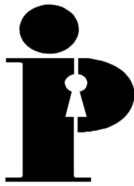

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1921

Appeal PA_000258_1

Ministry of the Solicitor General

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NATURE OF THE APPEAL:

The Ministry of the Solicitor General (the Ministry) received a request for access to information under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester, an engineering company, sought access to "the policies and procedures" of the Office of the Fire Marshal (OFM) "as they pertain to fire investigations in general." The requester also sought access to:

> . . . [A]ll documentation which directly or indirectly references [the requester] or any of its employees from the OFM. I am particularly interested in all file material and internal correspondence in the possession of [five named OFM employees].

The requester went on to list the names of ten individual employees of the requester about whom information was being sought.

The Ministry identified records responsive to the request, and then advised the requester that it was denying access to the records in their entirety on the basis of the exemptions at sections 14 (law enforcement), 15 (relations with other governments) and 18 (economic interests of Ontario) of the *Act*.

The requester (now the appellant) appealed the Ministry's decision to this office.

I sent a Notice of Inquiry setting out the issues in the appeal initially to the Ministry, which provided representations in response. In its representations, the Ministry indicated it was no longer relying on the exemption at section 15 to deny access to the records. The Ministry also indicated that it was relying on the mandatory exemption at section 21 (personal privacy) to deny access to portions of the records containing personal information such as names of individuals, telephone numbers and home addresses.

I then sent a Notice of Inquiry to the appellant, together with a copy of the Ministry's representations, and received representations in response. Finally, I sent a copy of the appellant's representations to the Ministry, which provided reply representations.

RECORDS

The three records at issue in this appeal consist of a 439 page document entitled "Standard Operating Procedures Manual" (Record 1), a 48 page document entitled "Fire Investigation Service: Fire Investigator Standards" (Record 2), and a 151 page document entitled "Fire Investigation Service: Fire Investigator Curriculum" (Record 3).

ISSUES

LAW ENFORCEMENT

Introduction
The Ministry submits that the records qualify for exemption under paragraphs (c), (g) and (l) of section 14(1) of the *Act*. Those sections read:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (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.

In order to establish that the particular harm in question under section 14(1)(c), (g) or (l) "could reasonably be expected" to result from disclosure of the records, the Ministry must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [Order PO-1772; see also Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

Investigative techniques and procedures: section 14(1)(c)

Introduction

The Ministry claims that this exemption applies to certain specified pages of all three of the records at issue.

In order to establish that section 14(1)(c) applies, the Ministry must demonstrate that:

(i) disclosure of the record could reasonably be expected to reveal investigative techniques and procedures; and

(ii) the techniques and procedures are currently in use or likely to be used in law enforcement.

Investigative techniques and procedures

In order to constitute an "investigative technique or procedure", it must be the case that disclosure of the technique or procedure to the public would hinder or compromise its effective utilization. The fact that a particular technique or procedure is generally known to the public would normally lead to the conclusion that its effectiveness would not be hindered or compromised by disclosure and accordingly that the technique or procedure in question is not within the scope of section 14(1)(c) [see Orders P_170, P-1487].

The Ministry submits:

> [Section 14(1)(c) applies] to those parts of the responsive records which contain operational policies and detailed methodologies that OFM investigators are expected to follow during the investigation of fires pursuant to section 9(2)(a) of the [*Fire Protection and Prevention Act, 1997*].
>
> The responsive records contain detailed step-by-step procedures on such matters as:
>
> - conducting fire scene examinations;
> - conducting routine, fatal, fraud, electrical, vehicle and boat fire investigations;
> - identifying specific types of fire causes;
> - identifying and handling incendiary devices and explosives;
> - using specialized communications tools;
> - identifying, preserving and analyzing evidence;
> - effectively using resources including the police, the canine unit and other investigative sources of information; and
> - working relationships with other law enforcement agencies.
>
> It is essential that law enforcement agencies formalize their operational policies, procedures and techniques in order to maintain appropriate standards and ensure consistency in application . . . This type of confidential information is not normally available to members of the public . . . [R]elease under [the *Act*] in response to an access request constitutes release to the general public. Unrestricted release of the

> requested information would seriously compromise the effectiveness of the identified techniques and procedures.
>
> For example, a would be arsonist would find documents like the OFM fire investigation checklists to be an invaluable aid. The detailed checklists could enable a would be arsonist to accurately predict the actions of an OFM fire investigator and adjust his or her actions accordingly in an effort to successfully escape detection. Public dissemination (via hard copy or the internet) of documents, such as checklists, would seriously jeopardize the ability of fire investigators to effectively investigate fires . . .

The appellant submits:

> The [records] should not be exempt from Section 14(1)(c) because [the OFM's] investigative technique or procedure is widely known to the public. Their technique or procedure is based on the requirements contained in the FPPA as well as the governing rules for Ontario government agencies. In addition, this technique or procedure is distributed over the internet, and through newsletters, and courses at the Ontario Fire College, and courses at Seneca College. An OFM investigator/engineer currently presents techniques and procedures used by the OFM and actual unedited OFM reports to students at Seneca College . . .
>
> All this information is readily available to the public in one form or another. One only needs to visit the anarchist guide on the Internet in order to obtain much of the information in the responsive records. In addition, public documents including the [U.S. National Fire Protection Association (NFPA)] 921 "Guide for Fire and Explosion Investigations", the Fire Protection Handbook, the Fire Protection Engineering Handbook, The Art and Science of Fire Investigation, Kirks Fire Investigation, An Introduction to Fire Dynamics, etcetera, all contain the same information listed above.
>
> The Seneca College course explains to students the "Philosophy behind fire investigations" and the arson provisions of the Criminal Code of Canada. The course also delves into several case studies which include a step-by-step description of the OFM's actions as well as the original unedited OFM reports for these investigations. If the OFM were concerned about the dissemination of this information, then they certainly would not permit one of their own investigators to be presenting this detailed information at Seneca College. There is no reasonable expectation that the responsive records would facilitate the commission of an unlawful act since this information is readily available to the public already.In reply to the appellant's representations, the Ministry submits:

