

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3236

Appeal MA14-412

Toronto Police Services Board

August 26, 2015

Summary: The police received a request for access to records relating to the acquisition of surveillance devices known as cell site simulators. The police refused to confirm or deny the existence of responsive records under the discretionary exemption in section 8(3) (refuse to confirm or deny) because any responsive records, if they exist, would be exempt under section 8(1)(c). In addition, the police determined that disclosing even the existence of responsive records would reveal information that is also exempt under section 8(1)(c). In this order, the police's decision is upheld and the appeal is dismissed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 8(1)(c) and 8(3).

Orders and Investigation Reports Considered: Order MO-2356.

OVERVIEW:

[1] The Toronto Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

Records regarding any Toronto police services acquisition of cell site simulators (also referred to as an IMSI [International Mobile Subscriber Identity] catcher), including invoices, purchase orders, contracts, loan

agreements, solicitation letters, correspondence with companies providing the devices, and similar documents.

[2] The police issued the following decision in response to the request:

... due to the nature of your inquiry surrounding the use of electronic surveillance devices, disclosing such information could reveal classified operational procedures currently in practice by the Police Service; thus, potentially jeopardizing the effectiveness in fulfilling its policing mandate.

The *Act* provides in section 8(1)(c) that:

'A head may refuse to disclose a record if the disclosure could reasonably be expected to, reveal investigative techniques and procedures currently in use or likely to be used in law enforcement.'

In light of the foregoing, the existence of the records identified in your request cannot be confirmed or denied in accordance with subsection 8(3) of the *Act*.

[3] The appellant appealed the police's decision to refuse to confirm or deny the existence of responsive records.

[4] During mediation, the appellant submitted that access to the requested information is in the public interest, as the use of cell site simulator devices is contested in many jurisdictions and has raised civil liberties issues. The police maintained their position "that if any records existed in relation to the police's acquisition and/or use of "cell site simulators", they would qualify for exemption under section 8(1)(c) of the *Act*. Furthermore, the police suggest that "due to the nature of the request surrounding the use of surveillance devices, disclosing such information could reveal classified operational procedures currently in practice by this Police Service, and potentially jeopardize the effectiveness in fulfilling our policing mandate."

[5] No further mediation was possible and the appeal was transferred to the adjudication stage of the process, where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the police, a complete copy of which were shared with the appellant, who also provided me with representations. Finally, the police provided additional submissions by way of reply representations.

[6] In this order, I uphold the police's decision to deny access to any responsive records, if they exist, on the basis of section 8(1)(c) and to refuse to confirm or deny the existence of responsive records under section 8(3).

ISSUES:

- A. Does the discretionary exemption in section 8(1)(c) apply to records responsive to the request, if they exist?
- B. Are the police entitled to rely on section 8(3) to refuse to confirm or deny the existence of responsive records?

DISCUSSION:

Issue A: Does the discretionary exemption in section 8(1)(c) apply to records responsive to the request, if they exist?

[7] The police take the position that any responsive records, if they exist, would be exempt from disclosure under section 8(1)(c) of the *Act*, which reads:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

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

[8] 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.¹ The techniques or procedures must be “investigative”. The exemption will not apply to “enforcement” techniques or procedures.²

[9] The police submit that “an IMSI catcher can generally be described as device used for intercepting mobile phone traffic and tracking movement of mobile phone users.” They argue that records relating to the acquisition of such devices “would affirm the police’s possession of such a device, and strongly suggest and/or possibly reveal the police’s use of that specific investigative tool.” They go on to argue that the disclosure of any responsive records would:

. . . support the assumption of the use of any surveillance device by police could be used to enable suspects to circumvent the techniques and procedures put in place. It would assist in educating criminals on how to protect themselves against police surveillance, or even allow unauthorized

¹ Orders P-170, P-1487, MO-2347-I and PO-2751.

² Orders PO-2034 and P-1340.

persons to employ such techniques themselves; thus, spoiling its potential for effective use as an investigative tool.

To require the police to disclose records affirming the use of electronic surveillance equipment would quickly lessen its effectiveness and, possibly jeopardize the safety of law enforcement officials operating such devices. Courts have recognized this emerging problem and have accepted a common law privilege protecting investigative technique.

[10] The appellant disagrees with the police's position and submits that the evidence submitted in support of its arguments is not sufficiently "detailed and convincing", as is required. He suggests that the reasoning relied upon by the police is "overly broad and unspecific, to the extent that the police have not established that confirming the existence of possible responsive records would compromise the effective utilization of an investigative technique or procedure."

