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

INTERM ORDER PO-2069-I

Appeal PA-010080-2

Ministry of Health and Long-Term Care

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NATURE OF THE APPEAL:

This is an appeal from a decision of the Ministry of Health and Long-Term Care (the Ministry), under the *Freedom of Information and Protection of Privacy Act* (the *Act*). An organization (the appellant) submitted a request to the Ministry for access to records relating to four named corporations and two federal government agencies, in the following terms:

> "…all documents that the Ministry has with regards to the following companies:
>
> [named company "A"]
> [named company "B"]
> The Canadian Development Corporation
> Ontario Development Corporation
> Health Canada's Health Protection Branch and /or Bureau of Biologics
>
> Specifically, I am requesting:
>
> Any documents, including but not exclusive of, submitted funding requests and proposals, business plans, special requests, and minutes of meetings that mention joint activities/projects/meetings of [named company "A"] and [named company "B"];
>
> Any documents, including but not exclusive of, submitted funding requests and proposals, business plans, special requests, and minutes of meetings that mention joint activities/projects/meetings of [named company "A"] and The Canadian Development Corporation;
>
> Any documents, including but not exclusive of, submitted funding requests and proposals, business plans, special requests, and minutes of meetings that mention joint activities/projects/meetings of [named company "A"] and the Ontario Development Corporation;
>
> Any documents, including but not exclusive of, submitted funding requests and proposals, business plans, special requests, and minutes of meetings that mention joint activities/projects/meetings of [named company "A"] and Health Canada's Health Protection Branch and /or Bureau of Biologics;
>
> Any documents, including but not exclusive of, submitted funding requests and proposals, business plans, special requests, and minutes of meetings that mention joint activities/projects/meetings of [named company "B"] and The Canadian Development Corporation;
>
> Any documents, including but not exclusive of, submitted funding requests and proposals, business plans, special requests, and minutes of meetings that mention joint activities/projects/meetings of [named company "B"] and the Ontario Development Corporation;

> Any documents, including but not exclusive of, submitted funding requests and proposals, business plans, special requests, and minutes of meetings that mention joint activities/projects/meetings of [named company "B"] and Health Canada's Health Protection Branch and /or Bureau of Biologics;
>
> The period for which I am seeking all these documents is January 1, 1980 to December 31, 1986 inclusive."

The Ministry responded by indicating that it had conducted a search in its Public Health Branch and had located several hundred records, including correspondence, reports and briefing notes. The Ministry advised that it was denying access to all of the responsive records on the basis of the exemptions at sections 13(1) (advice to government), 14(1) (law enforcement), 15 (intergovernmental relations), 17 (third party commercial information), 19 (solicitor-client privilege) and 21 (personal privacy) of the *Act*. The Ministry also stated the following:

> …section 14, the law enforcement exemption applies to all the records. Section 14 is relevant as a result of the long-standing criminal investigation by the RCMP into the possible wrongdoing in the Canadian blood system during the period 1980-1990.

By letter dated February 27, 2001, the appellant appealed the Ministry's decision to this office.

After the filing of this appeal, and during mediation of the appeal through this office, a number of events occurred. On August 27, 2001, the Ministry issued a supplementary decision letter. In this letter, the Ministry advised that the records deal exclusively with named company "A" and that records relating to the other organizations referenced in the request were not located, nor any records dealing with this company's relationship with these other entities. The Ministry indicated that the search period was from 1970 to 1990. The Ministry also stated that:

> …[t]he Records Management Branch of the Ministry no longer retained any records after their transfer to the Archives of Ontario. Accordingly, the Appellant may wish to address its request to the Archives or to the Ministry of the Attorney General from which this Ministry had obtained the records found to be responsive to the request.
>
> Finally, the scope of the search was exclusively among the documents in the possession of the Legal Services Branch of this Ministry.

On August 29, 2001, the Ministry sent an index of records to the appellant and to the mediator. The index lists 1,257 records. Some of the records have been marked as being non-responsive to the request, with the remaining indicating the exemptions relied on. Although section 14(1) is not referred to in this index, the Ministry's position on the application of this exemption remained as outlined in its original decision letter.