> . . . [T]he appellant is of the view that much of the responsive information he is attempting to access pursuant to his [*Act*] request . . . is already in the public domain. The appellant identifies the internet as a public source of information regarding fire investigation techniques and procedures, identifies relevant documents which may be purchased by members of the public and describes related courses offered to Seneca College students.
>
> To the best of the Ministry's knowledge, the responsive records at issue in this appeal are not made available to Seneca College students or the general public. In particular, the Ministry has been informed that the OFM employee engaged in secondary employment as a part-time instructor at Seneca College does not present information with respect to the responsive records in either written documentation (handouts) or through his verbal presentations to students.

Based on my detailed review of the records, and of excerpts from several publicly available sources provided by the appellant (including the National Fire Protection Association's "NFPA 1033: Standard for Professional Qualifications for Fire Investigator (1998 ed.), "Fire Protection Handbook" (18th ed.) and "NFPA 921: Guide for Fire and Explosion Investigations (2001 ed.), the American Society for Testing and Materials' "Standard Practice for Examining and Testing Items That Are Or May Become Involved In Litigation" (1997), "Kirk's Fire Investigation" (4th ed.), and the National Association of Fire Investigators' "1998 Canadian National Advanced Fire, Arson & Explosion Training Program" training materials), I am satisfied that the types of fire investigation procedures and techniques contained in the records are generally known or available to the public. The Ministry's response to the effect that the records themselves are not made available to Seneca College students is inadequate, and fails to address whether the substance of the records is disclosed in this manner. Accordingly, I find that the Ministry has failed to establish that disclosure of the techniques or procedures in the records could reasonably be expected to reveal investigative techniques or procedures not already in the public domain, or thereby hinder or compromise their effective utilization.

Currently in use or likely to be used in law enforcement

Although it is not necessary for me to do so, I will address the second part of the test for exemption under section 14(1)(c). To meet this part, the Ministry must demonstrate that any techniques and procedures which may be revealed by the records are currently in use or likely to be used in *law enforcement*. The term law enforcement is defined in section 2(1) of the *Act* 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);

With respect to the term law enforcement, the Ministry submits:

> . . . [P]arts of the responsive records fall within parts (a) and (b) of the definition of "law enforcement":
>
> Part (a) Policing: encompasses the activities of police services and includes activities such as the investigation and prosecution of offences, the collection and analysis of law enforcement information, the prevention of crime, the maintenance of law and order and the provision of protective services.
>
> Part (b) Investigations or inspections: encompasses the activities of law enforcement agencies to enforce compliance with standards, duties and responsibilities set out in statute or regulation.
>
> . . . [T]he OFM is a law enforcement agency responsible for investigations and inspections that may lead to legal proceedings. The primary legal authority for investigations and inspections is the *Fire Protection and Prevention Act* (*FPPA*). Staff of the OFM are responsible for ensuring compliance with the *FPPA* and the Fire Code.
>
> Section 9(2)(a) of the *FPPA* legally requires the [OFM] to investigate fires. This section states:
>
> 9(2) It is the duty of the Fire Marshal,
>
> (a) to investigate the cause, origin and circumstances of any fire or of any explosion or condition that in the opinion of the Fire Marshal might have caused a fire, explosion, loss of life or damage to property;
>
> . . .

Working under the authority contained in section 9(2)(a), where an investigator finds evidence of arson or other *Criminal Code* offences, the OFM works cooperatively with the police and other law enforcement partners to support a criminal prosecution. OFM fire investigators are often called upon to work with the police because of their specialized expertise in the area of fire investigation. Necessary witness/suspect interviews and statements are obtained in order for criminal prosecutions to be considered.

OFM staff investigate all fires that involve fatalities and/or life-threatening injuries or a gaseous explosion; and where appropriate, fires that involve deliberate, malicious setting or arson; and unusual origins or circumstances, such as large losses or widespread public concern.

Under the authority of sections 9(2) and 14 of the *FPPA*, OFM fire investigators are delegated the duty of investigation by the Fire Marshal. When investigating a fire, OFM investigators must assess the fire scene, interview witnesses and other involved parties and analyse all available information in order to determine whether the cause of the fire is incendiary (e.g. arson, vandalism, etc.), accidental (e.g. building deficiency, misuse of equipment, electrical failure, etc.) or undetermined. OFM fire investigators also assess whether there have been any violations or potential violations of law with respect to any of the circumstances relating to the fire.

Under section 14 of the *FPPA*, OFM investigators have broad powers of entry with respect to a place where a fire has occurred or is likely to occur . . .

With specific reference to section 14(2)(b), articles or materials seized during the course of an OFM fire investigation may be subject to forensic testing. The results of such forensic testing may lead to a criminal investigation in relation to the circumstances of a fire.

Section 14(3) authorizes the Fire Marshal or a fire chief, without a warrant, to enter adjacent lands as necessary for investigative purposes as detailed in sections 14(1) and (2).

