Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3677

Appeal PA15-678

Ministry of Natural Resources and Forestry

December 13, 2016

Summary: The ministry applied section 14(3) of the *Freedom of Information and Protection of Privacy Act* (the *Act*) to refuse to confirm or deny the existence of records containing the name of a confidential informant who may (or may not) have provided information regarding a hunting trip that resulted in the laying of charges under the *Fish and Wildlife Conservation Act*. The ministry argued that any such records, if they exist, are exempt from disclosure under the law enforcement exemption related to confidential sources at section 14(1)(d) of the *Act*, and that disclosing the very existence of records would reveal information that qualifies for exemption under that section. In this order, the adjudicator upholds the ministry's decision to apply section 14(3) to any responsive records, if they exist.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 14(1)(d) and 14(3).

OVERVIEW:

[1] The Ministry of Natural Resources and Forestry (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information related to a conservation officer's investigation of a hunting trip. The request stated:

> I am now requesting the name of the informant(s) who [made] incorrect hearsay accusations regarding a hunting trip on December 1st of 2012.

[2] The ministry submits that the request arises from an investigation that resulted in three individuals (one of whom is the appellant) having been charged with offences

under the *Fish and Wildlife Conservation Act (FWCA)*. The ministry notes that charges against two of the individuals, including the appellant, were withdrawn subject to agreements reached during plea negotiations.

[3] The ministry issued a decision letter that stated:

> The existence of records responsive to your request cannot be confirmed or denied in accordance with section 14(3) of the *Act*.

[4] The requester, now the appellant, appealed the ministry's decision to refuse to confirm or deny the existence of any responsive records.

[5] During mediation, the ministry maintained its position that it could not confirm or deny the existence of any records. The appellant confirmed that he wished to obtain access to the information sought.

[6] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. During my inquiry into this appeal I sought and received representations from both the ministry and the appellant. The non-confidential portions of the ministry's representations were shared with the appellant in accordance with the principles set out in this office's *Practice Direction 7* and section 7 of this office's *Code of Procedure.* I decided that it was not necessary to share the appellant's representations with the ministry.

[7] In this order I find that the ministry is entitled to refuse to confirm or deny the existence of any records pursuant to section 14(3) of the *Act*.

RECORDS:

[8] Pursuant to section 14(3) of the *Act*, the ministry refuses to confirm or deny whether records responsive to the request exist.

DISCUSSION:

[9] The sole issue to be decided in this appeal is whether the ministry is entitled to refuse to confirm or deny the existence of any records responsive to the request pursuant to section 14(3) of the *Act*. Section 14(3) states:

> A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) apply.

[10] This section acknowledges the fact that in order to carry out their mandates, law enforcement agencies must sometimes have the ability to withhold information in answering requests under the *Act*. However, it is the rare case where disclosure of the mere existence of a record would frustrate an ongoing investigation or intelligence-

gathering activity.[1]

[11] For section 14(3) to apply, the ministry must demonstrate that:

1. 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 itself convey information that could reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity.[2]

Would the records (if they exist) qualify for exemption under sections 14(1) or (2)?

[12] The ministry submits that the exemption at section 14(1)(d) would apply to any responsive records (if they exist). Section 14(1)(d) reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

[13] The term "law enforcement" is used in several parts of section 14, including in 14(1)(d). It 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).

[14] The term "law enforcement" has covered the following situations:

- A municipality's investigation into a possible violation of a municipal by-law that could lead to court proceedings.[3]

- A police investigation into a possible violation of the *Criminal Code.*[4]

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[1] Orders P-255 and P-1656.
[2] Order P-1656.
[3] Orders M-16 and MO-1245.
[4] Orders M-202 and PO-2085.