In the Ministry's index of records, three additional exemptions were claimed that were not raised in the original decision letter, sections 12, 18 and 22(a).

In the Report of Mediator, all of the exemptions relied on by the Ministry are noted as issues in dispute. Further, the Report indicates that the reasonableness of the search for responsive records is also an issue, as is the ability of the Ministry to raise new discretionary exemptions late in the process, and the responsiveness of certain records.

I decided to bifurcate my inquiry and deal initially with two issues: the applicability of section 14(1) of the *Act*, and the reasonableness of the Ministry's search for responsive records. I decided on this process since it was possible that my determinations of these issues would resolve most or all of the issues in this appeal.

Because a criminal investigation by the Royal Canadian Mounted Police (the RCMP) was cited by the Ministry as the basis for applying the section 14(1) exemption under the *Act*, I also decided to notify the RCMP and provide it with the opportunity of making representations on the issues raised by section 14(1) at this stage of my inquiry.

In the Notice of Inquiry sent to the Ministry and to the RCMP, I summarized the facts and issues raised by the appeal and invited them to make representations. Among other things, I specifically requested that, if the parties were relying on documentary evidence, such as court orders, I be provided with a copy of such evidence. I also requested that if a party was unable to provide this evidence, it explain to me why it was unable to do so. Further, with respect to the issue of the reasonableness of its search, I asked the Ministry to provide its evidence in affidavit form.

In response to the Notice of Inquiry, the RCMP provided brief representations in which it indicated that it does not object to the release of the records which are the subject of this inquiry.

The Ministry also provided representations to me. In these representations, the Ministry addressed the two issues raised in the Notice of Inquiry, the applicability of the section 14(1) exemption (Issue "A"), and the reasonableness of its search (Issue "B"). It also requested that its representations not be shared with the appellant, for the reason described below. Subsequently, I wrote to the Ministry, giving it a further opportunity to provide representations on certain matters and stating, among other things:

> By this letter, I am requesting once again that the Ministry provide this information about the search for records in **affidavit** form, by no later than **March 15, 2002**. **Please note that if the Ministry does not do so, it may not have a further opportunity to make submissions or provide evidence on this issue, and I may decide that it has not provided sufficient evidence to meet its onus.**
>
> Further, I note that the Ministry states in its representations, under the title "ISSUE "B" REASONABLENESS OF SEARCH":

> …the respondent wishes to supplement its letter of August 27, 2001 from the undersigned to [named individual], Mediator, but reserves its rights to make further representations on this issue.
>
> Please be advised that the present stage of this appeal is the Ministry's opportunity to make **all** of its representations on the issue of the reasonableness of the search. I have given the Ministry a further opportunity to provide information in the form of an affidavit. If there are additional representations the Ministry wishes to make on the issue of the reasonableness of the search, which have not already been provided, these must also be provided to me by no later than March 15, 2002.
>
> Finally, the Ministry has requested that its representations not be shared with the appellant, "as doing so may cause the ministry to be in violation of the court order". I ask that the Ministry provide me with its submissions on why its representations on the issue of the reasonableness of the search (and its affidavit, if one is submitted in response to this letter) should not be shared with the appellant. These submissions should refer to the criteria found in Practice Direction Number 7 for the withholding of representations, and should refer to each part of the representations and affidavit that the Ministry does not wish to be shared.
>
> [all emphases in original]

I did not request the Ministry's further submissions on whether I ought to share its representations on the application of section 14(1) to the records, as I found it unnecessary to invite the appellant to respond to these representations. As elaborated below, I find that the Ministry has not met its onus to establish the application of this exemption to the records.

The Ministry replied to the above letter, providing me with an affidavit describing the search for records responsive to the request. It still objected to the sharing of its representations and affidavit, referring simply to a "sealed court order". I subsequently issued Interim Order PO-2016-I, in which I addressed the issue of the sharing of the Ministry's representations. In that order, I found that the balance weighed in favour of disclosing the representations on the reasonableness of the Ministry's search to the appellant, and after providing the Ministry with a period of time to seek judicial review of this finding (which it has not), I provided those representations to the appellant, inviting it to make submissions on the issue of whether the Ministry's search was reasonable.