Section 14(6) provides that a Justice of the Peace may issue a warrant authorizing the Fire Marshal or a fire chief named in the warrant to enter on land or premises for investigative purposes as detailed in sections 14(1) and (2) in circumstances where the Fire Marshal or fire chief have been denied or anticipate being denied entry to land or premises or have been obstructed with respect to the exercise of their authorized powers.

> Section 9(3) of the *FPPA* provides the Fire Marshal with formal powers of public inquiry . . .
> Offences and Enforcement are detailed in Part VII of the *FPPA* . . .
>
> With specific reference to fire investigations, it should be noted that in accordance with section 28(1)(a) of the *FPPA*, OFM fire investigators have the authority to have individuals charged for the offence of obstructing them in performing their duties.
>
> OFM fire investigators are appointed as Special Constables pursuant to section 53 of the *Police Services Act*. This designation provides OFM fire investigators with the powers of a police officer to obtain and execute search warrants pursuant to the *Criminal Code* and secure evidence at the scene of fires and/or explosions. OFM investigators regularly identify fire incidents to be of a criminal nature. In such instances, OFM investigators work very closely with the police and other law enforcement agencies. *Criminal Code* search warrants must be obtained (either by OFM staff or the police) prior to the recovery of exhibits in such cases.
>
> Fire investigations undertaken by the OFM in accordance with . . . section 9(2)(a) of the *FPPA* may reveal possible violations of law relating to federal *Criminal Code* offences, such as arson, provincial offences, such as violations of the *Fire Code*.
>
> It is the position of the Ministry that OFM fire investigations are law enforcement investigations which may reveal or result in violations of law and that the OFM is a law enforcement agency.

The appellant submits:

> . . . [T]he Ministry does not act as a law enforcement agency and in fact is not responsible for the laying of charges, criminal or otherwise . . .
>
> . . . . .
>
> The duty of the Fire Marshal under the FPPA do not include the laying of criminal charges. Although the OFM may provide assistance to the police when requested, they are not charged with the responsibility of policing.
>
> . . . . .
>
> The Ministry has also suggested that the OFM fire investigators assess whether there has been any violations or potential violations of the law with respect to any of the circumstances relating to the fire. Again, the OFM investigators are not charged with this responsibility and it is the duty of the Police agencies and the Crown Attorney to assess violations of the law. Fire investigators are not charged with this responsibility under the FPPA.

In Order PO-1833, I considered the issue of whether or not the OFM is "an agency which has the function of enforcing and regulating compliance with a law" for the purpose of section 14(2)(a) of the *Act*. I concluded that the OFM is not such an agency:

> In my view, in conducting its investigation into the cause of the fire under either the old or the new statute, the OFM was not carrying out the function of enforcing or regulating compliance with a law. Neither the [*Fire Marshals Act*, the predecessor to the *FPPA*] nor the *FPPA* contains penalties or any other enforcement provisions which arise from this specific investigatory power (although there are such provisions in relation to enforcement of inspection orders and the fire code - see Part VII of the *FPPA*).
>
> OFM investigations of this nature may reveal possible violations of law, but the law to be enforced in such a case would be the arson provisions of the *Criminal Code*. Most significantly, any criminal investigations or prosecutions in these circumstances are under the purview of the local police and the Crown Law Office - Criminal of the Attorney General for Ontario, not the OFM. If, for example, the OFM determined that a fire resulted from "carelessness or design", criminal charges could be laid, but they would be laid and prosecuted by the police and the Crown, as was the case here. Moreover, nothing would prevent the police and the Crown Law Office - Criminal from laying and prosecuting arson charges, even in the face of an OFM finding that arson was not a cause, or that the cause could not be determined. These distinct roles are borne out by my review of the court's reasons for judgment in this matter.
>
> By this finding I do not suggest that the OFM cannot or does not routinely cooperate with the police and the Crown in certain cases, by sharing information at various stages throughout the criminal investigation and prosecution, and by providing expert testimony. However, the fact remains that, in this role, the OFM does not carry enforcement or regulatory responsibility. As in Order P-352, upon completion of its investigation, the OFM was not in a position to enforce or regulate compliance with the *FMA*, the *FPPA* or any other law in these circumstances.

These principles are applicable in the context of section 14(1)(c). The records at issue here, as in Order PO-1833, are used in the context of the OFM's mandate under section 9(2)(a) of the *FPPA* to investigate the cause, origin and circumstances of certain fires, explosions or conditions. In my view, any technique or procedure of the OFM which may be revealed by the records are not those that are used in law enforcement because, in using such techniques or procedures, the OFM is not engaged in law enforcement activities. I accept the Ministry's submission that OFM investigators have extensive investigation powers, including those derived from the *Police Services Act*, and that the

FPPA contains penalties for individuals or corporations which impede the OFM in discharging its duties. However, the fundamental purpose of these powers, in this context, is to assist the OFM in carrying out its non-law enforcement mandate.

Based on the above, I find that the Ministry has not established that any investigative techniques or
procedures that may be revealed in the records "are currently in use or likely to be used in *law enforcement*" as required by the second part of the two part test for exemption.

Therefore, neither of the two requirements under section 14(1)(c) applies, and this exemption is not applicable to the records.

Intelligence information: section 14(1)(g)

The Ministry claims that this exemption applies to certain specified pages of all three of the records at issue.

Previous orders have defined intelligence information as:

> . . . 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 violation of law, and is distinct from information which is compiled and identifiable as part of the investigation or a specific occurrence (Orders M-202, P-650, MO-1261).

