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

ORDER PO-2928

Appeal PA09-199-2

Ministry of Community Safety and Correctional Services

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NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received a 16-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to specified Ministry policies and other documentation. The relevant part of the request reads as follows:

> A copy of any regulations, policies, guidelines, orders or other documentation used to train police officers with respect to the signs and risks of excited delirium and how an officer should respond to a person suffering from excited delirium.

The Ministry located a responsive record, which consists of a DVD entitled "Excited Delirium", and issued a decision letter advising the requester that access had been denied to it in accordance with the exclusionary provision in section 65(6) of the *Act*. The Ministry took the position that the requested record is not subject to the *Act*.

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

During mediation, the Ministry specified that it relied upon the exclusionary provision in section 65(6)3 of the *Act*. Since the record was produced by the Niagara Regional Police Service (the Police), the Ministry notified this police service to seek their views on disclosure. The Police objected to the disclosure of the record.

Also during mediation, the Ministry issued a supplemental decision advising that if the record does not meet the requirements of section 65(6)3, it is claiming the application of the discretionary exemptions in sections 14(1) (law enforcement) and 18(1) (economic and other interests), as well as the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy) of the *Act* to deny access to the record.

No further mediation was possible and the file was transferred to the adjudication stage of the inquiry process, where an adjudicator conducts an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the Ministry and the Police initially, seeking their representations. I received representations from both parties. In its representations, the Ministry withdrew its reliance on sections 17(1) and 18(1). The Police continued to rely on section 18(1). I then sent a Notice of Inquiry to the appellant along with complete copies of the Ministry's and the Police's representations. I received representations from the appellant. Following receipt of the appellant's representations, I had a staff member from this office contact the appellant to inquire whether it was providing representations in response to the Police's representations, as it appeared to have only provided representations in response to the Ministry's representations. I did not receive a response from the appellant to my query concerning its response to the Police's representations.

RECORD:

The record consists of a DVD entitled "Excited Delirium".

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

I will first determine whether section 65(6)3 excludes the record from the *Act*. If the record is excluded from the *Act*, then it will be unnecessary for me to consider if it is exempt under the claimed exemptions under the *Act*. Section 65(6)3 states:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

If section 65(6) applies to the record, and none of the exceptions found in section 65(7) applies, the record is excluded from the scope of the *Act*.

The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner),* [2003] O.J. No. 4123 (C.A.). See also Order PO-2157].

The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

In *Ontario (Attorney General) v. Toronto Star*, 2010 ONSC 991, [2010] O.J. No. 1209, the Ontario Divisional Court defined "relating to" in section 65 (5.2) of the *Act* as requiring "some connection" between the records and the subject matter of that section. For section 65(6) to apply, it must be reasonable to conclude that there is some connection between "a record" and either "proceedings or anticipated proceedings", "negotiations or anticipated negotiations" or "meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest."

If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

Section 65(6) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original

institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act* (the municipal *Act*) [Orders P-1560 and PO-2106].

The exclusion in section 65(6) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees [*Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.)]

The type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions [*Ministry of Correctional Services*, cited above].

For section 65(6)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

The Ministry submits that:

> The record was produced by the Ontario Police Video Training Alliance (the OPVTA). The record was shot and edited by the Niagara Police Service [the Police] which contracts with the OPVTA to produce videos such as the record…
>
> The OPVTA is a not for profit organization that since 1996 has provided quality, low cost videos used to train approximately 24,000 police officers in over 90 member law enforcement agencies across the province. The OPVTA is governed by members of the Ontario law enforcement community. The OPP [Ontario Provincial Police] is a member agency of the OPVTA, and pays an annual membership fee to the OPVTA. The advice and solutions the OPVTA provides in its videos are based on Ontario law and policy. The OPVTA has produced many different law enforcement training videos similar to the record.
>
> The record provides police services such as the OPP with information and advice on what they should do when they are confronted with someone who appears to be in a state of Excited Delirium…
>
> The record is used solely to train and to instruct OPP officers, and such training is a form of communication within the meaning of subsection 65(6).

> The record has to do with an employment or labour relations matter, in that it advises police officers how to react when confronted with someone who is in a state of Excited Delirium. This is a key part of police training, and it relates to how police discharge their duties in a manner that promotes workplace safety. If police officers are not trained in how to respond to someone with Excited Delirium, they will not discharge their duties properly, when they encounter someone who is in this state. A lack of proper training is a workplace safety issue, a policing issue, and therefore a labour and employment issue.
>
> The Ministry has a significant interest in this record from an employment or labour relations perspective, the interest being to ensure the record is used to train OPP officers in how to respond to someone who has Excited Delirium. If OPP officers are not trained to respond to people who are in a state of Excited Delirium, police officers, people with Excited Delirium, and perhaps even other members of the public risk being injured or even killed. Training and workplace safety are critically important labour and employment issues and are the rationale behind the creation of the record, and the Ministry's interest is in ensuring that the record is communicated to its front-line OPP officers.