The appellant has not provided any representations in response.

DISCUSSION:

REASONABLE SEARCH

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether the Ministry has conducted a reasonable search for the records as required by section 24 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Ministry will be upheld. If I am not satisfied, further searches may be ordered.

Where a requester provides sufficient detail about the records which he/she is seeking and an institution indicates that further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records which are responsive to the request. The *Act* does not require the Ministry to prove with absolute certainty that further records do not exist. However, in order to properly discharge its obligations under the *Act*, the Ministry must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in the Ministry's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

In this case, the records located deal only with named company "A". As I have indicated, the Ministry states that its search did not reveal any records relating to named company "B", or any of the other entities named in the request. The appellant believes that the Ministry has been "unduly restrictive" in responding to the access request. Although the appellant takes the position that additional records responsive to the records should exist, it has not provided any evidence or detail in support of this position.

The Ministry has filed an affidavit sworn by counsel with the Ministry. In the Ministry's representations, it states that all staff at the Public Health Branch were requested to search their files for documents that met "the above noted search parameters" (which I understand to refer to the request). In the affidavit counsel states, among other things:

4. THAT to the best of my knowledge and belief, it was determined that records which might be responsive to the request had been collected by its Legal Services Branch (LSB) for a different purpose in relation to another matter.

5. THAT to the best of my knowledge and belief, the pool of documents that had been collected by LSB consisted of certain categories of documents within the following parameters:

    i) documents that had been collected by the Ministry of the Attorney General in preparation for the Krever Inquiry and matters relating to HIV/Hepatitis C involving the national blood distribution system; and
    ii) documents collected by Records Management staff in 2000 and 2001 through a search of Records Management Branch and the Archives of Ontario.

5. [sic] THAT to the best of my knowledge and belief, the search criteria in regard to the Krever Inquiry specified that all documents from the 1983 to 1988 [period] which dealt with enumerated issues were to be collected. The enumerated issues included:

   i. hemophilia factor 8 and heat treatment
   ii. hemophilia in general
   iii. fractionation plant in general
   iv. fractionation plant – self sufficiency in blood products
   v. MOHLTC policies in general regarding blood issues
   vi. MOHLTC decisions regarding blood issues
   vii. regulation of biologics (Bureau of Biologics)
   viii. fractionation plant in Canada
   ix. fractionation contracts with named company "A" and
   x. fractionation plant – Ontario jobs/industry.

6. THAT to the best of my knowledge and belief, the search criteria that was applied in regard to the documents collected by Records Management Branch staff in 2000 and 2001 specified that all documents from the periods 1980 to 1983 and 1987 to 1990 which dealt with enumerated issues were to be collected. The enumerated issues included:

   i. documents, including but not exclusive of, submitted funding requests or proposals, business plans, special requests and minutes of meetings that mention joint activities/projects/meetings of Ontario and blood products manufacturers, including named company "A" and
   ii. documents, including but not exclusive of, submitted funding requests or proposals, business plans, special requests and minutes of meetings that mention joint activities/projects/meetings of Ontario, the Federal Government and/or Federal Agencies and blood products manufacturers, including named company "A".

7. THAT to the best of my knowledge and belief, in or about the spring/summer of 2000, 78 boxes of documents were identified as productions to the Krever Inquiry (the "Krever Boxes"). Throughout the summer and fall of 2000, the documents were reviewed with a view to considering certain issues. The issues included:

   i. documents, including but not exclusive of, submitted funding requests or proposals, business plans, special requests and minutes of meetings that mention joint activities/projects/meetings, of Ontario and blood products manufacturers, including named company "A" during the relevant time period for this appeal; and
   ii. documents, including but not exclusive of, submitted funding requests or proposals, business plans, special requests and minutes of meetings

> that mention joint activities/projects/meetings, of Ontario, the Federal Government and/or Federal Agencies and blood products manufacturers, including named company "A", during the relevant time period for this appeal.

An estimate of over 10,000 records were considered.

8. THAT in or about March and April of 2001, numerous records from the Krever Boxes were identified that might be responsive to the request under the Act.

