

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER PO-3565-I

Appeal PA13-542

Ministry of the Attorney General

December 31, 2015

Summary: The ministry received a request for records relating to a decision of the Ontario Civilian Police Commission regarding complaints about the conduct of a councillor sitting as a member of a police services board. The ministry denied access to the records on the basis of the exemptions in sections 14(1)(a) and (b) (law enforcement), 14(1)(f) (right to a fair trial) and 21(1) (personal privacy). The appellant claims that section 23 (public interest override) applies to the records. In this interim order, the adjudicator finds that sections 14(1)(a), (b) and (f) do not apply to the records at issue.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 14(1)(a), (b) and (f).

OVERVIEW:

[1] The Ministry of the Attorney General (the ministry) received a request under the *Act* for access to a decision "by the Ontario Civilian Police Commission (the OCPC) regarding formal complaints into the conduct of [a named councillor] of Hamilton as a member of the Hamilton Police Services Board."

[2] In response, the ministry issued a decision stating that access to the requested records was denied on the basis of the exemption in section 14(1)(f) (right to a fair trial) of the *Act*.

[3] The appellant appealed the ministry's decision to this office.

[4] During mediation, the ministry confirmed that there were two records responsive to the request. It also advised that, in addition to the exemption in 14(1)(f), access to both records was also denied on the basis of the exemptions in sections 14(1)(a) and (b) (law enforcement) of the *Act*. In addition, the ministry took the position that the mandatory exemption in section 21(1) (personal privacy) applied to the records.

[5] Also during mediation, the appellant indicated that he believes there is a public interest in the records, and the possible application of the public interest override in section 23 of the *Act* was added as an issue in this appeal.

[6] Mediation did not resolve the issues, and the file was transferred to the inquiry stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry identifying the facts and issues in this appeal to the ministry and an affected party, initially. Both the ministry and the affected party provided representations.

[7] In its representations the ministry took the position that its representations ought not to be shared with any other parties. I reviewed the ministry's representations in light of the confidentiality criteria set out in section 7 of this office's *Code of Procedure* and *Practice Direction 7*. I then sent the ministry a letter indicating the portions of its representations which in my view fit within the confidentiality criteria, and those portions that did not fit within the criteria.

[8] In response, the ministry indicated that it accepted that certain portions of its representations could be shared, but also took the position that 15 additional portions of its representations ought not to be shared. The ministry also provided further arguments and reasons why, in its view, the identified portions of the representations ought not to be shared.

[9] After considering the ministry's position, I accepted its view that some additional portions of its representations should be withheld based on the confidentiality criteria. I also noted that a number of the ministry's confidential representations related to the application of the discretionary exemptions in sections 14(1)(a), (b) and (f), and that the "public interest override" in section 23 does not apply to section 14. In the circumstances of this appeal, and because of my findings below, I decided to issue this interim order addressing the possible application of section 14 to the records.

[10] In this order, I find that sections 14(1)(a), (b) and (f) do not apply to the records at issue. I remain seized of this matter to address the other issues raised in this appeal.

RECORDS:

[11] The records at issue are two letters from the OCPC.

ISSUE:

Do the discretionary law enforcement exemptions at sections 14(1)(a), (b) and/or (f) apply to the records?

DISCUSSION:

[12] The ministry takes the position that the two letters qualify for exemption under the discretionary exemptions found in sections 14(1)(a), (b) and (f). In the discussion below, I review the application of those exemptions to the two records; however, because of the confidential nature of some of the representations received from the ministry, I am constrained in some instances from describing the ministry's representations in detail in this order.

General principles

[13] Sections 14(1)(a), (b) and (f) 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;

(c) deprive a person of the right to a fair trial or impartial adjudication;

[14] 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, or

(c) the conduct of proceedings referred to in clause (b)

[15] The term "law enforcement" has been found to apply in the following circumstances:

- a municipality's investigation into a possible violation of a municipal by-law that could lead to court proceedings.¹
- a police investigation into a possible violation of the *Criminal Code*.²
- a children's aid society investigation under the *Child and Family Services Act* which could lead to court proceedings.³

[16] The term "law enforcement" has been found *not* to apply in the following circumstances:

- an internal investigation by the institution under the *Training Schools Act* where the institution lacked the authority to enforce or regulate compliance with any law.⁴
- a Coroner's investigation or inquest under the *Coroner's Act*, which lacked the power to impose sanctions.⁵

[17] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.⁶

[18] It is not enough for an institution to take the position that the harms under section 14 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.⁷ The institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.⁸

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

[19] In addition to the requirements set out above regarding the definition of "law enforcement," previous orders of this office have established that, for the section

¹ Orders M-16 and MO-1245.

² Orders M-202 and PO-2085.

³ Order MO-1416.

⁴ Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.).

⁵ Order P-1117.