The Ministry submits:

> Parts of the responsive records contain information concerning OFM roles, responsibilities and procedures in relation to Criminal Intelligence Service of Ontario [CISO] and Joint Forces Operations initiatives. The OFM is occasionally involved in Joint Forces Operations initiatives resulting from, for example, organized criminal activity, labour disputes or the actions of serial arsonist.
>
> . . . . .
>
> Public release of confidential procedures which establish the working relationship between the OFM and other law enforcement agencies would undermine the effectiveness of OFM and other law enforcement agencies efforts to work together to resolve arson related and other crimes. Public release of this information would interfere with the gathering of intelligence information . . .

The appellant submits:

> The . . . records should not be protected by Section 14(1)(g) since this disclosure would not interfere with the gathering of/or reveal law enforcement intelligence information. The OFM simply is not involved in

> intelligence gathering information and the records sought do not include this type of information.

The Ministry argues that disclosure of the records would interfere with the gathering of law enforcement intelligence information. Portions of the records address the issue of intelligence information (for example, Part 7 of Record 1) and the OFM's relationship with other agencies which may engage in the gathering of law enforcement intelligence information. However, my review of the records indicates that this information consists of generalized organizational and reporting procedures. The records do not contain the type of detail which could reasonably be expected either to reveal law enforcement intelligence information or to interfere with the gathering of such information, and the Ministry has not provided the necessary detailed and convincing evidence to establish that disclosure of this information could reasonably be expected to cause the interference described in section 14(1)(g).

Facilitate the commission of an unlawful act/hamper the control of crime: section 14(1)(l)

In addition to the representations set out above, the Ministry submits:

> . . . the unrestricted, public dissemination of the responsive operational policies, procedures and techniques in and of itself could reasonably be expected to interfere with the ability of the OFM to effectively investigate future fires. As noted earlier, section 28(1)(a) provides that an individual who hinders, obstructs or interferes with the Fire Marshal, an assistant to the Fire Marshal or a fire chief in the exercise of his or her powers and duties is guilty of an offence under the *FPPA*.
>
> Parts of the responsive records contain information about the OFM communications system. Public dissemination of information about the OFM communications system could make it easier for an individual to attempt unauthorized access to the system and possibly interfere with emergency and other service calls.
>
> Parts of the responsive records contain confidential pager, cellular phone and Canadian Police Information Centre (CPIC) telephone numbers. Cellular phones and pagers are often used for emergency-related communications, for calls outside of normal business hours and for out of office/on fire scene calls. In terms of confidentiality, access to cellular phone and pager numbers is usually restricted to ensure that the communication lines are available for emergency purposes. The CPIC telephone number is confidential and used for law enforcement inquiries for police information. Public release of this information could encourage individuals to attempt unauthorized access to CPIC information or unnecessarily tie up the line so that it is unavailable for legitimate callers.

> [Disclosure of the above] could lead to inappropriate incoming calls/communications compromising the ability of the OFM and other identified agencies to effectively respond to calls for emergency service. This in turn could help facilitate the commission of an unlawful act and hamper the control of crime.
>
> . . . . .
>
> Public release of confidential procedures which establish the working relationship between the OFM and other law enforcement agencies would undermine the effectiveness of OFM and other law enforcement agencies efforts to work together to resolve arson related and other crimes. Public release of this information would . . . help facilitate the commission of an unlawful act and hamper the control of crime.

The appellant submits:

> The records that are being sought should not be covered by Section 14(1)(l) since the disclosure of records would not *reasonably* be expected to facilitate the commission of an unlawful act.
>
> . . . . .
>
> The Ministry states that the responsive records contain *confidential* pager and cellular phone numbers as well as other telephone numbers. Interestingly, a telephone call to the OFM will produce the cellular phone numbers, pager numbers, and home/ office numbers for any investigator employed by the OFM.

In Order M-552, the appellant sought access to records which included police cell phone numbers. In upholding the claim for exemption under the municipal counterpart to section 14(1)(l), Adjudicator Donald Hale stated:

> The Police submit that the disclosure of the cellular telephone numbers, the users of each phone, the account and invoice numbers as well as the date, time, originating location and billed time of each call as indicated on the phone bill would hamper their ability to control crime. The Police argue that by making public the cellular telephone numbers, the lines could be tied up, rendering them useless. In addition, the disclosure of the telephone's user, and the date, time, originating location and billed time would reveal information about the location of informants, complainants, victims, suspects and witnesses which may be used to some advantage by those under investigation.
>
> I agree that the ability of the Police to investigate and solve crimes would be adversely affected by the disclosure of the cellular telephone numbers and the names of those who use them, as well as the date, time, originating location and billed time for each call. I find that the Police have provided

> me with sufficient evidence to demonstrate that there exists a reasonable expectation that the harm envisioned by section 8(1)(l) would occur should this information be disclosed.

In my view, consistent with Order M-552, it is reasonable to expect that disclosure of the CPIC number in question could lead to individuals abusing these communication tools, thus hampering the control of crime by causing harm to the CPIC system. In addition, I find that the OFM cellular and pager numbers are exempt since, for similar reasons, their disclosure could reasonably be expected to facilitate the commission of an unlawful act, that is, interference with OFM investigations under the *FPPA*. I accept the Ministry's submission that these numbers are treated in a confidential manner, in preference to the appellant's submission that these numbers, as well as home numbers, are routinely disclosed by OFM staff, which I find to be less credible.

For similar reasons, I also accept the Ministry's argument that detailed information in the records concerning the OFM's communication system should not be disclosed by virtue of section 14(1)(l) of the *Act*.