The Police submit that:

> This video (as do all training videos) falls under the exclusion as a record prepared, maintained and used by the institution in relation to employment-related matters in which the institution has an interest.
>
> The video is a form of communication about officer training (an employment-relate matter) in which the institution has an obvious interest: the entire welfare of the institution depends upon its having well informed, well trained officers. There is also a consequent legal interest as well as a financial interest in having well trained officers.

The appellant submits:

> …that meeting this definition requires more than a superficial connection between the creation, preparation, maintenance and/or use of the record and the labour relations or employment related proceedings or anticipated proceedings.
>
> In addition, the Ministry argues that a lack of proper training in regards to handling situations where an individual is in a state of Excited Delirium would be a workplace-safety issue, therefore making it a labour and employment issue. It relies on the analysis that "labour relations" or "employment-related matters" apply in the context of an organization or operational review. However, [the appellant] notes that both of these terms were found not to apply in this context in previous orders [Orders M-941 and P-1369].

Part 1: collected, prepared, maintained or used

Based upon the representations of the Ministry, I find that the record was collected, maintained and used by the Ministry in the training of OPP officers. The OPP is part of the Ministry. Therefore, part 1 of the test has been met.

Part 2: meetings, consultations, discussions or communications

The record was used to train and to instruct OPP officers. I agree with the Ministry that such training is a form of communication within the meaning of section 65(6). Therefore, communications have passed between the Ministry and its employees, OPP officers. I am, therefore, satisfied that the Ministry collected, maintained and used the record in relation to communications. As a result, I find that part two of the test under section 65(6)3 has been satisfied.

Part 3: labour relations or employment-related matters in which the institution has an interest

The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition [Orders M-830 and PO-2123]
- an employee's dismissal [Order MO-1654-I]
- a grievance under a collective agreement [Orders M-832 and PO-1769]
- disciplinary proceedings under the *Police Services Act* [Order MO-1433-F]
- a "voluntary exit program" [Order M-1074]
- a review of "workload and working relationships" [Order PO-2057]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act* [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)].

The phrase "labour relations or employment-related matters" has been found *not* to apply in the context of:

- an organizational or operational review [Orders M-941 and P-1369]
- litigation in which the institution may be found vicariously liable for the actions of its employee [*Ontario (Ministry of Correctional Services) v. Goodis* (cited above)].

The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner),* cited above].

The records collected, prepared maintained or used by the Ministry are excluded only if [the] meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees' actions [*Ministry of Correctional Services*, cited above].

I must now determine, first, whether the communications in the record are about "labour relations or employment-related matters", and, if so, whether these are matters in which the Ministry "has an interest".

In Order PO-2913 Adjudicator Laurel Cropley considered the application of section 65(6)3 to training materials prepared for use at the OPP Academy in training police officer recruits, instructing them on the safe use of firearms, tasers and restraints. She found that that the *Act* applies to these and other generic training materials. She determined that whether or not section 65(6) applies to a record rests with the nature of circumstances in which the particular record is used.

In particular, Adjudicator Cropley found the records would be excluded under section 65(6)3 of the *Act* (or its municipal *Act* equivalent, section 52(3)3) if they were prepared or used in relation to communications about the employment-related training or qualifications of a particular individual. In that situation, their use was, therefore, about the employment of the individual by an institution. She found that records relating to matters in which the institutions are acting as employers and the terms and conditions of the employment of specifically identified individuals are at issue fall within the ambit of the section 65(6)3 exclusion.

With respect to generic training materials that are similar to the record at issue in this appeal, Adjudicator Cropley found section 65(6)3 is not directed at records of this nature because these records are communications about operational procedures to be followed by the institution's employees generally, and do not relate to specific employees. She determined that the training materials at issue in that appeal contained information about:

> …OPP-wide procedures used to establish consistency in, and adequacy of training. As well, they are tools for ensuring that the OPP as an organization meets its statutory mandate as a police agency, as noted by the Ministry. In addition, although not determinative of the issue, I would suggest that the establishment of training standards is one facet of holding the police accountable to the public with respect to the overall performance and behaviour of its officers, and particularly with respect to the use of force, including the use of firearms, tasers and restraints.
>
> Previous orders have found that where records are prepared in the course of routine procedures, such as police officers' notes or occurrence reports, they would not typically fall under the exclusion in section 65(6). However, when

