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

ORDER PO-2470

Appeal PA-040127-1

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, between 1988 and 1994. The requested records include the following: studies, reports, memoranda, 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.

In response to the request for the Police records, the Ministry granted partial access to the responsive information. Access to parts of the information was denied in accordance with sections 13(1) (advice or recommendations), 14(1)(a), (b), (c), (e), (g) and (l) (law enforcement), 15(a) and (b) (relations with other governments) and 21(1) (invasion of privacy) of the *Act*. 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 Ministry records.

The requester (now the appellant) appealed both the Ministry's decision with respect to the Ontario Provincial Police records and the decision relating to the Ministry records. This office decided to deal with the Police and the Ministry requests in concurrent appeals. This appeal will deal with the Police Records.

During the course of mediating this appeal, the Ministry created an Index of Records and shared it with the appellant. Upon review of the Index the appellant withdrew his request for Record 5 which was the sole record for which section 21(1) was an issue. Accordingly, that section is no longer at issue in this appeal. No further mediation was possible.

Initially, I sent a Notice of Inquiry to the Ministry inviting its representations. I received those representations and shared them in their entirety with the appellant, along with the Notice of Inquiry. The appellant then provided representations to me.

RECORDS:

The records remaining at issue are indexed as number 2, 4, 7, 10, 12, 13 and 15 on the Ministry's Index of Records. The records consist of correspondence, maps, action plans and a report. Each record is dated within the requested period of 1988 to 1994.

DISCUSSION:

ADVICE TO GOVERNMENT

The Ministry has taken the position that the exemption in section 13(1) of the *Act* applies to record 4.

Section 13(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised.

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563; Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario*

(Information and Privacy Commissioner) (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564].

Record 4 consists of three separate memorandums each dated in 1993. Two of the memorandums originated with the Police and the third is from a Minister of the Ontario Government.

In its representations the Ministry stated the following with regard to Record 4 and section 13(1) of the *Act*:

> Record 4 contains a specific recommendation respecting the OPP members and their legal status in the circumstances where they are required to undertake enforcement activity in another province. The record reveals that the recommendation was ultimately accepted by the person being advised. The Ministry submits that disclosure of Record 4 would reveal the recommendation or the substance of the recommendation.

In his representations, the appellant disagrees with the Ministry. With regard to record 4, the appellant attempts to draw a distinction between 'advice' or 'a suggested course of action" and "the provision of information" which he thinks is what this record contains.

I have carefully examined the records and have concluded that record 4 fits within the section 13(1) exemption. The first page of the record is a recommendation from a senior officer with the Police to a Deputy Commissioner which includes a notation from the senior officer accepting the recommendation. The next four pages are draft letters referring to the advice of the first page, asking for approval of the recommendations from federal and provincial Cabinet members. The Government officials are being asked to accept or reject the course of action suggested. This record clearly contains a suggested course of action, in the form of a recommendation, which was ultimately accepted by the person being advised. Disclosure of the other 4 pages, which refers in detail to the recommendation, would also reveal the recommendation. Accordingly, I find that record 4 qualifies for exemption under section 13(1).

Since record 4 has qualified for exemption under section 13(1), I will not consider the application of other exemptions applied to the record.

LAW ENFORCEMENT

The Ministry has identified specific sub-sections of section 14 (1) of the *Act*, namely (a), (b), (c), (e), (g) and (l) to exempt records 2, 7, 10, 12, 13, and 15. However, not all of these subsections are claimed for each record.

Section 14(1) states in part:

(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;

(c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

(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;

(l) facilitate the commission of an unlawful act or hamper the control of crime.

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)

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.)].

Except in the case of section 14(1)(e), where section 14 uses the words "could reasonably be expected to", 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.)].

In the case of section 14(1)(e), the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.)].

It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a per se fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg]*.

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

The Ministry is claiming the section 14(1)(g) exemption for records 7, 12 and 15.

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].

Under section 14(1)(g), with respect to records 7, 12, and 15, the Ministry representations state:

> 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.

The appellant states:

> The appellant submits that this bare assertion falls far short of providing any evidence of either how the OPP Records comprise "intelligence" or how their disclosure could lead to the specific harms "harms" listed particularly given the fact that the OPP Records are between 11 and 17 years of age.

Having carefully reviewed the records in question, I concur with the Ministry's position. The records themselves provide the necessary "detailed and convincing" evidence in this case. Each of records 7, 12 and 15 are memorandums to the Director, Criminal Investigations Branch. Although they are dated 1993 or 1994, they contain information gathered for intelligence purposes in a covert manner. Despite their age, I believe that their disclosure could reasonably be expected to interfere with the further gathering of law enforcement intelligence and intelligence with respect to specific organizations. I also find that disclosure of the records could

reasonably be expected to reveal law enforcement intelligence information gathered for the purpose of combating tobacco smuggling.

Therefore, records 7, 12 and 15 are exempt from disclosure under section 14(1)(g).

Section 14(1)(c): Investigative techniques

The Ministry is applying exemption 14(c) to record 10. Record 10 is a "Draft Action Plan" on tobacco smuggling which is 37 pages long with two attachments. Record 10 appears to be a document providing an action blueprint to the Federal Government as well as both the Ontario and Quebec Governments as the issue touches each of them. The record provides background on the issue of tobacco smuggling in Ontario and Quebec as well as providing a series of general recommendations.