9. THAT, in addition, roughly 49 boxes of materials that had been provided from the Ministry of the Attorney General were reviewed for responsive records.

10. THAT the materials provided from Records Management Branch and the Archives of Ontario were also reviewed for responsive records.

After reviewing the submissions of the Ministry, I find that it made a reasonable determination about the likely locations of responsive records, and collected and reviewed a large volume of records in its search. It also appears, and it is not apparent why, that the Ministry restated the request slightly, in its directions to staff during the search for records. For example, the request is worded in terms of the relationships between named companies "A" and "B", and between each of named companies "A" and "B" and the Canadian Development Corporation, the Ontario Development Corporation and Health Canada's Health Protection Branch and/or the Bureau of Biologics. The direction to staff, as outlined in the excerpt from the affidavit above, is worded in terms of the relationships between "Ontario and blood products manufacturers, including [named company "A"]", and between "Ontario, the Federal Government and/or Federal Agencies and blood products manufacturers, including [named company "A"]". No mention is made of named company "B" by name in the Ministry's description of its search.

Despite the differences between the wording of the request, and the Ministry's description of its search, I accept the Ministry's general assertion that staff were requested to search their files for documents that met the search parameters as set out in the request. The appellant has not made any representations on the issue, and has not submitted that the search as described in the affidavit was flawed or incomplete.

On the basis of the representations and evidence before me, therefore, I find that the Ministry has conducted a reasonable search for records responsive to the request.

LAW ENFORCEMENT

As I have indicated, the Ministry's decision denied complete access to the responsive records relying on, among others, the discretionary exemption in section 14(1) of the *Act*. The decision stated that section 14 applies to all the records, and that it is relevant "as a result of the long-standing criminal investigation by the RCMP into possible wrongdoing in the Canadian blood system during the period 1980-1990."

Section 14(1) states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (d) 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;
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> (f) deprive a person of the right to a fair trial or impartial adjudication;
>
> (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
>
> (h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;
>
> (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
>
> (j) facilitate the escape from custody of a person who is under lawful detention;
>
> (k) jeopardize the security of a centre for lawful detention; or
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

The Ministry has not specified which of the above provisions it relies on, despite having been requested to do so.

The circumstances of this case are somewhat unusual. Generally, section 14(1) (the "law enforcement exemption") is relied on by institutions or agencies engaged in law enforcement activities. In the typical case, a law enforcement agency has a concern about the harm that

disclosure of records may cause to its law enforcement activities or interests. In the case before me, the responding institution, the Ministry, has not claimed that it is engaged in law enforcement activities in the present context; it is simply in possession of records which it claims may implicate the law enforcement interests of another agency, the RCMP. Further, as I have indicated, the RCMP was notified of this appeal and has not supported the application of section 14(1) to the records in this case. In a letter in response to the Notice of Inquiry, in which the RCMP was specifically invited to make submissions on the application of that section or any part of it, the RCMP's Departmental Privacy and Access to Information Coordinator, on behalf of the Commissioner, states that the RCMP does not object to the release of the documents which are the subject of this inquiry.

I am therefore left to consider the application of section 14(1) in circumstances where the law enforcement agency whose investigation is said by the Ministry to raise the application of that section, has not objected to release of the records.

In the following discussion, I refer to the Ministry's representations on the application of section 14(1) which, as I have indicated above, were not shared with the appellant because I found it unnecessary to invite the appellant to respond to them. Although I did not share them with the appellant, it is necessary to refer to at least some of them in this decision, in order to provide a context for my findings. My purpose in referring to these representations here (in order to provide reasons for my decision) is different from the purpose underlying the sharing of representations with other parties (procedural fairness). Nevertheless, it is worth noting that none of the criteria in IPC Practice Direction 7 would have led me to withhold these representations from the appellant had I decided to seek the appellant's response to the Ministry's position on these matters. The Ministry's position on the sharing of its representations, as put forward in the cover letter to its representations, was based on the effect of a court order. In Interim Order PO-2016-I (my prior order in this appeal), I found an insufficient evidentiary and legal basis for this position.

