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

ORDER PO-1656

Appeal PA-980262-1

Ministry of the Solicitor General and Correctional Services

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

NATURE OF THE APPEAL:

The Ministry of the Solicitor General and Correctional Services (the Ministry) received a request under the Act for access to all information held by the Ontario Government about himself. The requester specifically referred to information in the files of the "Criminal Investigation Dept.", "Biker Squad" and "Investigation Support Bureau" of the Ontario Provincial Police (OPP). Finally, the requester stated that:

> I appreciate your assistance in helping me to understand some incidents, starting in 1996 on my return from business travels abroad, which can only be caused by supplying discriminating information to immigration departments.

The Ministry responded to the request by refusing to confirm or deny the existence of records responsive to the request, pursuant to sections 14(3) and 21(5) of the Act.

The requester, now the appellant, appealed the Ministry's decision.

During mediation of the appeal, the Mediator assigned to this matter by the Commissioner's office confirmed with the appellant that he was seeking access only to records in the custody or under the control of the Ministry and, more specifically, the OPP.

A Notice of Inquiry was provided to the appellant and the Ministry. Representations were received from both parties. In its representations, the Ministry stated that it was no longer relying on section 21(5) of the Act to refuse to confirm or deny the existence of records.

DISCUSSION:

REFUSAL TO CONFIRM OR DENY EXISTENCE OF RECORDS AND THE LAW ENFORCEMENT EXEMPTION

Introduction

Section 47(1) of the Act provides individuals with a general right of access to their own personal information in the custody or under the control of an institution. Section 49 provides a number of exceptions to this general right of access. However, this right of access under section 47(1) is not absolute; section 49 provides a number of exceptions to this general right of access to personal information by the individual to whom it relates. In particular, under section 49(b), a head may refuse to disclose to the individual to whom the information relates personal information where, among others, section 14 would apply to the disclosure of that information.

The Ministry relies on section 14(3) of the Act as the basis for its decision to refuse to confirm or deny whether any responsive records exist. Section 14(3) of the Act permits an institution to refuse to confirm or deny the existence of a record to which section 14(1) or (2) applies. In this case, the Ministry in its

representations claims that paragraphs (a), (e) and (g) under section 14(1), and paragraph (a) of section 14(2) are applicable to records of the nature requested, should they exist. Those sections read:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (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;
>
> (2) 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 P-255 Assistant Commissioner Tom Mitchinson made some general comments about the purpose and application of section 14(3) of the Act:

> 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.

In Order P-344, Assistant Commissioner Mitchinson stated the following with respect to the interpretation and application of section 14(3):

> 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), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power which I feel should be exercised only in rare cases.

> 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.

I adopt the principles derived from the above cited decisions of Assistant Commissioner Mitchinson for the purpose of this appeal. In my view, before it may be permitted to exercise its discretion to invoke section 14(3), the Ministry must provide sufficient evidence to establish that:

1. Disclosure of 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 in itself convey information to the requester which could compromise the effectiveness of a law enforcement activity which may exist or may be reasonably contemplated.

Part one: disclosure of the records (if they exist)

Definition of Law Enforcement

Under part one of the section 14(3) test, the Ministry must demonstrate that disclosure of the records, if they exist, would qualify for exemption under sections 14(1) or (2), in particular paragraphs (a), (e) and (g) under section 14(1), and paragraph (a) of section 14(2) as claimed. In order for a record to be considered for exemption under sections 14(1) or (2), the matter which generated the record must satisfy the definition of the term "law enforcement" as found in section 2(1) of the Act, which 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 Ministry submits that records of the nature requested could fall within either or both of paragraphs (a) or (b) of the definition of "law enforcement". The Ministry submits that records of the nature requested would be generated by the activities of a police force (the OPP) which may include one or more of

investigation and prosecution of offences, collection and analysis of intelligence information, prevention of crime, maintenance of law and order, provision of protective services and enforcement of compliance with standards, duties and responsibilities set out in statute or regulation. The Ministry refers to the OPP's responsibilities as a police force as set out in sections 1, 19 and 42 the Police Services Act. In the circumstances, I am satisfied that the activities of the OPP which would be involved in generating records of the nature requested would qualify as "law enforcement" within paragraphs (a) or (b) of the section 2(1) definition. This finding is consistent with previous orders of this office, including Orders 106, P-255 and M-202.

