for vehicles and computer rental fees.

In my view, section 14(3) does not provide an institution with the authority to refuse to confirm or deny the existence of information contained in a record where that information, itself, is not subject to either section 14(1) or (2) of the Act. For this reason, and applying the threshold test for the interpretation of section 14(3), I find that the Ministries cannot rely on this provision to refuse to confirm or deny the existence of the proposals.

I have also reviewed the contents of the Funding Certificate along with the accompanying letter and memorandum of advice. These documents generally describe the scope of the murder investigation and consider whether additional funding would be appropriate. The Certificate of Funding then authorizes the allocation of a certain sum of money to fund the Green Ribbon Task Force. That money is to be paid out pursuant to the Treasury Act which is a public statute. Based on my preliminary evaluation of these records, I believe that only some of the information contained in these documents could qualify for exemption under either sections 14(1) or (2) of the Act. Accordingly, based on the application of the threshold test, I find that the Ministry cannot apply section 14(3) of the Act to the Funding Certificate and to the accompanying letter and memorandum.

CONCLUSION:

Earlier in this order, I found that, based on the application of the purposive test for the interpretation of section 14(3) of the Act, the two Ministries had failed to provide detailed and convincing evidence that the disclosure of the mere existence of the records requested would communicate information to the requester which falls under either sections 14(1) or (2) of the Act. I also find that, based on the application of the threshold test for interpreting section 14(3), the Ministries have failed to establish that sections 14(1) or (2) apply to the records as a whole. On this basis, the Ministries would equally be precluded from relying on section 14(3) to refuse to confirm or deny the existence of the records at issue.

ORDER:

1. In this order, I have disclosed the existence of records responsive to the appellant's request. Because the two Ministries may apply for judicial review, I have decided to release this order to the Ministries in advance of the appellant. The purpose of adopting this approach is to provide the Ministries with an opportunity to review this order to determine whether to apply for judicial review.

2. If I have not been served with a Notice of Application for Judicial Review within fifteen (15) days of the date of this order, I order each Ministry to issue a decision letter pursuant to sections 26 and 29(1)(b) of the Act to the appellant indicating which information contained in the records the respective Ministry is prepared to release. These letters should be issued to the appellant within twenty (20) days of the date of this order.

3. I order each Ministry to provide me with a copy of the relevant decision letters within five (5) days of the date on which these letters are issued. These decision letters should be forwarded to my attention, c/o the Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1. A copy of this order will be sent to the appellant upon the expiration of the fifteen (15) day period referred to above, unless a Notice of an Application for Judicial Review has been served on me.

Original signed by: July 14, 1993
Irwin Glasberg
Inquiry Officer