> allegations of misconduct are made, the records subsequently retrieved from the case file for the purposes of the investigation have been excluded from the *Act* [See, for example: Orders MO-2428 and PO-2628]. I accept that once a performance issue arises as a result of a particular police officer's actions, records that describe the training that the officer received may well engage the interests of the institution in its capacity as employer.
>
> However, I am not persuaded that the records at issue, which consist of generic training materials, relate to matters in which the Ministry is acting as an employer and the terms and conditions of the employment of specifically identified individuals are at issue. For this reason, the communications represented by the records are not "about" employment-related matters" within the meaning of section 65(6)3. Accordingly, I find that the records at issue do not meet the requirements of part 3 of section 65(6)3 and they are subject to the *Act*.

I agree with and adopt Adjudicator Cropley's findings in Order PO-2913. The DVD at issue in this appeal is a generic tool for police officers. Therefore, it is more accurately described as a communication about operational procedures to be followed by the institution's employees. As a result, the record is not "about employment-related matters" within the meaning of section 65(6)3, and it does not meet the requirements of part 3 of section 65(6)3. Accordingly, I find that the DVD is subject to the *Act* and I must determine whether it is exempt under sections 14(1), 18(1) or 21(1).

ECONOMIC AND OTHER INTERESTS

The Niagara Regional Police Service is the affected party in this appeal. They have claimed that disclosure of the record could reasonably be expected to be injurious to their financial interests under the discretionary exemption in section 18(1)(d) of the *Act*. Although the Ministry initially claimed that section 18(1)(d) applied to the record, it later withdrew its claim that this exemption applied and did not provide representations on section 18(1)(d). The appellant did not provide representations on section 18(1)(d) nor did it provide representations concerning the Police's role in the production of the record.

Section 18(1)(d) states:

> A head may refuse to disclose a record that contains,
>
> > information where the disclosure could reasonably be expected to be injurious to the *financial interests of the Government of Ontario* or the *ability of the Government of Ontario* to manage the economy of Ontario; [emphasis added]

The Police are not an institution under the *Act*, and I am not satisfied that, even if disclosure could reasonably be expected to be injurious to their financial interests, this could reasonably be expected to injure the financial interests of the Government of Ontario or its ability to manage the economy. Accordingly, even if the Police were permitted to raise the possible application of

this exemption, I would find that it does not apply. In addition, the Ministry has withdrawn its reliance on section 18(1)(d).

In these circumstances, I find that the record is not exempt under section 18(1)(d).

The Police are, however, an institution under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) The equivalent section in the *MFIPPA* to section 18(1)(d) is section 11(d). This section contains information that differs from section 18(1)(d). Section 11(d) of *MFIPPA* reads:

> A head may refuse to disclose a record that contains,
>
> > information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

The record at issue is a video made by the Ontario Police Video Training Alliance (OPVTA) which is a member-driven organization that provides video training packages to member police services. The OPVTA website referred to in the Ministry's representations, contains the following information about the production of the record and other training videos:

> All programs are shot and edited by members of the Niagara Regional Police Video Unit, winners of over 150 major international awards for production excellence...
>
> The OPVTA is funded on a cost-recovery basis through annual membership fees, which are based on authorized strength. At present, annual membership fees range from $500 (1-49 sworn members) to $24,000 (1,500+ sworn members).
>
> Topics for programs are solicited from member Services year-round, and production priorities are established at regular meetings…
>
> Programs are released on DVD and are generally 10-12 minutes in length: perfect for viewing at shift briefings or as part of facilitated classes.

The Police state that:

> The [OPVTA] was formed in order to provide a cost-effective means of producing video training programs and packages to member services…
>
> Should [the record and other videos] be made publicly available, through any means, there would be no reason for police services to pay to join the OPVTA. The OPVTA would lose its source of funding and could ultimately be dismantled. This absolutely essential and proven means of training would thereby be eliminated or, alternatively, the costs would have to be borne by the Niagara Regional Police Service. In addition to the above-noted interests, the Niagara

> Regional Police Service has a direct financial interest in the continued funding of these videos by the OPVTA...
>
> Given that the OPVTA is an extension of the Niagara Regional Police Service and reports to the Niagara Regional Police Service Chief and the Niagara Regional Police Services Board, I would argue that section 11(d) of [the municipal *Act*] applies to the record.

In this case, consideration could have been given to transferring the request to the Police under section 25 of the *Act*. If transferred, the Police would have been able to claim and, on appeal, argue in favour of, the application of section 11(d) of *MFIPPA*.