Sections 14(1) and (2)

Once it has been determined that records of the nature requested would have been generated by law enforcement activities, it must be determined whether or not the records would qualify for exemption under sections 14(1) or (2). The Ministry cites in particular paragraphs (a), (e) and (g) under section 14(1), and paragraph (a) of section 14(2).

With respect to section 14(1)(a), the Ministry submits that disclosure of records of the nature requested could have the effect of interfering with on-going law enforcement matters.

Regarding section 14(1)(g), the Ministry cites former Commissioner Sidney B. Linden's Order 106, involving a request for "OPP Criminal Intelligence Records", in which he stated:

> The "OPP Criminal Intelligence Records" are records related specifically to police investigations. Disclosing the contents of such records could, for example, "interfere witha law enforcement matter", "interfere with an investigation", "reveal law enforcement intelligence information respecting organizations or persons" or reveal the contents of a "report prepared in the course of law enforcement, inspections or investigations".
>
> Based on the representations made by the institution regarding the nature and general content of such records, I am satisfied that if such a record relating to the appellant existed, access to the record could be refused by the head under either subsection 14(1) or (2) of the Act.

Although the request in this case was not identical to the request in Order 106, the Ministry indicates that records of the nature requested here could be construed as falling within the scope of intelligence information. The Ministry goes on in its representations to refer to Order M-202, in which former Inquiry Officer Asfaw Seife described the nature of police intelligence information in the context of the equivalent provision to section 14(1)(g) of the Act in the Municipal Freedom of Information and Protection of Privacy Act. Inquiry Officer Seife concluded:

> In my view, for the purposes of section 8(1)(g) of the Act, "intelligence" information may be described 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 violation of law, and is distinct from information which is compiled and identifiable as part of the investigation of a specific occurrence.

The Ministry further provided detailed information as to how disclosure of records of the nature requested, if they existed, could interfere with either a law enforcement matter or the gathering of law enforcement intelligence information, or how disclosure could reveal gathered law enforcement intelligence information.

In my view, the Ministry has provided sufficient evidence to establish that records of the nature requested would constitute either law enforcement investigation or intelligence information, and that disclosure of the records, if they existed, would interfere with a law enforcement matter, or interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons. My finding is based in part on the principles outlined in Orders 106 and M-202 cited above. Accordingly, records of the nature requested would be exempt under sections 14(1)(a) or (g).

Since I have found that sections 14(1)(a) or (g) would apply to records of the nature requested, it is not necessary for me to make a finding with respect to the applicability of sections 14(1)(e) or 14(2)(a) of the Act.

Part two: disclosure of the fact that records exist (or do not exist)

Under part two of the test for the application of section 14(3), the Ministry must demonstrate that disclosure of the fact that records exist (or do not exist) would in itself convey information to the appellant which could compromise the effectiveness of a law enforcement activity which may exist or may be reasonably contemplated.

Given the nature of the request and the principles cited above as derived from Orders 106 and M-202, and in light of the Ministry's representations, I am satisfied that disclosure of the fact that responsive records exist or do not exist would in itself convey information to the appellant which could compromise the effectiveness of any law enforcement activity which may exist or may be reasonably contemplated.

In his Order P-344, Assistant Commissioner Mitchinson stated the following with respect to the exercise of discretion under section 14(3):

> In considering whether or not to apply sections 14(3) and 49(a), a head must be governed by the principles that information should be available to the public; that individuals should have access to their own personal information; and that exemptions to access should be limited and specific. Further, the head must consider the individual circumstances of the request. These considerations would include whether an investigation exists or is

> reasonably contemplated, and if there is an investigation, whether disclosure of the existence of records would interfere with the investigation. If no investigation exists or is contemplated, the head must be satisfied that some other provision of sections 14(1) or (2) applies to the record, and must still consider whether disclosure would harm the interests protected under the specific provision of section 14.

Considering the Ministry's representations and all of the circumstances of this case, I am satisfied that the Ministry properly considered all of the relevant circumstances in accordance with the guidelines set out in Order P-344.

Conclusion

Both parts of the test for the application of section 14(3) have been met.

ORDER:

I uphold the decision of the Ministry.

Original signed by: February 8, 1999
David Goodis
Senior Adjudicator