



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER PO-2252**

**Appeal PA-030254-1**

**Ministry of Public Safety and Security**



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## **NATURE OF THE APPEAL:**

The Ministry of Public Safety and Security (now the Ministry of Community Safety and Correctional Services) (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act (the Act)* for all documents in the custody or under the control of the Ontario Provincial Police regarding its investigation into the death of the requester's husband.

The Ministry identified approximately 25 banker's boxes of responsive records, and denied access to all of them on the basis of the following exemptions in the *Act*:

- sections 14(1)(a), 14(1)(b) and 14(2)(a) - law enforcement
- section 21(1) - invasion of privacy
- sections 49(a) and (b) - discretion to deny access to requester's personal information

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

Mediation was not successful, and the appeal was transferred to the adjudication stage. I began my inquiry by sending a Notice of Inquiry to the Ministry seeking representations on the sections 14(1)(a) and 14(1)(b) exemptions and the exercise of discretion. The Ministry responded with representations, the non-confidential portions of which were then shared with the appellant. The appellant also submitted representations. In her representations the appellant narrowed the scope of the request to include only those records which relate to her, and pointed out that the purpose of the request is to provide evidence to insurers that she is not implicated in her husband's death.

I then sent the appellant's representations to the Ministry for reply. After reviewing the representations, the Ministry issued a revised decision letter to the appellant, disclosing a copy of the statements she provided to the OPP during the course of the investigation. The Ministry also provided representations reinforcing its position that the rest of the records qualify for exemption under sections 49(a) and sections 14(1)(a) and (b) of the *Act*.

## **RECORDS:**

The records comprise 25 bankers' boxes of documents compiled by the OPP in the context of its investigation into the death by homicide of the appellant's husband and a related house fire. They are described by the Ministry as consisting of occurrence reports, search warrants, witness statements/interview reports, OPP officers' case notes, Coroner's records, photographs, videotapes and other related records.

## **DISCUSSION:**

### **LAW ENFORCEMENT**

#### **General principles**

The sections 14(1)(a) and (b) exemptions provide the Ministry with discretion to deny access to records in circumstances where disclosure could reasonably be expected to interfere with an ongoing law enforcement matter or investigation. The Ministry bears the onus of providing

evidence to substantiate that first, a law enforcement matter or investigation is ongoing and second, that disclosing the records could reasonably be expected to interfere with the matter or investigation. In order to establish that disclosing records “could reasonably be expected to” result in the harms identified in these sections, the Ministry must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

### **Sections 14(1)(a) and (b)**

Sections 14(1)(a) and (b) read as follows:

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;

In order to meet the requirements of sections 14(1)(a) and (b), the Ministry must establish that the law enforcement matter or investigation in question is specific and ongoing. The exemptions do not apply where the matter or investigation is completed, or where the alleged interference is with a “potential” law enforcement matter or investigation [Orders PO-2085, MO-1578].

The term “law enforcement” is defined in section 2(1) as follows:

“law enforcement” means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b)

The parties are in agreement that the OPP in conducting its homicide investigation is engaged in policing activities, thereby falling within the scope of the definition of “law enforcement”.

The Ministry makes the following submissions in support of its position that the records fall within the parameters of sections 14(1)(a) and/or (b):

The Ministry submits that disclosure of the OPP records at issue may reasonably be expected to interfere with an ongoing law enforcement investigation. The Ministry submits that the responsive records are relevant to a matter that is currently under investigation by the OPP. The OPP investigation has been undertaken with a view to a future law enforcement proceeding.

The Ministry submits that disclosure of the records at issue at this point in time would interfere with an active law enforcement investigation undertaken by the OPP with respect to the circumstances of the January 11, 2002 homicide and related house fire.

The Ministry also relies on Order PO-2085, where Adjudicator Sherry Liang upheld the sections 14(1)(a) and (b) exemptions when dealing with records from the Office of the Fire Marshal (OFM) that were relevant with respect to an ongoing Toronto Police Service and OFM law enforcement investigation into the circumstances of a sudden death and related house fire.

The Ministry also provided a confidential letter from the OPP official in charge of the investigation, which outlines the status of the investigation and confirms that it is active and ongoing.