In order to meet the "investigative technique or procedure" test, the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public [Orders P-170, P-1487].

The techniques or procedures must be "investigative". The exemption will not apply to "enforcement" techniques or procedures [Orders PO-2034, P-1340].

Under section 14(1)(c), the Ministry makes the following representations on Record 10:

> The records at issue contain detailed information relating to investigative and intelligence targets, personnel requirements and law enforcement investigative techniques to be used in investigations aimed at curtailing the distribution of contraband tobacco.

The appellant submits:

> The Appellant submits that these bare assertions fall far short of providing "detailed and convincing" evidence of either how the OPP Records comprise "investigative techniques and procedures" or how their disclosure could lead to any specific harm particularly given the fact that the OPP records are between 11 and 17 years of age.

I have carefully examined the record and have determined that Record 10 does in fact reveal investigative techniques and procedures currently in use or likely to be used in law enforcement described in section 14(c). Accordingly, the record itself provides the necessary "detailed and convincing" evidence for the application of this exemption. It contains a detailed plan for law enforcement to use in dealing with tobacco smuggling, based on a careful and detailed investigation outlined in the record. Record 10 amounts to an investigative history of the issue of tobacco smuggling and strategies to combat the issue going forward based on the investigation results. Based on the evidence before me, I find that the investigative techniques or procedures it reveals are not generally known to the public. I accept the Ministry's position that a number of

anti-smuggling investigations are ongoing and the release of this record could reasonably be expected to risk its effectiveness. Therefore, I uphold the Ministry's exemption of Record 10 under section 14(c).

Section 14(1)(e): endanger life or physical safety of law enforcement officer or other person

The Ministry is claiming section 14(1)(e) to exempt record 2. Unlike the other parts of section 14(1), "detailed and convincing" evidence is not required under section 14(1)(e). Rather, under section 14(1)(e), the Ministry must provide evidence to establish a reasonable basis for believing that endangerment to the life or physical safety of a law enforcement officer or any other person will result from disclosure of the record. [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)*, cited above.]

A person's subjective fear, while relevant, may not be sufficient to establish the application of the exemption [Orders PO-2003, PO-2338 and PO-2334]. The term "person" is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization [Order PO-1817-R].

With respect to section 14(1)(e) and record 2 the Ministry's representations provide the following:

> It is the view of the Ministry that release of the records at issue could reasonably be expected to endanger the life or physical safety of law enforcement officers and other individuals. Release of the records at issue would reveal the identities of specific individuals who are active investigative or intelligence targets of interest.

The Ministry's representations further state:

> The records contain sensitive law enforcement information respecting criminal activities involving specific persons. Release of such information could reasonably be expected to threaten the life and physical safety of law enforcement officers and other individuals.

The appellant in his representations states that "...it is doubtful that materials between 11 and 17 years of age could reasonably be expected to present any such danger."

I have carefully examined these records. With the lowered threshold for section 14(1)(e), and bearing in mind the difficulty of predicting future events in a law enforcement context, I find that there is a reasonable basis for believing that endangerment will result from disclosure. Record 2 contains the names of officers, the weapons and equipment they have been issued, hotel arrangements, which and how many officers are in uniform and how many are plain-clothed, and which specific areas they will be patrolling. Given the ongoing law enforcement issues posed by tobacco smuggling, it is not unreasonable to expect that current law enforcement activities would parallel those outlined in Record 2. I have therefore concluded that a reasonable basis exists that

endangerment will result from disclosure of Record 2 and I uphold the application of Section 14(1)(e) to Record 2.

Section 14(1)(l): facilitate the commission of an unlawful act

The Ministry has applied section 14(1)(l) to the remaining record at issue, Record 13. In its representations, the Ministry states:

> With particular reference to Record 13, release of this information would reveal anti-smuggling enforcement strategies employed or considered by the OPP in 1994. Release of this information may reasonably be expected to undermine the current efforts of law enforcement agencies to curtail tobacco smuggling.

In his representations, the appellant again states that the Ministry has not met its burden of providing detailed and convincing evidence of the harm and pointed out that the records are between 10 and 17 years of age.

While I agree the record is dated, I believe that the Police have provided clear evidence that they have not substantially changed their anti-smuggling strategies. The strategies listed in this record involve multiple police forces at several levels of government. I am satisfied that the Ministry's submissions, combined with the contents of the record, provide the necessary "detailed and convincing" evidence for me to conclude that disclosure could reasonably be expected to hamper the control of the tobacco smuggling and thereby facilitate the commission of an unlawful act or hamper the Police's ability to control crime.

Conclusion

In addition to my decision to uphold the Ministry's application of section 13(1) to Record 4, I am satisfied that each of the remaining records 2, 7, 10, 12, 13 and 15 are exempt from disclosure under section 14(1).

Since I have decided to uphold the Ministry's decision not to disclose the records pursuant to sections 13(1) and 14(1), it in not necessary for me to consider the Section 15 exemptions.

ORDER:

I uphold the Ministry's decision.

Original signed by: May 11, 2006
Brian Beamish
Assistant Commissioner