However, I do not accept the Ministry's generalized assertion that disclosure of procedures which establish the working relationship between the OFM and other agencies would help facilitate the commission of an unlawful act or hamper the control of crime. The Ministry has simply not provided the kind of detailed and convincing evidence to establish a reasonable expectation of harm arising from disclosure of procedures concerning the relationship between the OFM and other agencies.

Conclusion

I find that the records are not exempt from disclosure under section 14(1)(c), (g) or (l), with the exception of certain portions of Record 1 containing communications information, which are exempt under section 14(1)(l) of the *Act*.

ECONOMIC AND OTHER INTERESTS

Introduction

The Ministry claims that sections 18(1)(a) and (c) apply to the records. Those sections read:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;

> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

Section 18(1)(a): information that belongs to an institution and has monetary value

Introduction

In order to qualify for exemption under section 18(1)(a), the Ministry must establish that the information:

1. is a trade secret, or financial, commercial, scientific or technical information; and

2. belongs to the Government of Ontario or an institution; and

3. has monetary value or potential monetary value [Order 87].

In Order M-654, Adjudicator Holly Big Canoe stated with respect to part 3 of the test for exemption under the municipal counterpart to section 18(1)(a):

> The use of the term **"monetary value"** in section 11(a) requires that the information itself have an intrinsic value. The purpose of section 11(a) is to permit an institution to refuse to disclose a record which contains information where circumstances are such that disclosure would deprive the institution of the monetary value of the information . . . [emphasis in original].

Type of information

The Ministry submits that the responsive information consists of technical and commercial information, and states:

> In Order P-454, former Assistant Commissioner Irwin Glasberg defined the term technical information as used in section 17(1) of the [*Act*] as follows:
>
> > In my view, technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will

> > usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information which also appears in section 17(1)(a) of the *Act*.
>
> In Order P-662, former Inquiry Officer John Higgins adopted this definition for the purposes of section 18(1)(a).
>
> The responsive records contain technical information relating to the process of fire investigation and the process of training of professional fire investigators . . . [T]he field of fire investigation involves aspects of law enforcement and other applied sciences such as engineering and electronics. The records also contain detailed technical information on fire and life safety issues, as well as human behaviour in fire circumstances. Parts of the responsive records also contain information relating to the chemistry and physics of fire.
>
> . . . . .
>
> . . . [T]he responsive information can also be viewed as commercial information which has significant intrinsic monetary value. In Order P-493, former Inquiry Officer Anita Fineberg interpreted the term commercial information in section 17(1) of [the *Act*] as follows:
>
> > In my view, commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.
>
> This interpretation was adopted for the purposes of section 18(1)(a) in Order P-636.

The appellant does not appear to dispute the Ministry's assertion that the records contain technical and commercial information.
I accept the Ministry's submission that the appropriate interpretation of "technical" information is set out in former Assistant Commissioner Glasberg's Order P-454. In addition, the term "scientific" information have been defined by this office as follows:

> Scientific information is information belonging to an organized field of knowledge in either the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field. Finally, scientific

> information must be given a meaning separate from technical information which also appears in section 17(1)(a) of the *Act* [Order P-454].

In my view, the records contain scientific information. Portions of the records describe the chemistry and physics of fires, explosions and other conditions, and this information fits within the definition of scientific information set out above. In addition, the records contain detailed information about the process and methodology of fire investigation. In my view, this information qualifies as technical information.

Belongs to the government/has monetary value or potential monetary value

In Order PO-1763 [upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)* (April 25, 2001), Toronto Doc. 207/2000 (Ont. Div. Ct.)], I stated as follows, in reference to the phrase "belongs to":

> With reference to the meaning of the phrase "belongs to", Assistant Commissioner Tom Mitchinson stated in Order P-1281:
>
> > The Ministry submits that the database, the data elements, and the selection and arrangement of the data in the database belong to the Government of Ontario or an institution. The Ministry argues that the term "belongs to" in section 18(1)(a) denotes a standard less than ownership or copyright, but does not clearly articulate what the standard is or how it is applicable here. If these words do mean "ownership", the Ministry argues that, quite apart from any consideration of copyright, it has ownership by virtue of its right to possess, use and dispose of the data as outlined in the various statutes authorizing its collection, retention and use under the [Ontario Business Information System (ONBIS)] system, as well as by virtue of its physical possession of the database and its control of the access and use of the ONBIS system.
> >
> > I do not accept these submissions. In my view, the fact that a government body has authority to collect and use information, and can, as a practical matter control physical access to information, does not necessarily mean that this information "belongs to" the government within the meaning of section 18(1)(a). While the government may own the physical paper, computer disk or other record on which information is stored, the *Act* is specifically designed to create a right of public access to this information unless a specific exemption applies. The public has a right to use

> any information obtained from the government under the *Act*, within the limits of the law, such as laws relating to libel and slander, passing off and copyright, as discussed below.
>
> If the Ministry's reasoning applied, all information held by the government would "belong to" it and, presumably, the rights to use information belonging to government could be restricted for this reason alone...

Similarly, in his earlier Order P-1114, the Assistant Commissioner stated:

> Individuals, businesses and other entities may be required by statute, regulation, by-law or custom to provide information about themselves to various government bodies in order to access services or meet civic obligations. However, it does not necessarily follow that government bodies acquire legal ownership of this information, in the sense of having copyright, trade mark or other proprietary interest in it. Rather, the government merely acts as a repository of information supplied by these external sources for regulatory purposes.