The appellant submits:

As a general principle, it is submitted that the length of time over which an investigation has been conducted must be taken into account in determining whether a refusal to disclose records is justifiable under subsections 14(1)(a) and (b). It is submitted that, *in general*, the possibility that the disclosure of the requested records could reasonably interfere with the investigation of a law enforcement matter must be reduced by the passage of time. [appellant's emphasis]

The appellant's husband died over two years ago, on January 11, 2002. It has now become public knowledge that the investigation of the appellant's husband's death is at a stand still. ... It is obvious that the trail is now cold and that the police have turned to the public for assistance. It is submitted that, because of the age of the investigation and the apparent lack of progress, the likelihood that disclosure of the requested information will interfere with the investigation of a law enforcement matter is much reduced, if it is present at all.

The appellant's representations also refer to other law enforcement exemptions in section 14(1) that have not been claimed by the Ministry and are not relevant in the context of this inquiry.

In its reply representations, the Ministry reiterates that the law enforcement investigation is ongoing, and submits “the passage of two years and the fact that a suspect has not been charged does not mitigate this circumstance”.

Based on the Ministry’s representations, including the confidential letter that I was not at liberty to share with the appellant for reasons of confidentiality, I find that the Ministry has provided the necessary detailed and convincing evidence to establish the requirements of sections 14(1)(a) and (b). It is clear that the OPP homicide investigation is a “law enforcement” matter as defined in section 2(1), and that the investigation is active and ongoing despite the passage of two years since the death of the appellant’s husband. Finally, the Ministry has persuaded me with its evidence that disclosing the records comprising the investigation file could reasonably be expected to interfere with this law enforcement investigation.

Therefore, I find that the requirements of sections 14(1)(a) and (b) have been established.

### **Exercise of Discretion**

Section 14(1) is a discretionary exemption that applies to records that do not contain a requester’s personal information. Section 49(a) is a corresponding exemption for records that do contain a requester’s personal information. Both types of records are at issue in this appeal.

Section 49(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

Where section ... 14 ... would apply to the disclosure of that personal information

In its original representations, the Ministry points out that in deciding to deny access to the records it took into account all relevant facts and circumstances, including the family relationship between the appellant and the deceased, and “carefully considered the potential benefits to the appellant should the records be disclosed and also the importance of the records to the appellant”.

In balancing these factors against the ongoing nature of the homicide and house fire investigation, the Ministry stated:

The Ministry ultimately concluded in its exercise of discretion that the premature release of the requested information could reasonably be expected to interfere with an ongoing law enforcement matter and lead to various investigative harms. The Ministry believes that release of the requested information to the appellant would be inappropriate at this time.

The confidential letter submitted by the Ministry provides more specific details regarding the potential investigative harms.

The appellant's representations on the exercise of discretion focus on the fact that the Ministry, to that point, had not even disclosed the appellant's own statement to the OPP as evidence that the Ministry had taken a blanket policy of refusing to disclose any records without considering factors particular to the appellant and the circumstances of the specific investigation at issue.

As noted earlier, the Ministry disclosed the appellant's statement in response to the appellant's representations.

In its reply representations, the Ministry goes on to state:

The Ministry has given careful consideration to the appellant's comments regarding the Ministry's decision to withhold the requested records in their entirety. The Ministry considers each and every request on an individual case by case basis. Discretionary exemptions from disclosure are invoked only where it is appropriate to do so after carefully reviewing all relevant facts and circumstances.

In this particular case, the Ministry has reconsidered its position and decided to grant the appellant access to the statements she provide to the OPP notwithstanding that these records in the circumstances of her request are subject to the discretionary exemptions from disclosure contained in section 49(a) in conjunctions with sections 14(1)(a) and (b). ...

With respect to the other responsive records concerning the appellant, the Ministry maintains its position that release of this information to the appellant in the circumstances of the request is not appropriate at this time. ...

Based on the Ministry's representations, including those contained in the confidential letter, I find nothing improper about the way in which it has exercised discretion to deny access to various records under section 49(a) and sections 14(1)(a) and (b) of the *Act*.

**ORDER:**

I uphold the Ministry's decision.

Original signed by: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

\_\_\_\_\_  
March 12, 2004