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

ORDER M-432

Appeal M-9400396

Metropolitan Toronto Police Services Board

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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The Metropolitan Toronto Police Services Board (the Police) received a request for access to information they had gathered between January 1, 1993 and December 1, 1993 on "groups or individuals who demonstrate". The requester indicated that the Chief of Police was reported in a Toronto newspaper as stating that the Police routinely gather such information.

The Police responded by advising the requester that the existence of the records could neither be confirmed nor denied under sections 8(3) and 14(5) of the Act. The requester appealed this decision.

A Notice of Inquiry was sent to the Police and the appellant. Representations were received from the Police only.

DISCUSSION:

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF A RECORD

INVASION OF PRIVACY

In order for the Police to claim the application of section 14(5) of the Act, the records, if they exist, must contain the personal information of individuals other than the appellant.

"Personal information" is defined in section 2(1) of the Act, in part, as "... recorded information about an identifiable individual ..."

The Police do not specifically address this issue in their submissions. However, I am prepared to accept that if records of the nature requested existed, some references in the records could be said to relate to "identifiable individuals" and, thus, they could contain personal information.

Section 14(5) of the Act states:

> A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

In Orders P-339 and P-423, issued under the provincial Freedom of Information and Protection of Privacy Act, former Assistant Commissioner Tom Mitchinson described the circumstances in which section 21(5), the equivalent of section 14(5) of the Act, might be applied by an institution:

> In my view, an institution relying on this section must do more than merely indicate that disclosure of the records would constitute an unjustified invasion of personal privacy. An institution must provide detailed and convincing evidence that disclosure of the mere existence of the requested records would convey information to the requester, and that the disclosure of this information would constitute an unjustified invasion of personal privacy.

In their representations, the Police explain how, in their view, confirming or denying the existence of responsive records would result in an unjustified invasion of personal privacy. They state that indicating that an individual is or is not the subject of a law enforcement investigation would constitute an unjustified invasion of that individual's personal privacy.

In my view, the head, by confirming that records do or do not exist, would not be confirming that an individual is or is not identifiable from the information contained in the requested records. The head is only confirming that records associated with the subject matter described by the appellant in his request do ordo not exist. In this regard, I note that the appellant did not specifically mention any names in his request.

Accordingly, confirmation that records responsive to the appellant's request do or do not exist, without indicating the nature of these records or the parties involved with any particular record, would not compromise the privacy interests of any individual.

I, therefore, find that the head has not provided sufficient evidence to establish that disclosure of the mere existence or non-existence of responsive records would convey information to the appellant which would constitute an unjustified invasion of personal privacy. Therefore, I find the requirements of section 14(5) have not been met.

LAW ENFORCEMENT

I will now consider the applicability of section 8(3) of the Act in the circumstances of this appeal. This section provides:

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

The first step in this analysis is to determine if section 8(1) or (2) of the Act applies.

Although they do not state this explicitly, the submissions of the Police appear to claim that, if records of the nature requested existed, they would qualify for exemption under sections 8(1)(a), (b), (c), (d), (e), (g), (k) and (l) and 8(2)(a). These sections provide that:

> A head may refuse to disclose a record if 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;
>
> (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
>
> (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.

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;

In order for records of the type requested, if they exist, to qualify for exemption under sections 8(1)(a), (b), (c), (d), (g) and 8(2)(a), the matter which would generate the records must satisfy the definition of the term "law enforcement" as found in section 2(1) of the Act. This provision reads:

> "law enforcement" means,
>
> (a) policing,
>
> (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, and
>
> (c) the conduct of proceedings referred to in clause (b).

The purpose of the exemption contained in section 8(1) is to provide the Police with the discretion to preclude access to records in circumstances where disclosure of the records could reasonably be expected to result in one of the harms set out in this section. The Police bear the onus of providing sufficient evidence to establish the reasonableness of the expected harm(s) and, in my view, the Police discharge this onus by

establishing a clear and direct linkage between the disclosure of the specific information and the harm alleged (Orders P-534 and P-542).

The Police submit that records of the sort requested, if they exist, would relate to a police investigation into a violation of law which may result in criminal proceedings being instituted against an individual or individuals. The Police further provide evidence as to how such an investigation might be carried out and how disclosure of such records would interfere with this type of law enforcement investigation.