The Assistant Commissioner has thus determined that the term "belongs to" refers to "ownership" by an institution, and that the concept of "ownership of information" requires more than the right to simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense - such as copyright, trade mark, patent or industrial design - or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party. Examples of the latter type of information may include trade secrets, business to business mailing lists (Order P-636), customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, there is a quality of confidence about the information, in the sense that it is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others. [See, for example, *Lac Minerals Ltd. v. International Corona*

> *Resources Ltd.* (1989), 61 D.L.R. (4th) 14 (S.C.C.), and the cases discussed therein].

The Ministry submits:

> The requested records were initially developed in house by the OFM at considerable financial and other cost to ensure that OFM fire investigators are properly trained and that appropriate standards and procedures were established and followed. These materials were created by and belong to the Ministry, an Ontario Government institution. The materials have been consistently treated in a confidential manner.
>
> . . . . .
>
> The Ministry is of the view that the training of fire investigation professionals now is a competitive business. As per the attached advertisements and brochures, the private sector currently offers certification training for fire service professionals employed by the private and public sectors on a fee-for-service basis.
>
> The OFM is considering a plan to selectively train staff from fire departments, police services, the Electrical Safety Authority, the Technical Standards and Safety Authority, etc. in the process of fire investigation for fire safety and enforcement purposes. It is proposed that the training be done on a cost recovery/fee-for-service basis. The responsive records would be used by the OFM as source documents to develop materials suitable for the proposed fire investigation training program. Public release of these materials to a potential competitor, such as the appellant's company, would undermine the competitive position of the OFM. As can be noted from the advertisements, the appellant is currently engaged in providing certification training to fire investigators on a fee-for-service basis.
>
> It should be noted that a number of these private organizations hire former OFM staff to deliver certification training and provide other services. As per the advertisements, the knowledge and expertise of former OFM staff members is considered a highly valuable business asset by these organizations. Some of the private organizations also sell fire investigation training materials, such as handbooks and videos . . . [T]he responsive OFM records would be highly valuable business information assets to these organizations in the current marketplace.
>
> . . . [T]he responsive information is similar to the type of information that was contemplated by the Williams Commission as necessary for exemption in order to protect the economic interests of government in their report *Public Government for Private People: The Report of the*

Commission on Freedom of Information and Individual Privacy/1980, vol. 2 (Toronto: Queen's Printer, 1980) (at pp. 318-319):

. . . . .

> There are a number of governmental institutions (in particular, Crown corporations) engaged in the supply of goods and services on a competitive basis. For example, the activities of the Ontario Urban Transportation Development Corporation Limited have been briefly described in a Commission research paper. The purpose of establishing the corporation was to create a publicly funded corporate vehicle which could assume development risks associated with the improvement of conventional public transportation technologies and the design of new high quality transit systems. While the Corporation's primary objective is to assist in meeting the needs of the province of Ontario for developments in the field of transportation technology, it is also hoped that the corporation will be able to market its expertise and products on a competitive basis in other jurisdictions. In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute.

. . . . .

Private organizations, such as the appellant's company, are able to control dissemination of their valuable business information assets . . . [S]imilar protection should be extended to the responsive records which are valuable business and operational assets belonging to the OFM.

The appellant submits:

> . . . It appears from their representations that the Ministry is claiming intellectual propriety over scientific fields including fire investigation techniques, engineering, electronics, fire and life safety, human behavior in fire circumstances, and the chemistry and physics of fire. This is a ridiculous argument and it suggests that only the OFM harbors this intellectual information when in fact these sciences are taught all over the world. Numerous books, Standards, Codes, and Guidelines contain the technical information which the Ministry has stated is in the responsive records.
>
> The fundamentals of fire investigation have been contained in the NFPA 921 "Guide for Fire and Explosion Investigations" for many years. The responsive records would contain the same or similar fundamental fire

> investigation techniques. The information contained in the responsive records would be of no monetary value.
>
> In their own representations, the Ministry has suggested that the OFM is considering a plan to selectively train staff from Fire Departments, Police services, the Electrical Safety Authority, and the Technical Standards and Safety Authority, etcetera in the process of fire investigation for fire safety and enforcement purposes. [The fact that] [b]oth the Electrical Safety Authority and the Technical Standards and Safety Authority are privately run companies to for-profit organizations demonstrates that there is no monetary value to the records.
>
> The "Fire Cause and Determination" course was already . . . presented by the Fire Marshal in Ottawa, Thunder Bay, Huron/Perth, and Middlesex, Elgin [as] outlined in the Fire Marshal's Communiqué. A fire investigation course is also being presented at Seneca College by one of the OFM investigators. In their representations, the Ministry describes [the appellant's company] as a potential competitor suggesting that the OF is driven by profit rather than public interest. Their website provides a very different role for the OF and it states that [the appellant's company] is an OF stakeholder.
>
> The Ministry representation also incorrectly states that [the appellant's company] is currently engaged in providing "certification training to fire investigators on a fee-for-service basis". Certification training is provided by the Canadian Association of Fire Investigators, a National Association with memberships throughout Canada. [The appellant's company] provides instruction for the course on a cost recovery/fee-for-service basis. Every course that we have instructed to date has been a [losing proposition] (i.e. we have lost money).
>
> The responsive records have absolutely no monetary value and this information is already being disseminated to the public and for-profit organizations.

The records in question are training and instructional materials, and guidelines, which are intended to assist OFM staff in discharging their statutory duties in investigating the cause, origin and circumstances of certain fires, explosions or conditions under section 9(2)(a) of the *FPPA*.

