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

ORDER PO-2296

Appeal PA-020354-1

Ministry of Public Safety and Security

Tribunal Service Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Sevices de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The requester made a request to the Ministry of Public Safety and Security (now the Ministry of Community Safety and Correctional Services) (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act)* for access to information relating to an investigation by the Office of the Fire Marshal (the OFM) into a fire. Specifically, the requester sought access to the notes, coloured photographs and reports prepared by a named investigator and a named engineer. The requester is a consulting engineer retained by the insurer of the owners of the property where the fire occurred.

The Ministry issued a decision to the requester denying access to the responsive records, relying on the following exemptions in the *Act*:

- sections 14(1)(a), 14(1)(b), 14(1)(l) and 14(2)(a) (law enforcement); and
- section 21(1) (invasion of privacy) with specific reference to sections 21(2)(f) (highly sensitive) and 21(3)(b) (information compiled and identifiable as part of an investigation into a possible violation of law).

The requester (now the appellant) appealed the Ministry's decision.

Mediation did not resolve this appeal, and the file was transferred to adjudication. This office sent a Notice of Inquiry to the Ministry, initially, outlining the facts and issues and inviting the Ministry to make written representations. The Ministry submitted representations in response to the Notice. In its representations, the Ministry withdrew its reliance on sections 14(1)(b), 14(1)(l) and 14(2)(a); these exemption claims are therefore no longer at issue. At the same time, the Ministry issued a new decision to the appellant, claiming for the first time the discretionary exemptions at sections 14(1)(f) (law enforcement) and 19 (solicitor-client privilege) as additional grounds for denying access to the records. I then sent a Notice of Inquiry to the appellant, together with a copy of the non-confidential portions of the Ministry's representations. The appellant, in turn, provided representations.

RECORDS:

255 pages of records remain at issue. They consist of reports, administrative forms, notes and photographs.

BRIEF CONCLUSION:

The records are exempt from disclosure under section 14(1)(a).

DISCUSSION:

DOES THE LAW ENFORCEMENT EXEMPTION AT SECTION 14(1)(A) APPLY TO THE RECORDS?

I have decided to begin by reviewing whether the records qualify for exemption under the discretionary exemption at section 14(1)(a), which reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > interfere with a law enforcement matter;

General principles

Because section 14(1)(a) is a discretionary exemption, even if the information falls within the scope of this section, the institution (here, the Ministry) must nevertheless consider whether to disclose the information to the requester.

The term "law enforcement," which appears in section 14(1)(a), is defined in section 2(1) of the *Act* as follows:

> "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).

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context (*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)).

In order for a record to qualify for exemption under section 14(1)(a), the law enforcement matter in question must be specific and ongoing (Order MO-1578). The institution holding the records need not be the institution conducting the law enforcement matter (Order PO-2085).

In addition, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient (Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers'*

Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 (C.A.)).

The parties' representations

In its representations, the Ministry indicates that certain individuals have been charged with offences under the *Criminal Code* in connection with the fire and that the criminal prosecution is ongoing. Among other things, the Ministry submits:

> … the records at issue documenting the investigation into the circumstances of the … fire fall within parts (a), (b) or (c) of the definition of "law enforcement". The records at issue reflect aspects of the [Ontario Provincial Police] and OFM investigation into the circumstances of the fire. The records at issue are also relevant in respect to the matter currently before the court.
>
> … the OFM and OPP in investigating the circumstances of the … fire were engaged in "law enforcement" activities, as defined in section 2(1) of the [*Act*].
>
> …
>
> … disclosure of the OFM records at issue would interfere with an ongoing law enforcement matter. … the responsive records are relevant to a matter that is currently before the court.

The Ministry also makes certain confidential representations that I am not at liberty to disclose in this order.

The appellant submits, among other things,

> The Ministry does not act as a law enforcement agency and, in fact, is not responsible for laying of charges, criminal or otherwise. The responsibilities and mandate of the Ministry are contained in the *Fire Protection and Prevention Act* (*FPPA*). …
>
> …
>
> The duty of the Fire Marshal under the *FPPA* does not include the laying of criminal charges. Although the OFM may provide their opinions on the cause and origin of a fire loss to the police when requested, they are not charged with the responsibility [of] policing.
>
> …