The Ministry submits that it is "not free in law, and risks being found in contempt of court, by either disclosing the disputed records or making representations to the IPC with respect to their contents." The Ministry states that there is a search warrant which covers some, but not all, of the records in issue, that it remains under execution against the Ministry and that, along with the Information in support of the warrant, remains subject to a sealing order. Other information provided by the Ministry suggests that the warrant has been at least partially executed. The Ministry provides a lengthy excerpt from the decision of the Supreme Court of Canada in *Attorney-General of Nova Scotia v. MacIntyre* (1982), 132 D.L.R. (3d) 385, which discusses the "open court" principle, and an exception to this principle in the case of applications for search warrants. It is not clear to me the purpose for which this excerpt has been provided. The Supreme Court concluded in that case that the effective administration of justice would be frustrated if individuals were permitted to be present when warrants are issued. However, the court also concluded (at pp. 404-5) that once a warrant has been executed, the need for continued concealment is substantially diminished:

> In my opinion, however, the force of the "administration of justice" argument abates once the warrant has been executed, i.e., after entry and search. There is thereafter a "diminished interest in confidentiality" as the purposes of the policy of secrecy are largely, if not entirely, accomplished. The need for continued concealment virtually disappears. The appellant concedes that at this point individuals who are directly "interested" in the warrant have a right to inspect it. To that extent at least it enters the public domain. The appellant must, however, in some manner, justify granting access to the individuals directly concerned, while denying access to the public in general. I can find no compelling reason for distinguishing between the occupier of the premises searched and the public. The curtailment of the traditionally uninhibited accessibility of the public to the working of the courts should be undertaken with the greatest reluctance.
>
> The "administration of justice" argument is based on the fear that certain persons will destroy evidence and thus deprive the police of the fruits of their search. Yet the appellant agrees these very individuals (i.e., those "directly interested") have a right to see the warrant, and the material upon which it is based, once it has been executed. The appellants do not argue for blanket confidentiality with respect to warrants. Logically, if those directly interested can see the warrant, a third party who has no interest in the case at all is not a threat to the administration of justice. By definition, he has no evidence that he can destroy. Concern for preserving evidence and for the effective administration of justice cannot justify excluding him.

After quoting from the decision above, the Ministry submits that "were [it] to make representations on the exemptions claimed only with respect to documents not covered by the warrant, [it] would, still, risk being found in contempt of court by permitting the IPC and the appellant to identify through a process of elimination which documents referred to in the Index of records are subject to the warrant."

Although it is not abundantly clear, I understand the Ministry's position to be that it is unable to make representations on the application of section 14(1), or any of the exemptions claimed, because of the existence of a search warrant which remains "under execution". I understand its position to be that it is unable to make representations because in doing so, the result would be the identification of the records covered by the warrant. Further, I understand the Ministry's position to be that if it identifies the records covered by the warrant during the course of this appeal, it risks being found in contempt of court.

The Ministry also refers to Order M-53. In that order, former Commissioner Tom Wright found himself bound by a court order which restricted dissemination of the record in dispute, beyond specified purposes. He stated:

> Disclosure of the nature of the record to the parties in the course of conducting my inquiry cannot be made. As well, if I were to find that the exemptions claimed by the parties resisting disclosure do not apply to the record, either in

> whole or in part, I may not order unconditional disclosure of the record. To order partial or full disclosure of the record or to refer to the record in any way which would reveal its content, in my view, may well constitute contempt of court. Simply stated, for the purposes of processing these appeals, I am not prepared to test the contempt waters.

The issue before me can be summarized as follows. The Ministry has claimed the application of the section 14(1) exemption. It has not specified on which part of section 14(1) it relies, but it has indicated that its reliance on section 14(1) is based on an investigation by the RCMP. The RCMP has in turn indicated that it does not object to the release of any of the records at issue. Further, the Ministry takes the position that it is simply unable to make submissions in support of its position because it would be in legal jeopardy if it were to do so.