As identified in Orders P-1114 and PO-1763, the Ministry could claim that the information "belongs to" it if it holds a copyright, patent, trade mark, or industrial design interest. The Ministry has not provided submissions to this effect, and on this basis I am unable to conclude that the Ministry owns the information in the records by virtue of any of these interests.

Orders P-1114 and PO-1763 indicate a second possible route for finding that information "belongs to" an institution, which requires a finding that the law would recognize a substantial interest in protecting the information from misappropriation by another party, where there is inherent monetary value in the information and the necessary "quality of confidence". Even if I accept that the Ministry plans to sell its training services to other organizations for a fee, and to use the records in so doing, I am not satisfied that the information in the records has the necessary "quality of confidence" because, as noted above in my analysis of the possible application of section 14(1)(c), the information is generally known.

Accordingly, I find that the Ministry has failed to demonstrate that the information in the records "belongs to" it, and the exemption does not apply for this reason. In addition, because the information is generally known, I am not persuaded that it has "monetary value" in the sense described in Order M-654.

Therefore, although some information in the records qualifies as "scientific" or "technical" information, it does not meet the other requirements for exemption under section 18(1)(a) and I find that this section does not apply.

Section 18(1)(c): prejudice to economic interests/competitive position

Section 18(1)(c) provides institutions with a discretionary exemption which can be claimed where disclosure of information could reasonably be expected to prejudice an institution in the competitive marketplace, interfere with its ability to discharge its responsibilities in managing the provincial economy, or adversely affect the government's ability to protect its legitimate economic interests (Order P-441).

In Order PO-1747, I stated:

> The words "could reasonably be expected to" appear in the preamble of section 14(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

The Ministry refers to the pertinent passage from Order P-441, above, relies on its submissions regarding section 18(1)(a), and also submits:

> As evidenced in the comments regarding section 18(1)(a), the Ministry is of the view that there is currently a market for the responsive records. The OFM is considering offering fee-for-service fire investigation training that would use the responsive records as source documents for the development of training materials. The OFM has expended considerable financial and human resources to develop the responsive records. Uncontrolled public release of the responsive records, which the Ministry believes are valuable business information assets in the fire investigation field, would result in the taxpayers of Ontario subsidizing private organizations, such as the appellant's company. These organizations would avoid paying the significant expenses that the OFM has incurred to develop step-by-step operational procedures and training materials. This circumstance would prejudice the economic interests of the OFM and also put the OFM at a competitive disadvantage in the event the OFM ultimately decides to offer external fee-for-service training.

The appellant submits:

> The responsive records should not be covered by Section 18(1)(c) since the disclosure of the information within the record would not be expected to prejudice the economic interests of an institution. In their representations, the Ministry has stated that the OFM is considering offering fee-for-service fire investigation training that would use the responsive records as source documents for the development of training materials. This fee-for-service fire investigation training would be of little benefit since it is not combined with a National Certification program. The Canadian Association of Fire Investigators training curriculum sets out the requirements for Certification as a Canadian Certified Fire Investigator, Level A, B, and C. The National Association of Fire Investigators also sets out a certification-training program for Certified Fire and Explosion Investigators. The International Association of Arson Investigators also has a nation-wide Certification program for Certified Fire Investigators. The responsive records are of no monetary value since the information contained within the responsive records is already available to the public and the responsive records do not reflect national or nationwide issues. In addition, if the OFM was truly concerned about [its] competitive edge, it certainly would not permit one of its own fire investigators to present the responsive records [at] Seneca College.

In reply, the Ministry states:

> To the best of the Ministry's knowledge, the [records] are not made available to Seneca College students or the general public. In particular, the Ministry has been informed that the OFM employee engaged in secondary employment as a part-time instructor at Seneca College does not present information with respect to the responsive records in either written documentation (handouts) or through his verbal presentations to students.

The Ministry's submissions focus essentially on its competitive position in the marketplace and the impact that disclosure would have on that position with resulting adverse consequences for its economic interests. The entire foundation of this argument is the assertion that the OFM is considering offering fee-for-service training that would use the records as source documents for developing additional training materials. In other words, the OFM would use records containing information which I have determined is already largely in the public domain to create additional materials for fee-for-service training purposes. Its arguments in this respect are based in part on its assertion, which I have already rejected, that the records are valuable business information assets belonging to the Ministry.

The Ministry does not support this assertion by offering any additional documentation or other evidence that describes any actual or potential plans for implementing such a training program at any time, let alone in the reasonably foreseeable future. The Ministry itself submits that it would only be at a competitive disadvantage "in the event that it ultimately decides to offer external fee for service training", suggesting that any reasonable prospect of competitive harm in the context of offering such a program is at best speculative. The Ministry indicates that it is proposed that such a program, if one is ultimately developed and implemented, would be on a cost-recovery basis, so that it is not apparent that its economic interests would be affected in any significant or material way by disclosure of what it describes as source documents.

The Ministry further submits that it has expended considerable financial and human resources to develop the records, and that Ontario taxpayers would thereby end up subsidizing private organizations which would avoid paying these significant expenses to develop similar materials. I am not persuaded by these assertions that the Ministry's competitive or economic interests could reasonably be expected to be prejudiced by disclosure. Firstly, I have been provided with no detail or other evidence beyond these bare assertions. Secondly, there is nothing else on the record before me to suggest that the appellant or any other private entity could reasonably be expected to use the materials to crib or piggyback on the Ministry's efforts for competitive gain. I have found above that the information contained in the records is largely in the public domain already, so that it is not apparent that a private entity would find any great advantage in using these materials for this purpose. The Ministry itself admits that these records would serve only as "source documents" for the development of additional training materials for use on a fee-for-service basis, leaving open the prospect that other public domain material would

be required to be used for developing such a program, whether by the Ministry or another private entity.

