



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

# **ORDER PO-2471**

**Appeal PA-040128-1**

**Ministry of Community Safety and Correctional Services**



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## **NATURE OF THE APPEAL:**

The Ministry of Community Safety and Correctional Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the Act) for any and all documents relating to cigarette smuggling and taxation, covering the period between 1988 and 1994. The requested records include studies, reports, memorandum, briefing notes, statistics and e-mail messages.

Prior to issuing its decision, the Ministry advised the requester that an extension of time was required because the request necessitated a search through a large number of records. In its time extension letter, the Ministry advised that it had divided the request into two files: one referring to Ontario Provincial Police (the Police) records; and the other referring to Ministry records.

This appeal deals with the Ministry records. In response to the request for these responsive records maintained by the Criminal Intelligence Service Ontario (CISO), the Ministry denied access to the responsive information in accordance with the discretionary exemptions in sections 13(1) (advice or recommendations), 14(1)(a), (b), (c), (e), (g) and (l) (law enforcement) and 15(a) and (b) (relations with other governments) and the mandatory exemption in section 21(1) (personal privacy). The factors and presumptions in section 21(2)(f) and 21(3)(b) were identified in support of the section 21(1) exemption claim. A separate decision letter was issued in reference to the Police records.

The requester (now the appellant) appealed the Ministry's decision with respect to the CISO records. The matter was not settled at the mediation stage and was transferred to the adjudication stage of the appeal process for an inquiry. The requester also appealed the Ministry's decision with respect to the Police records.

Former Assistant Commissioner Tom Mitchinson commenced this inquiry by sending a Notice of Inquiry to the Ministry seeking representations on the application of the section 14(1) exemptions. The Ministry submitted representations. He then sought representations from the appellant and included with his Notice of Inquiry a complete copy of the Ministry's representations. He then received representations from the appellant.

## **RECORDS:**

The records consisted of 7 separate documents, comprised of reports from various police services held by the Criminal Intelligence Services of Ontario (CISO). Each record contains information relating to the investigation of tobacco smuggling activities by law enforcement officers in Ontario. The Ministry describes CISO as "...a unique co-operative of law-enforcement agencies dedicated to fighting organized and major crime by sharing and analyzing criminal intelligence."

## **DISCUSSION:**

### **PRELIMINARY ISSUE:**

In the appellant's representations he raises two preliminary issues. The two issues are related and are based on his assumption that this office was not provided copies of the responsive records. The first issue he raises is that the "general description" of the records provided by the

Ministry did not allow him to make fair reply representations, and did allow this office to fairly adjudicate this appeal. The appellant's second preliminary issue is that this office cannot properly exercise its discretion and fairly determine this appeal without having an opportunity to examine the records.

To be clear, I have had the opportunity to carefully examine each of the seven records at issue in this appeal. Due to the sensitivity of the records, a representative of the CISO visited this office and provided access to the records both to the original adjudicator on this file and me. As a matter of practice, this office would not adjudicate an appeal without carefully examining the records at issue.

With respect to the lack of detail contained in the description of the undisclosed records, which was provided to the appellant by the Ministry, the records are sensitive in nature and the Ministry attempted to provide the appellant with enough information about their contents to enable him to make his representations. I acknowledge that it is difficult for any appellant to make representations based on a description of the records alone. However, there is no other feasible way to conduct appeals dealing with records that the institution claims to be exempt from disclosure. Under the circumstances, I am satisfied that the appellant has been given every reasonable opportunity to provide representations.

## **LAW ENFORCEMENT**

### **General principles**

Sections 14(1) (a), (b) and (g) state:

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

The term “law enforcement” is used in several parts of section 14, and is defined in section 2(1) 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)

The term “law enforcement” has been found to apply in the following circumstances:

- a police investigation into a possible violation of the *Criminal Code* [Orders M-202, PO-2085]

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.)].

#### **Section 14(1)(a): law enforcement matter**

The law enforcement matter in question must be a specific, ongoing matter. The exemption does not apply where the matter is completed, or where the alleged interference is with “potential” law enforcement matters [Orders PO-2085, MO-1578].

The institution holding the records need not be the institution conducting the law enforcement matter for the exemption to apply [Order PO-2085].

#### **Section 14(1)(b): law enforcement investigation**

The law enforcement investigation in question must be a specific, ongoing investigation. The exemption does not apply where the investigation is completed, or where the alleged interference is with “potential” law enforcement investigations [Order PO-2085].

The institution holding the records need not be the institution conducting the law enforcement investigation for the exemption to apply [Order PO-2085].

#### **Section 14(1)(g): law enforcement intelligence information**

The term “intelligence information” means:

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 violations of law. It is distinct from information compiled and identifiable as part of the investigation of a specific occurrence [Orders M-202, MO-1261, MO-1583].