The situation before me is not dissimilar to that discussed in Interim Order PO-2016-I in this appeal, in which I stated:

> As discussed above, the Ministry takes the position that the sharing of its representations with the appellant would cause it (as well as this office and the appellant) to be in violation of a court order. As a general matter, the Ministry's concern about breaching a court order is a serious one, which ought not to be taken lightly. In Order M-53, former Commissioner Tom Wright decided against the continuation of an appeal where to order partial or full disclosure of a record may well constitute contempt of an order that he found to have general injunctive effect. In that appeal, the terms of the order were placed before him for his consideration, and submissions made as to the legal effect of those terms.
>
> The existence of a court order prohibiting the disclosure of the information in the Ministry's representations would likely weigh strongly in favour of withholding those representations. The difficulty in the appeal before me is that I have very little evidence to support the Ministry's position and in particular, very little evidence about the order said to prohibit the disclosure of the representations. Virtually the only evidence I have about the order is the general assertion that it "seals" a matter before the courts. I have no information linking that order to the information in the representations, which describe how the Ministry searched for records. I therefore do not have a sufficient basis for understanding how the sharing of that information could be in violation of a court order. Further, I have been given no case law, statutory authority, rule of the courts or any other legal authority supporting the Ministry's position on the sharing of these representations.

As in Interim Order PO-2016-I, I find that the Ministry's concern about breaching a court order is a serious one, which ought not to be taken lightly. If the Ministry were unable to make submissions (and therefore could not participate meaningfully in this appeal) because of the terms of a court order, this would be a serious concern relevant to whether natural justice can be met in this appeal. The dilemma here, as in Interim Order PO-2016-I, is that I have very little

evidence before me to support this contention. The evidence before me is simply the assertion that there is a search warrant, that the warrant and information are sealed by court order, and that the warrant "remains under execution". I have no information about the terms and context of the court order, and no case law, statutory authority, or other legal authority, which establishes that the Ministry would be in violation of any such order by making representations in this appeal on the application of section 14(1).

The Ministry appears to be concerned that the mere revelation of which records are subject to the search warrant would place it in violation of the court order. Again, I have no evidence or legal authority, which permits me to reach this conclusion. I have not been provided with any court order on any aspect of this matter, or any other legal authority allowing me to understand the breadth of that sealing order.

I note that in *MacIntyre*, the Supreme Court of Canada referred to the policy reasons for the secrecy surrounding the *issuance* of warrants. The Court stated, at p.404:

> In a process in which surprise and secrecy may play a decisive role the occupier of the premises to be searched would be alerted, before the execution of the warrant, with the probable consequence of destruction or removal of evidence. I agree with counsel for the Attorney-General of Ontario that the presence in an open court-room of members of the public, media personnel, and, potentially, contacts of suspected accused in respect of whom the search is to be made, would render the mechanism of a search warrant utterly useless.

An important rationale underlying the secrecy of proceedings during which search warrants are obtained is, thus, the need to prevent the subject of the warrant from being alerted prior to the search.

I infer from the Ministry's representations that it has information about the breadth of the search warrant, at the very least, about which records have been seized. If that is so, then there is nothing in the *MacIntyre* decision which suggests a prohibition against revealing that information. As I read the decision in *MacIntyre*, it does not stand for the proposition that if there has been partial execution and the subject of the warrant is in a position to know the nature of the records which have been confiscated, it would be contempt for that person to reveal that information to others. This is, of course, subject to any specific court direction (such as in Order M-53) prohibiting the dissemination of the information. But I have no information before me that establishes that the court order referred to by the Ministry prohibits the identification of the records which have been confiscated under the search warrant in this case.

I note that since the *MacIntyre* decision, the *Criminal Code* has been amended to provide specifically for sealing orders on information relating to the issuance of a warrant (section 487.3). Those provisions allow for an application to terminate a sealing order or vary any of its terms or conditions. Although (assuming that these provisions apply) it is open to the Ministry to make such an application, I have no information before me suggesting that the Ministry has

taken any steps in this direction, and no submissions on the application of these provisions to the appeal before me.

I find, therefore, that there is an insufficient basis to conclude that this situation parallels the circumstances dealt with in Order M-53, nor have I been provided with sufficient information to justify a conclusion that the Ministry is incapable of making representations in support of its position that section 14(1) applies to exempt the records at issue.