Notwithstanding that the Ministry had the opportunity to review and respond to the appellant's submissions, it has not offered any rebuttal to the appellant's statement that the Ministry's fee-for-service training would be of little benefit since it is not combined with a national certification program offered by specific national and international fire investigation associations. The only submission of the appellant which the Ministry has chosen to address in this respect is in making its statement that, to the best of its knowledge, the records are not made available to Seneca College students or the general public and, more specifically, through a Ministry employee engaged as a part-time instructor at Seneca College. Apart from its submissions respecting confidential cell phone pager and other telephone numbers, the Ministry has made no effort to assist in identifying or distinguishing the specific information contained in the records which it claims is not publicly available. In the circumstances, I can only accept, at its highest, the submission that the actual records themselves are not publicly available; I cannot accept that the information they contain generally is not publicly available.

Accordingly, based on all of the material before me and the generality of the Ministry's submissions, I cannot conclude that there is any material competitive advantage to private entities, or corresponding competitive disadvantage to the Ministry, in the disclosure of this information. As a result, I find that disclosure could not reasonably be expected to prejudice the economic interests or the competitive position of the Ministry, and the section 18(1)(c) exemption therefore does not apply.

PERSONAL PRIVACY

The Ministry claims that pages 252, 255 and 261 of Record 1, and page 432-B of Record 3 contain personal information which is exempt under section 21 of the *Act*, the mandatory personal privacy exemption.

"Personal information" under the *Act* is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual [paragraph (c)] and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual [paragraph (h)].

Where records contain personal information within the meaning of the *Act*, they may qualify for exemption under section 21, which prohibits the disclosure of such information to another person, unless the disclosure does not constitute an unjustified invasion of personal privacy.

The appellant submits that the information withheld under this section includes "fire investigation field office addresses, cellular and pager numbers paid for by the OFM and field office telephone numbers which are also paid for by the OFM", and that this

information does not qualify as personal information. The appellant also submits that "one only needs to contact the OFM to obtain this information."

Pages 252, 255-256 and 261 of Record 1 contain home telephone numbers and/or home addresses of Ministry staff. These numbers and addresses are "about" the individuals in question, despite the fact that they appear in an employment context (see, for example, Order P-1384). In the absence of any evidence to indicate that disclosure would *not* constitute an unjustified invasion of these individuals' privacy, I find that this personal information is exempt under section 21 of the *Act*.

Page 432-B of Record 3 contains references to several cases under the heading "Fire Cause Research: Research Before the Courts". While most of the cases are described generically, the first two cases on the list are referred to by use of a surname. The first surname is clearly the name of the accused in a 1979 reported decision of the Court of Appeal for Ontario. The basis of the second name is not clear to me, but presumably it is also the name of the accused or other involved person in a court case. In my view, while these names may constitute personal information, the use of surnames to identify court cases is a commonly accepted practice, and in this context such names or normally considered to be in the public domain. In the absence of exceptional circumstances, disclosure of case names should be considered not to be an unjustified invasion of privacy under section 21. I find no exceptional circumstances here and, therefore, the two names are not exempt under section 21.

CONCLUSION

I find that the records are not exempt under sections 14, 18 or 21 of the *Act*, with the exception of small portions of Record 1, which I found exempt under section 14(1)(l) and 21.

Although it is not necessary to my determination, I find support in sections 33(1)(b) and 35(2) of the *Act* for the conclusion that the records should be disclosed, with certain minor exceptions. These sections require institutions to make certain types of records available to the public:

> **33.** (1) A head shall make available, in the manner described in section 35,
>
> (b) instructions to, and guidelines for, officers of the institution on the procedures to be followed, the methods to be employed or the objectives to be pursued in their administration or enforcement of the provisions of any enactment or scheme administered by the institution that affects the public.

> **35.** (2) Every head shall cause the materials described in sections 33 and 34 to be made available to the public in the reading room, library or office designated by each institution for this purpose.

In my view, the records can be described as instructions to, and guidelines for, officers of the OFM on the procedures to be followed, the methods to be employed or the objectives to be pursued in their administration of the provisions of the *FPPA*, an enactment or scheme which affects the public. Sections 33(1)(b) and 35(2) thus signal the Legislature's intent that records of this nature ought to be made available to the public, subject to any necessary severances for exempt information. If I were to accept the Ministry's submission that records of the nature at issue in this appeal are exempt on the basis that they are not now publicly available and their contents makes them useful to others, the legislative intent reflected in sections 33(1)(b) and 35(2) could be largely frustrated. I do not accept that sections 18(1)(a) and (c) in particular were intended to be so applied.

ORDER:

1. I do not uphold the Ministry's decision to withhold the records, with the exception of certain portions of Record 1 as follows: portions of pages 252, 255-261 and 420; and all of pages 303-311.

2. I order the Ministry to disclose Records 1, 2 and 3 to the appellant, with the exception of the portions highlighted on the partial copy of Record 1 enclosed with the Ministry's copy of this order, no later than **August 15, 2001**.

3. In order to verify compliance with provision 2, I reserve the right to require the Ministry to provide me with a copy of the material disclosed to the appellant.

Original Signed By: ______________________________ July 10, 2001
David Goodis
Senior Adjudicator