



Information and Privacy
Commissioner/Ontario

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

ORDER M-617

Appeal M_9500322

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 all information which may be contained in an intelligence file in the requester's name which "came into existence seven or more years ago".

The Police responded by advising the requester that the existence of records could neither be confirmed nor denied in accordance with section 8(3) of the Act. The requester appealed this decision.

A Notice of Inquiry was sent to the Police and the appellant. Representations were received from both parties. In their representations, the Police indicate that, if records of the nature requested exist, they would be exempt from disclosure under the law enforcement exemption contained in section 8(1) of the Act.

DISCUSSION:

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF A RECORD

The Police submit that, if records of the nature requested exist, they would qualify for exemption under sections 8(1)(c), (d) and (g) of the Act. These sections provide that:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

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

In order for records of the type requested, if they exist, to qualify for exemption under sections 8(1)(c), (d) or (g), 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 definition 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 exemptions 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 that the disclosure of the records, if they exist, could reasonably be expected to result in the harm which is alleged.

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(1) of the Act. I also find that the Police have established that the disclosure of the information contained in records of the type requested, if they exist, could reasonably be expected to reveal investigative techniques, disclose the identity of a confidential source and reveal law enforcement intelligence information as contemplated by sections 8(1)(c), (d) and (g) of the Act. Accordingly, I find that records of the type requested, if they exist, would contain information which would qualify for exemption under sections 8(1)(c), (d) and (g).

Section 8(3) of the Act provides the Police with the discretion to refuse to confirm or deny the existence of records responsive to the appellant's request. This section provides:

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

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 purpose of this appeal.

Following my review of the representations of the Police and the appellant, I conclude that merely confirming the existence or non-existence of records of the type requested would communicate to the appellant information which would fall within sections 8(1) or (2) of the Act. I find that revealing the existence or non-existence of a police intelligence file relating to a requester could reasonably be expected to interfere with the gathering of law enforcement intelligence information by the Police. Accordingly, I find that section 8(3) applies in the circumstances of this appeal.

ORDER:

I uphold the decision of the Police to refuse to confirm or deny the existence of records responsive to the request.

Original signed by: _____

Donald Hale

Inquiry officer

October 18, 1995