> In the representations, the Ministry stated that the "records at issue documenting the investigation into the circumstances of the … fire fall within the parts (a), (b) **or** (c) of the definition of "law enforcement". Clearly, the Ministry has misinterpreted the definition of law enforcement and has suggested that "law enforcement" means parts (a), (b), **or** (c) rather than (a), (b), **and** (c). The records at issue do not fall within parts (a), (b), **and** (c) of the definition of "law enforcement". Therefore, the Ministry is not engaged in "law enforcement" activities, as defined in section (1) [sic] of the [*Act*].
>
> The OFM does not act as a "law enforcement" agency as defined by the *Act*. The OFM simply conducts routine inspections/investigations and reports the cause and origin of fires. The Crown Attorney then decides whether criminal charges are warranted and the police lay the charges at that Crown's request.
>
> …
>
> … this particular case is not an "ongoing law enforcement matter", as suggested by the Ministry. Charges have been laid and the investigation is over. This matter is now proceeding to trial. Since these records are subject to the disclosure provisions of the *Criminal Code*, it would be neither premature nor an unreasonable expectation to have these records disclosed.
>
> …
>
> The Ministry's representations imply that a premature release of documents could allow the suspects the opportunity to cover their tracks and evade charges. Simply stated, the police [sic] representations contradict the "principle of fundamental justice". Disclosure of records allows further scrutiny, which ensures that justice is seen to be done. This principle forms the foundation for [the *Criminal Code* and the *Act*]. Access to the "information to obtain search warrant" is provided freely and contains much of the information in the records. A copy of the "information to obtain search warrant" is attached …
>
> …

The appellant refers to a decision of the Ontario Superior Court of Justice on an application brought by the insurer under section 490(15) of the *Criminal Code* in connection with the same fire. Section 490(15) of the *Criminal Code* enables parties to apply for permission to examine anything that has been detained pursuant to sections 490(1) to 490(3.1). The Court granted the insurer partial relief to allow the insurer to "make the required decision [regarding] coverage," and it adjourned the remainder of the application "to allow police to complete their investigation uncompromised." The appellant submits that:

> [This ruling] is in keeping with other decisions that deal specifically with issues of fundamental justice. It is unreasonable for the Ministry to deny access to records on the basis of "ongoing investigation that can last for years or decades". In this case, the Ministry has not provided a logical connection between the disclosure and the potential for harm. The onus is on the Ministry to provide evidence to substantiate the reasonableness of the expected harm.

Findings

I find that the records qualify for exemption under section 14(1)(a).

First, the ongoing criminal prosecution constitutes a "law enforcement matter" within the meaning of section 14(1)(a). As noted above, section 2(1) defines "law enforcement" for the purposes of the *Act*. The upcoming trial is a "proceeding in a court or tribunal" in which "a penalty or sanction could be imposed," as described in paragraph (b) of section 2(1). Thus, the trial fits within the definition of "law enforcement" in paragraph (c) of section 2(1) ("the conduct of proceedings referred to in clause (b)").

I do not accept the appellant's submission that paragraphs (a), (b) and (c) in section 2(1) must be read together to construct one integrated definition of "law enforcement." On the contrary, paragraphs (a), (b) and (c) provide three alternative and independent meanings for the term "law enforcement." The use of the word "and" following paragraph (b) signifies that paragraphs (a), (b) and (c) constitute an exhaustive list of matters that qualify as "law enforcement;" it does not mean that together the three paragraphs combine to form one comprehensive definition of that term. A matter need only be caught by one of the three paragraphs to qualify as "law enforcement."

I am also satisfied that the criminal prosecution is a specific and ongoing matter: it has not been completed and future court dates have been scheduled. Whether investigations preceding the trial have been completed does not alter this finding.

Secondly, based on the materials before me, including the Ministry's confidential representations, I find that disclosing the records could reasonably be expected to interfere with the ongoing prosecution. The Ministry's confidential representations, in particular, include detailed and convincing examples of how such interference might occur.

Whether or not the same or similar information may be obtained through avenues outside the *Act* such as the *Criminal Code*, as the appellant suggests, is irrelevant to whether the Ministry must disclose the records under the *Act*. Information that may be exempt under the *Act* may be available through other avenues, and *vice versa* (see, for example, section 64 of the *Act* and Order PO-1688).

Accordingly, the records qualify for exemption under section 14(1)(a). In addition, I am satisfied that the Ministry did not err in exercising its discretion to withhold the records.

Because the records are exempt under section 14(1)(a), it is not necessary for me to decide whether to allow the Ministry's late claims under sections 14(1)(f) and 19, or to review the Ministry's other exemption claims.

ORDER:

I uphold the Ministry's decision.

Original signed by
Shirley Senoff
Adjudicator

June 24, 2004