In the absence of representations from the Ministry, it is still open to me to find the provisions of section 14(1) applicable. However, weighing strongly against such a finding is the position taken by the RCMP, the agency identified by the Ministry as that whose investigation gives rise to the application of the "law enforcement" exemption to the records. As I have indicated above, the RCMP has not identified any concerns over the release of the records and, indeed, has expressed that it does not object to their release.

As noted, section 14(1) deals with the concerns of a law enforcement agency, such as interference with a law enforcement matter, interference with an investigation, disclosure of the identity of a confidential source or information furnished by such a source, and deprivation of the right to a fair trial. Its provisions were outlined in the Notice of Inquiry sent to the RCMP. In my view, the failure of the RCMP, as the investigating body in this case, to object to disclosure despite being given the opportunity to do so, indicates that it would not be reasonable to expect that the harms outlined in section 14(1) could result from disclosure. Accordingly, I find that this section does not apply.

My finding insofar as it relates to the Ministry's submissions requires some further elaboration. Although the Ministry has not made reference to any of the specific provisions of section 14(1), I must surmise that section 14(1)(h) is of particular concern. Section 14(1)(h), as set out above, allows an institution to refuse disclosure where disclosure could reasonably be expected to "reveal a record which has been confiscated from a person by a peace officer in accordance with an *Act* or regulation". The Ministry has confirmed that records have been seized under a search warrant (although it should be noted that it has never specified under which *Act* or regulation the warrant was obtained). The Ministry has not specified whether any of the records at issue are copies of records which have been seized and, again, I must surmise from its representations that some of the records are indeed copies of records which have been seized, raising the possible application of section 14(1)(h).

In prior decisions of this office, where the section 14(1)(h) exemption was found to be applicable, the nature of the records covered by a search warrant was described in the order, and the institution made representations outlining the circumstances of the confiscation of the records, and the legal authority under which they were confiscated (see, for instance, Order MO-1551 and Interim Order PO-2033-I). In order to establish the applicability of the exemption, therefore, the confiscated records were identified, and distinguished from other records at issue.

In the appeal before me, although I have some evidence establishing that a search warrant exists, and that it has been at least partially executed against the Ministry, I do not have any information

about the statutory or regulatory basis for the search warrant, nor any specific information about which records have been confiscated under that warrant.

Section 53 of the *Act* provides:

> Where a head refuses access to a record or a part of a record, the burden of proof that *the record* or the part falls within one of the specified exemptions in this Act lies upon the head. [emphasis added]

The burden of proof under section 53 requires the Ministry to establish the applicability of an exemption to each record or part of a record at issue. In the context of section 14(1)(h), and having regard to prior orders in this area, I find that this burden requires the Ministry to establish that specific records meet the requirements of this exemption. Thus, although it is possible that at least some of the records at issue in this appeal have been confiscated under a search warrant (and it should be noted once again that I have little information about the warrant, and no information about its statutory or regulatory basis), the Ministry has not met its burden when it fails to identify which records were so confiscated. Nor has the Ministry specified which of the other harms outlined in section 14(1) could reasonably be expected to result from disclosure, or provided any basis to conclude that such an expectation would be reasonable.

In the result, I am satisfied that the Ministry has failed to establish the application of any of the provisions in section 14(1) of the *Act*.

ORDER:

1. I find that the Ministry has conducted a reasonable search for records responsive to the request.

2. I do not uphold the Ministry's application of the exemptions under section 14(1) of the *Act*.

3. Because of my decision to provide details of the Ministry's representations which it objected to sharing, and which were not the subject of Interim Order PO-2016-I, I have decided to release this order to the Ministry in advance of the appellant and the RCMP in order to provide the Ministry with an opportunity to examine the order and determine whether to apply for judicial review.

4. If I have not been served with a Notice of Application for Judicial Review by thirty (30) days of the date of this order, I will release this order to the appellant within five (5) days of the expiry of the thirty (30) day period.

5. In accordance with the requirements of section 54(4) of the *Act*, I will give the appellant and the RCMP notice of the issuance of this order by a separate letter, concurrent with the issuance of the order to the Ministry.

6. I will issue a Supplementary Notice of Inquiry shortly dealing with the remaining issues in this appeal.

Original Signed By: November 14, 2002
Sherry Liang
Adjudicator