The transfer provisions in section 25 of the *Act* state:

> (1) Where an institution receives a request for access to a record that the institution does not have in its custody or under its control, the head shall make all necessary inquiries to determine whether another institution has custody or control of the record, and where the head determines that another institution has custody or control of the record, the head shall within fifteen days after the request is received,
>
> > (a) forward the request to the other institution; and
> >
> > (b) give written notice to the person who made the request that it has been forwarded to the other institution.
>
> (2) Where an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in which case the head transferring the request shall give written notice of the transfer to the person who made the request.
>
> (3) For the purpose of subsection (2), another institution has a greater interest in a record than the institution that receives the request for access if,
>
> > (a) the record was originally produced in or for the other institution; or
> >
> > (b) in the case of a record not originally produced in or for an institution, the other institution was the first institution to receive the record or a copy thereof.
>
> (4) Where a request is forwarded or transferred under subsection (1) or (2), the request shall be deemed to have been made to the institution to which it is

> forwarded or transferred on the day the institution to which the request was originally made received it.
>
> (5) In this section,
>
> "institution" includes an institution as defined in section 2 of the Municipal Freedom of Information and Protection of Privacy Act.

As section 18(1)(d) does not apply, I will go on to consider whether the law enforcement exemption at section 14(1) applies.

LAW ENFORCEMENT

Although, the Police submit that section 14(1) does not apply to the record, the Ministry relies on sections 14(1)(e), (i) and (l) which state:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> (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;
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

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

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.)].

Except in the case of section 14(1)(e), where section 14 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

In the case of section 14(1)(e), the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.)].

It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

The Ministry submits that section 14(1) applies as:

- The record was created solely as a training device for police officers, and is used by the Ministry exclusively to train OPP officers;

- The record is created solely for policing use, and is not for public use. The OPVTA web site says that its programs, which include the record, are exclusively for the use of its member law enforcement agencies; and,

- The record instructs police officers in how to respond to someone who is in a state of Excited Delirium, which is a core policing duty, by providing training on how to restrain such individuals safely, and through other policing interventions.

14(1)(e): life or physical safety

The Ministry submits that:

> Excited Delirium endangers the safety of police officers, the individuals who exhibit its symptoms, and other members of the public. Individuals who are in a state of Excited Delirium may also have engaged in criminal activity. Disclosing the record could invite countermeasures from individuals who want to thwart law enforcement. These individuals could, for example, mimic the symptoms of Enhanced Delirium in an attempt to distract the police, which would put the safety of police, the individual who is trying to thwart law enforcement, and any other third party who is close by at additional risk. It is the Ministry position that

> criminals and would-be criminals knowing what police will do when confronted with someone who has Excited Delirium is a threat to safety…
>
> Since the record is a DVD, it can be easily posted on the Internet for mass consumption were it to be disclosed. This might prove dangerous not only for Ontario police officers confronting individuals in a state of Excited Delirium, but for police officers throughout the world.

Concerning section 14(1)(e), the appellant submits that the Ministry has failed to provide a reasonable basis for establishing that endangerment will result from disclosing the record.

Analysis/Findings re: section 14(1)(e): life or physical safety

The Ministry is concerned about the endangerment to life of the police officers who are called upon to restrain persons in a state of excited delirium, or in circumstances where other individuals mimic its symptoms to trigger particular police responses which would become known if the video is released.

The record at issue contains two portions; a training video about how police officers should act in responding to cases where individuals are in a state of excited delirium which depicts police responding to cases where persons are in that state (the training portion of the record). The second portion is an interview with a doctor from the Coroner's Office explaining the condition of excited delirium and reviewing various studies, court cases and other information concerning the treatment of persons in that state (the interview portion).

In Order MO-2207, Adjudicator Morrow considered whether two TTC documents that dealt with the use of force and handcuffing policies, procedures and techniques was exempt under section 8(1)(e) of the *Municipal Freedom of Information and Protection of Privacy Act* (the municipal *Act*, the equivalent municipal section to section 14(1)(e) of the *Act*). He described the information at issue as follows:

> … Record 1 is comprised of two documents that deal with the use of tactical handcuffing, empty hand control and tactical positioning all with regard to the safe handling of subject individuals. One is a "Training Precis" prepared in April 1999 by the TTC's Corporate Security Department on the use of force, empty hand control and tactical handcuffing and the other is an excerpt from a "Policy, Procedure and Rules Manual" issued by the TTC's Corporate Security Department in February 1999 concerning the handcuffing of persons in custody.