## **Representations**

### **Sections 14(1)(a) and (b)**

In support of its position that the records at issue relate to law enforcement, the Ministry's representations included the following:

The CISO is described on the Ministry's internet site as "...a unique co-operative of law-enforcement agencies dedicated to fighting organized and major crime by sharing and analyzing criminal intelligence." The CISO administers the Joint Forces Operations (JFO) program which provides resources and funding for local, provincial and federal police services involved in major criminal investigations. The CISO's Provincial Bureau has the responsibility to receive, store, analyze and distribute criminal intelligence to law enforcement agencies. It is one of nine provincial bureaus which form the Criminal Intelligence Service Ontario. The Ministry submits that the CISO is engaged in law enforcement as defined in the *FIPPA*.

The Ministry makes the following submissions in support of its position that the records fall within the parameters of sections 14(1)(a) and (b):

The responsive records contain information relating to the investigation of tobacco smuggling activities by law enforcement officers in Ontario. Law enforcement agencies are actively working to curtail tobacco smuggling. As confirmed in the attached excerpt from the Criminal Intelligence Service Canada 2003 Annual Report, tobacco smuggling is a continuing issue:

...illicit activities are occurring in various forms including: cross-border smuggling, continuing illicit manufacturing, a declining but continuing interprovincial movement and, domestic thefts...

The Ministry submits that release of the CISO reports at issue may reasonably be expected to interfere with investigations undertaken by law enforcement agencies to address the ongoing issue of contraband tobacco smuggling.

The appellant submitted the following in response to the Ministry's representations:

The Appellant submits that this material and the Ministry Representations fall far short of providing any evidence of any ongoing "matters" or "investigations", and is clearly not "detailed or convincing". The Appellant questions what relevance the "evidence" of smuggling activity in 2003 and 2004 bears on the Ministry demonstrating that Ministry Records of over 11 years of age could pertain to actual or ongoing investigations.

It is further submitted that, absent further evidence, that it is doubtful that even if the Ministry Records pertain to actual ongoing “matters” or “investigations”, that materials between 11 and 17 years of age could reasonably be expected to interfere with those matters or investigations.

With respect to the appellant’s concerns about the age of the records, the Ministry representations enclosed several attachments to indicate the ongoing nature of the tobacco smuggling problem. All of the enclosures were shared with the appellant. The Ministry summarized some of the enclosures as follows:

The attached excerpt from the Criminal Intelligence Service Canada 2004 report entitled “Selected Socio-economic Effects of Organized Crime in Canada” details some of the harms associated with the ongoing illegal distribution of contraband tobacco by criminal groups.

The attached news clipping from the North Bay Nugget dated August 18, 2004 highlights recent concerns expressed by a senior officer of the Royal Canadian Mounted police (RCMP). The officer believes that the ongoing illegal distribution of contraband tobacco is a growing concern for police across Canada.

#### **Section 14(1)(g)**

The Ministry submitted the following representations in support of its position that the records were exempt under section 14(1)(g):

The Ministry submits that the records at issue contain intelligence information that has been gathered by the CISO. The Ministry refers to the content of the records at issue in support of its position in this regard.

As noted earlier, the CISO is a “unique co-operative of law-enforcement agencies dedicated to fighting organized and major crime by sharing and analyzing criminal intelligence.”

Intelligence information is gathered for purposes relating to the maintenance of law and order and for ensuring the safety of communities. The gathering of intelligence information helps police agencies to take a pro-active approach in regard to targets and criminal activities of interest. Such information is treated as highly confidential and is disclosed within the law enforcement community on an absolute need to know basis only. The value of such information would be seriously compromised should it be publicly disclosed.

Disclosure of the records at issue could lead to a number of harms including identification of individuals who are being monitored, informants and infiltrators and could result in persons or organizations of interest going “underground” or

otherwise taking steps to conceal their identities, criminal activities or associations.

Intelligence information is a valuable tool. Intelligence information is used by law enforcement agencies to develop appropriate strategies to make communities safe and secure. The identification of the sources [of] intelligence reflected in the records could have serious health and safety repercussions and may result in sources no longer providing such information due to the possibility of reprisals. This would interfere with the ability of the CISO and other law enforcement agencies to continue gathering valuable intelligence information.

In response, the appellant submitted that the bare assertion that the records comprise “intelligence” and that their disclosure could lead to a number of harms falls short of providing any evidence to this effect, particularly given the age of the records.

### **Analysis and Findings**

Based on the Ministry’s representations, and my careful examination of each record, I find that the Ministry has provided the necessary detailed and convincing evidence required to establish the application of section 14 (g) to the records. More particularly, I am satisfied that disclosure of the records could interfere with the ongoing intelligence activities of CISO and other police services. I am also satisfied that the records reveal law enforcement intelligence information and that, although the records were compiled a number of years ago, that intelligence information remains relevant to the activities of CISO and other police services in combating smuggling.

Therefore, I find that the requirements of sections 14(1)(g) have been established. Since I have decided that all of the records qualify for exemption under section 14(1)(g), it is not necessary for me to examine the possible application of the other exemptions claimed by the Ministry.

### **ORDER:**

I uphold the Ministry’s decision.

Original signed by: \_\_\_\_\_  
Brian Beamish  
Assistant Commissioner

\_\_\_\_\_ May 11, 2006