[11] The appellant relies upon the reasoning of Adjudicator Colin Bhattacharjee in Order MO-2356 where it was found that the police had not provided a sufficiently detailed and convincing explanation as to how and why the disclosure of certain information contained in a policy and procedures manual could reasonably be expected to result in the harms contemplated by section 8(1)(c). I note that in that decision it was found that many of the withheld documents from the policy and procedures manual were publicly available or, at the very least, "generally known to the public." The appellant in the current appeal does not assert that the information sought in any records responsive to his request are either publicly available or are generally known to the public, however.

[12] In its reply representations, the police submit that "the need to safeguard any highly sensitive investigative techniques and procedures, including the use of any electronic surveillance devices are paramount in maintaining their effectiveness, and thus upholding the police's ability to continue to successfully carry out its policing mandate."

[13] In my view, any records which might be responsive to the request, as framed, would by definition reveal the fact that the police have access to electronic surveillance devices for intercepting mobile phone traffic and tracking the movements of mobile phone users. I specifically find that the disclosure of responsive records could reasonably be expected to reveal the fact that the police are currently using or are likely to make use of electronic surveillance devices such as those suggested in the request.

[14] I further find that the use of electronic devices such as a cell site simulator is an "investigative technique" that is currently or is likely to be used by the police in law

enforcement activities and that the disclosure of this fact could reasonably be expected to hinder or compromise its effectiveness. I agree with the police's position that knowledge of the existence of this investigative tool would enable those who are subject to an investigation to take steps to avoid detection or surveillance by the police. For these reasons, I find that the discretionary exemption in section 8(1)(c) would apply to any records that are responsive to the request, if they exist, and that any such records would, therefore, be exempt under that section.

Issue B: Are the police entitled to rely on section 8(3) to refuse to confirm or deny the existence of responsive records?

[15] Section 8(3) states:

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

[16] 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.³

[17] For section 8(3) to apply, the institution must demonstrate that:

1. the records (if they exist) would qualify for exemption under sections 8(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.⁴

[18] I have found above that any responsive records, if they exist, would qualify for exemption under section 8(1)(c). Accordingly, the first part of the test under section 8(3) has been satisfied.

[19] In support of its claim regarding the application of section 8(3) to any responsive records, if they exist, the police submit that:

³ Orders P-255 and P-1656.

⁴ Order P-1656.

The authorized use of clandestine surveillance devices have proven to be effective law enforcement tools, so long as they remain secret. Confirming the use of a specific surveillance device would likely destroy any future value of that tool in the police investigations.

Furthermore, the ability of the police to maintain confidentiality in relation to the possession of such investigative tools and techniques is imperative, as its discovery would seriously hamper future criminal investigations and prosecutions.

[20] The appellant takes issue with the police's assertions, arguing that they are overly broad and unspecific, failing to meet the "detailed and convincing" requirement for the exemption in section 8(1)(c) or section 8(3).

[21] In its reply representations, the police reiterate that:

If the police were in possession of specific covert devices (specifically used for intercepting mobile phone traffic and tracking movement of mobile phone users), under section 8(3) of the MFIPPA, the disclosure of the mere existence of records referencing such a device would convey information to the appellant, and in turn, whoever he chooses to share it [with].

[22] Based on the police's representations, I am satisfied that the disclosure of the very fact that responsive records exist or do not exist would convey to the appellant information which, in and of itself, would be exempt from disclosure under section 8(1)(c). I specifically find that the disclosure of this information respecting the existence or non-existence of responsive records could reasonably be expected to reveal investigative techniques which are either in use or could likely be used in law enforcement.

[23] Further, I conclude that information which would confirm or deny the existence or non-existence of responsive records could reasonably be expected to reveal the fact that the police have or do not have these types of surveillance equipment. The disclosure of this information would thereby reveal information that is exempt under section 8(1)(c) and section 8(3) may therefore be claimed. Accordingly, I find that the police's reliance upon section 8(3) is proper in this case and I uphold its application in the circumstances of this appeal.

[24] Finally, I accept that the police exercised its discretion in an appropriate fashion, taking into account the nature of the request and the manner in which the police responded to it. I will not, accordingly, disturb it on appeal.

ORDER:

I uphold the police's decision and dismiss the appeal.

Original Signed by: _____
Donald Hale
Adjudicator

_____ August 26, 2015