Adjudicator Morrow found that most of the information in those documents qualified for exemption under section 8(1)(e) of the municipal *Act*:

> I am satisfied that, for the most part, Record 1 contains information that if disclosed could reasonably be expected to endanger the life or physical safety of a TTC Special Constable. Specifically, significant portions of Record 1 contain detailed information about the appropriate use of force, the use of handcuffs and

> empty hand tactics for controlling dangerous individuals. In my view, disclosing this information could reasonably be expected to put a Special Constable at risk of physical harm in performing his or her law enforcement duties. Therefore, I find this information exempt under section 8(1)(e). This conclusion is consistent with other decisions of this office regarding the application of section 8(1)(e) [see, for example, Order MO-1779].
>
> However, I find the following sections of the Training Precis portion of Record 1 not exempt under section 8(1)(e):
>
> - Cover page
> - Introduction
> - Part II - Care and Maintenance of Handcuffs
> - Portions of Part III – Policy and Procedure, including a drawing of handcuffs with parts labeled
> - References to *Criminal Code* Sections 25 and 26
> - Definition of Handcuffs
>
> This information is either generic in nature or available in the public domain. Accordingly, I find that this information is not exempt under section 8(1)(e).

I adopt this reasoning of Adjudicator Morrow in this appeal.

The training portion of the video in this appeal also deals with the use of force and handcuffing procedures and techniques, as well as other detailed law enforcement techniques for officers dealing with individuals suffering from excited delirium. This portion of the record actually sets out specific techniques or tactics that police officers should employ when using or deploying law enforcement tools in cases of excited delirium (also see Order MO-2365).

The interview portion of this video also deals with specific detailed law enforcement techniques and advice and is information that is related to the training portion of the video. Certain portions of the interview portion are interspersed with the training portion of the video.

In *Office of the Worker Advisor* (cited above), the Ontario Court of Appeal established the following evidentiary standard for the application of section 14(1)(e):

> The expectation of harm must be reasonable, but it need not be probable. Section 14(1)(e) requires a determination of whether there is a reasonable basis for concluding that disclosure could be expected to endanger the life or physical safety of a person. In other words, the party resisting disclosure must demonstrate that the reason for resisting disclosure is not a frivolous or exaggerated

> expectation of endangerment to safety. … It is difficult, if not impossible, to establish as a matter of probabilities that a person's life or safety will be endangered by the release of a potentially inflammatory record. Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes ss. 14(1)(e) or 20 to refuse disclosure.

Based upon my review of the record and the parties' representations, I find that the Ministry has provided sufficient evidence to establish a reasonable basis for concluding that disclosure could be expected to endanger the life or physical safety of police officers. In my view, this concern is not frivolous or exaggerated. In making this finding, I am also mindful of the difficulty of predicting future events in the context of law enforcement.

Therefore, I find that section 14(1)(e) applies and it is not necessary for me to consider whether sections 14(1)(i) and (l) or section 21(1) also apply. I will now consider whether the Ministry exercised its discretion in a proper manner.

EXERCISE OF DISCRETION

I will now determine whether the Ministry exercised its discretion under section 14(1) concerning the record and, if so, whether I should uphold the exercise of discretion.

The section 14(1) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Relevant considerations

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

The Ministry submits that it exercised its discretion in accordance with the following considerations:

- The police service that produced the record… is opposed to its release.
- The record is not intended for public release. It was created by the OPVTA to be used by law enforcement exclusively for training purposes.

- The release of the record may harm law enforcement for reasons …set out above.

The Police did not provide representations on this issue.

The appellant submits that:

> … the Ministry used its discretion in a manner that is inconsistent with its obligations under the *Act*. The *Act* itself aims to ensure that information should be made available to the public and that exemptions from the right of access should be limited and specific. [D]isclosure of the record would help to increase public confidence in the operation of the institution instead of diminishing it, which is what would happen if the record were to remain unreleased.

Analysis and Findings

Based upon my review of the Ministry's representations, I find that it took into account relevant considerations in deciding to not exercise its discretion to disclose the record.

As stated above, 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.)]. The information is significant to the Ministry. Although the appellant has claimed that disclosure will increase public confidence in the Ministry, it has not provided me with details as to why this is so. Based upon my review of the record, I find that the Ministry's concerns about possible harm to law enforcement interests outweigh any possible benefit that might flow from increased public confidence in the Ministry.

As the Ministry exercised its discretion in a proper manner, I will uphold its exercise of discretion.

ORDER:

I uphold the decision of the Ministry and dismiss the appeal.

Original signed by: November 17, 2010
Diane Smith
Adjudicator