⁶ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

⁷ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

⁸ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

14(1)(a) exemption to apply, the matter in question must be ongoing or in existence.⁹ The exemption does not apply where the matter is completed, or where the alleged interference is with “potential” law enforcement matters.¹⁰ The “matter” may extend beyond a specific investigation or proceeding,¹¹ and the institution holding the records need not be the institution conducting the law enforcement matter for the exemption to apply.¹²

[20] The ministry takes the position that the records relate to an investigation undertaken by the OCPC. It states that OCPC staff undertook an investigation and prepared a report, and confirms that the OCPC decided not to proceed to a public hearing under section 25(1) of the *Police Services Act* (the *PSA*). It refers to a previous order of this office (PO-1150) in support of its position that section 14(1)(a) applies, and also refers to the confidentiality provisions in section 21(10) of the *PSA*. In addition, the ministry provides confidential representations in support of its position that the exemption in section 14(1)(a) applies. Because of the confidential nature of those representations, I cannot refer to them in detail in this order.

Finding

[21] I have reviewed the records at issue and considered the ministry’s representations, including the confidential representations provided by it. In the circumstances, I find that the requirements for the application of the exemption in section 14(1)(a) have not been established. In making this finding, I specifically reject the ministry’s arguments made in the confidential portions of paragraphs 18 and 20 of its representations, and find that the harm described in paragraph 23 is not established. I am unable to describe these representations in detail due to confidentiality concerns. In addition, I do not accept the ministry’s position that the confidentiality provisions in section 21(10) of the *PSA* apply to the records at issue.

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

[22] In addition to the requirements set out above regarding the definition of “law enforcement,” previous orders of this office have established that, for the section 14(1)(b) exemption to apply, 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.¹³ The investigation in question must be ongoing or in existence.¹⁴ The

⁹ Order PO-2657.

¹⁰ Orders PO-2085 and MO-1578.

¹¹ *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.).

¹² Order PO-2085.

¹³ Order PO-2085.

¹⁴ Order PO-2657.

institution holding the records need not be the institution conducting the law enforcement investigation for the exemption to apply.¹⁵

[23] In support of its position that the section 14(1)(b) exemption applies, the ministry adopts the submissions it made under section 14(1)(a). It also states that the records, which contained the OCPC's decision in respect of the investigation, qualify for exemption under this exemption, and it again refers to the confidentiality provisions in section 21(10) of the *PSA*. In addition, the ministry provides confidential representations in support of its position that the exemption in section 14(1)(b) applies. Because of the confidential nature of those representations, I cannot refer to them in detail in this order.

Finding

[24] I have reviewed the records at issue and considered the ministry's representations, including the confidential representations provided by it. In the circumstances, I find that the requirements for the application of the exemption in section 14(1)(b) have not been established. In making this finding, I again specifically reject the ministry's arguments made in the confidential portions of paragraphs 18 and 20 of its representations. I also do not accept the ministry's positions set out in the confidential portions of paragraphs 26, 27 and 28. I am unable to describe these representations in detail due to confidentiality concerns. In addition, I do not accept the ministry's position that the confidentiality provisions in section 21(10) of the *PSA* apply to the records.

Section 14(1)(f): right to a fair trial

[25] In order to establish that the exemption in section 14(1)(f) would apply, the ministry must show that there is a "real and substantial risk" of interference with the right to a fair trial or impartial adjudication. The exemption is not available as a protection against remote and speculative dangers.¹⁶

[26] In support of its position that the section 14(1)(f) exemption applies, the ministry adopts the submissions it made under sections 14(1)(a) and (b). It also provides additional confidential representations in support of its position that section 14(1)(f) applies. Because of the confidential nature of those representations, I cannot refer to them in detail in this order.

¹⁵ Order PO-2085.

¹⁶ Order P-948, *Dagenais v. Canadian Broadcasting Corp.* (1994), 120 D.L.R. (4th) (S.C.C.), and Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.).

Finding

[27] I have reviewed the records at issue and considered the ministry's representations, including the confidential representations provided by it. In the circumstances, I find that the requirements for the application of the exemption in section 14(1)(f) have not been established. In making this finding, I again specifically reject the ministry's arguments made in the confidential portions of paragraphs 18 and 20 of its representations. I also do not accept the ministry's positions set out in the confidential portions of paragraphs 32 and 33, and find that the ministry has not established that disclosure of the records could reasonably be expected to deprive a person of the right to a fair trial or impartial adjudication, nor that a "real and substantial risk" of interference with the right to a fair trial or impartial adjudication exists.

Summary

[28] In this interim order I have found that the exemptions in sections 14(1)(a), (b) and (f) do not apply to the records at issue. As a result, it is not necessary to consider the ministry's submissions regarding its exercise of discretion in applying section 14.

[29] I remain seized of this matter to address the other issues raised in this appeal.

ORDER:

1. I find that the records at issue do not qualify for exemption under sections 14(1)(a), (b) or (f) of the *Act*.
2. I remain seized of this matter to address the other issues raised in this appeal.

Original Signed by: _____
Frank DeVries
Senior Adjudicator

December 31, 2015 _____