Having reviewed the representations of the Police, I am satisfied that records of the type requested, if they exist, would relate to a law enforcement matter, as that term is defined in section 2 of the Act. I am also satisfied that disclosure of records of the type requested, if they exist, could reasonably be expected to interfere with a law enforcement matter or investigation as contemplated by sections 8(1)(a) and (b) of the Act. Accordingly, I find that records of the type requested, if they exist, would qualify for exemption under sections 8(1)(a) and (b).

I must now determine if, in the circumstances of this appeal, the Police properly applied section 8(3) of the Act to refuse to confirm or deny the existence of records responsive to the appellant's request.

A requester in a section 8(3) situation is in a very different position than other requesters who have been denied access under the Act. By invoking section 8(3), the Police are denying the requester the right to know whether a record exists, even when one does not. This section provides the Police with a significant discretionary power which I feel should be exercised only in rare cases.

In Order P-542, former Inquiry Officer Asfaw Seife articulated the following test to determine the appropriateness of the application of section 14(3) of the Provincial Freedom of Information and Protection of Privacy Act, which is the equivalent of section 8(3) of the Act.

> An institution relying on section 14(3) of the Act 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). The institution must establish that disclosure of the mere existence or non existence of such a record would communicate to the requester information that would fall under either section 14(1) or (2) of the Act.

I adopt this test for the purposes of this appeal.

The Police submit that if the existence or non-existence of the records was confirmed or denied, individuals who engage or might engage in demonstrations could alter their behaviour so as to negatively impact on the law enforcement process.

The Police acknowledge that the mere existence of the remark attributed to the Chief of Police in the press and which formed the basis of the request would appear to acknowledge the existence of a record. They

indicate, however, that a thorough search of their files containing copies of any news item published in the press regarding their institution failed to show that any such quote was ever made. Thus the Police maintain that, as they do not have a record of the quote ever having been made, they can still rely on section 8(3).

This office reviewed the newspaper referred to in the appellant's request and, in fact, located the quote attributed to the Chief of Police. It was found in an article entitled "Eng Queries Secret Studies on Blacks" and appeared in the Saturday, February 12, 1994 edition of the Toronto Star newspaper. Based on the submissions of the Police themselves as noted above, I am not persuaded that merely confirming the existence or non existence of the records would communicate information to the appellant which would fall under sections 8(1) or (2) of the Act.

Therefore, I find that section 8(3) of the Act is not applicable in the circumstances of this appeal.

If responsive investigation records had existed, I would have proceeded to consider whether these records qualified for exemption under the Act. However, the Police have claimed that no records exist. They explain the apparent contradiction between the quote attributed to the Police Chief and their position on this appeal by stating that "... this organization does not keep records which can be retrieved as outlined in the request letter".

In my view, this submission could be interpreted in one of two ways. The Police could be saying that the appellant did not provide sufficient detail in his request to enable an experienced employee upon a reasonable effort to identify the record (section 17(1) of the Act). Alternatively, the Police may be suggesting that the request was for information which exists in a format other than that asked for by the appellant. In either case, the Police have an obligation under section 17(2) of the Act to assist the requester in reformulating the request so as to comply with section 17(1). Accordingly, I will require the Police to assist the appellant in reformulating his request so as to comply with the provisions of the Act.

ORDER:

1. I do not uphold the decision of the Police to refuse to confirm or deny the existence of the records.

2. In this order, I have disclosed the fact that no responsive records exist. I have released this order to the Police in advance of the appellant in order to provide the Police with the opportunity to review this order and determine whether to apply for judicial review.

3. 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 will release this order to the appellant within five (5) days following the expiration of the 15-day period.

4. I order the Police to assist the appellant in clarifying his request. The **appellant** should contact the Police within fifteen (15) days of the release of this order to him. If the appellant contacts the Police within this time period, and the request is clarified, I order the Police to make a decision on access

to the records within thirty (30) days of the date of the clarification.

5. In the event that the appellant does not contact the Police within the time period noted in Provision 4, or does not provide the Police with any information that would assist them in the clarification process, Provision 4 will be deemed to have been satisfied and the Police must so notify the appellant in writing.

6. I order the Police to provide me with a copy of the decision letter referred to in Provision 4 or the notification in Provision 5 within five (5) days after the date on which they are forwarded to the appellant. They should be sent to my attention c/o Office of the Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: December 13, 1994
Anita Fineberg
Inquiry Officer