- A children's aid society investigation under the *Child and Family Services Act* which could lead to court proceedings.[5]

- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997.*[6]

[15] This office has stated that "law enforcement" does not apply to the following situations:

- An internal investigation by the institution under the *Training Schools Act* whereby the institution lacked the authority to enforce or regulate compliance with any law.[7]

- A Coroner's investigation or inquest under the *Coroner's Act*, which lacked the power to impose sanctions.[8]

[16] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[9]

[17] 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.[10] 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.[11]

Section 14(1)(d): confidential source

[18] The ministry must establish a reasonable expectation that the identity of the source of the information would remain confidential in the circumstances.[12]

[19] The ministry submits that it has established guidelines with respect to confidential informants who provide information with respect to law enforcement matters and who either implicitly or explicitly request confidentiality. It explains that the

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[5] Order MO-1416.
[6] Order MO-1416.
[7] 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.).
[8] Order P-1117.
[9] Ontario (Attorney General) v. Fineberg (1994), 19 O.R. (3d) 197 (Div. Ct.).
[10] Order PO-2040 and Ontario (Attorney General) v. Fineberg, cited above.
[11] Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner), 2014 SCC 31 (CanLII) at paras. 52-4.
[12] Order MO-1416.

guidelines provide that:

> [A] Confidential Informant's identity will be kept confidential and they will only be referred to internally by an assigned number; the Confidential Informant must not tell anyone they are a Confidential Informant; if it is determined that the guideline has been breached, [the ministry] may revoke their Confidential Informant status; and, Confidential Informant status does not give the Confidential Informant any special authority or exemption.

[20] The ministry submits that if there was a confidential informant involved in the matter referred to by the appellant "he or she would [have been] recruited under the guidelines."

[21] Specifically addressing whether section 14(1)(d) would apply to any responsive record that might exist, the ministry submits:

> [T]he investigation into the appellant resulted in charges under the *FWCA.* Charges under the *FWCA* which result in a conviction or plea bargain are clearly a law enforcement matter. The request is for records identifying or naming the Confidential Informant who provided information relating to a law enforcement matter, i.e., an investigation and charges under the *FWCA*; therefore, section 14(1)(d) would apply to any records … relating to a Confidential Informant should they exist.

Would disclosure of the fact that records exist (or do not exist) would itself convey information that could reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity?

[22] With respect to the second part of the test, the ministry submits that section 14(3) of the *Act* enables the ministry to refuse to confirm or deny the existence of a record to which one of the exemptions at either sections 14(1) or (2) apply. It submits that previously in its representations it has established that the exemption at section 14(1)(d) would apply to any record that would identify or name a confidential source. It submits that the guidelines that it has established with respect to its confidential informants require that their identity be kept in the strictest confidence, both inside and outside of the ministry. It submits that revealing the existence of a confidential informant would "undermine this useful tool." It also submits that "[p]roviding information about the source such as that contained in the record could allow a Confidential Informant to be identified."

[23] The ministry further submits:

> If the sources were revealed, it is unlikely that the ministry would be able to obtain further information concerning illegal activities. Any information would be provided on a confidential basis and any individual recruited

> under the guidelines as a Confidential Informant may fear that it would prejudice any dealings with the requester. Furthermore, if it was known that the existence of a Confidential Informant could be revealed by the ministry, it may prove to be a deterrent to those who would otherwise provide such information under the guidelines as it would undermine confidence in the program which is premised on complete confidentiality. This would make ongoing and future investigations more difficult and hamper the ministry's efforts to successfully bring charges.

[24] The appellant submits that he believes that he already knows who the confidential informant(s) are based on the "hearsay evidence" that he submits conservation officers provided to him when they attended at his home. He also submits that there is information regarding the incident which gave rise to the charges against him circulating amongst members of his community. He submits that he seeks confirmation as to the identity of the confidential source and it is his view that he requires this information to "dispel the embellished and incorrect information told to [the Conservation Officer] by the Confidential Informant(s)."

Analysis and finding

[25] Based on the ministry's representations, I am satisfied that a record responsive to the appellant's request, if it exists, would qualify for exemption under section 14(1)(d).

[26] Additionally, I accept that based on the wording of the request and on the representations of the parties, disclosure of the very fact that responsive records do or do not exist would shed light on or reveal information about circumstances surrounding the ministry's use (or lack of use) of the confidential informant program. I further accept that disclosure of this type of information could reasonably be expected to have an impact on or compromise the effectiveness of the ministry's use of that program by deterring confidential informants from providing information on possible incidents of illegal activity.

[27] Accordingly, I find that both parts of the test for section 14(3) have been satisfied by the ministry and, for the purposes of this appeal, it is entitled to refuse to confirm or deny the existence of records responsive to the request.

ORDER:

I find that the ministry is entitled to apply the discretionary exemption in section 14(3) to refuse to confirm or deny the existence of responsive records.

Original Signed By: December 13, 2016
Catherine Corban
Adjudicator