

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3066-R

Appeal PA09-461-2

Ministry of Community Safety and Correctional Services

March 26, 2012

Summary: This is a reconsideration of Order PO-3010 in which the adjudicator found that information in the Use of Force Manual was not exempt under section 14(1)(e), (i) or (l). In this order, the adjudicator reverses the previous finding and finds certain portions of the responsive record exempt under section 14(1)(e).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, s. 14(1)(e).

OVERVIEW:

[1] The appellant made a 10-part request to the Ministry of Community Safety and Correctional Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to a particular incident at the appellant's home.

[2] After conducting an inquiry into the appeal, I issued Order PO-3010 where I upheld the ministry's decision that certain records were excluded from the scope of the *Act* under section 65(6)1, but ordered the ministry to disclose portions of the Use of Force Manual.

[3] On December 16, 2011, I received a reconsideration request from the ministry. In addition, the ministry asked that I stay the operation of the order pending the disposition of its reconsideration request. On December 20, 2011, I granted an interim stay of Order PO-3010. On December 22, 2011, the ministry submitted its full

representations on their reconsideration request. On January 25, 2012, I provided the appellant with a copy of the ministry's representations and invited him to make representations in response. The appellant did not do so.

[4] In this decision, I find that the first and fourth severance on page 86 of the record is exempt from disclosure under section 14(1)(e).

ISSUES:

- A. Are there grounds under section 18.01 of the *Code of Procedure* to reconsider Order PO-3010?
- B. Is the information on page 86 of the record exempt under section 14(1)(e) of the *Act*?
- C. Was the ministry's exercise of discretion proper?

DISCUSSION:

A. ARE THERE GROUNDS UNDER SECTION 18.01 OF THE *CODE OF PROCEDURE* TO RECONSIDER ORDER PO-3010?

[5] Section 18 of the IPC's *Code of Procedure* sets out the grounds upon which the Commissioner's office may reconsider an order. Sections 18.01 and 18.02 of the *Code of Procedure* state:

- 18.01 The IPC may reconsider an order or other decision where it is established that there is:
 - (a) a fundamental defect in the adjudication process;
 - (b) some other jurisdictional defect in the decision; or
 - (c) a clerical error, accidental error or omission or other similar error in the decision.
- 18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

[6] The ministry submits that there was a fundamental defect in the adjudication process and that it has established the necessary ground for reconsideration set out in paragraph (a) of section 18.01. I summarize the ministry's representations as follows:

- My finding that the information on page 86 of the record is either "generalized administrative information" or "generalized or administrative information" is unclear and incomprehensible, thus rendering the Order fundamentally defective.
- The ministry's incontrovertible evidence points to a reasonable expectation of harm from disclosure of the record.
- This office's jurisprudence indicates that OPP training manual information is the type of information that can be withheld under section 14(1)(e)¹.

[7] The ministry also provided an affidavit from a Superintendent of the OPP with its reconsideration request supporting its position that the information on page 86 is exempt from disclosure under section 14(1)(e).

[8] I have reviewed the ministry's representations and my findings in Order PO-3010 on the application of the exemptions at sections 14(1)(e), (i) and (l) with respect to the information at issue on page 86. I find that my use of the terms "generalized administrative information" or "generalized or administrative information" without further elucidation rendered my reasoning unclear. By necessity, in order not to disclose the contents of the record, I used these terms to convey the type of information at issue on page 86. However, in using these terms and phrases without providing additional explanation, I agree with the ministry that the reasoning in Order PO-3010 with respect to the application of the section 14(1) exemptions is unclear. As a result, I agree that there was a fundamental defect in the adjudication process and the ministry has established sufficient grounds for a reconsideration of Order PO-3010.

B. IS THE INFORMATION ON PAGE 86 OF THE RECORD EXEMPT UNDER SECTION 14(1)(E) OF THE ACT?

Section 14(1)(e)

[9] Section 14(1)(e) states:

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

endanger the life or physical safety of a law enforcement officer or any other person;

¹ The ministry cites Order PO-2913 in support of this position.

[10] 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.)].

[11] 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*].

[12] A person's subjective fear, while relevant, may not be sufficient to establish the application of the exemption [Order PO-2003].

[13] The term "person" is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization [Order PO-1817-R].

[14] In support of its position that the information on page 86 is exempt under section 14(1)(e), the ministry submitted the following in its original representations:

The Ministry has withheld parts of pages 83 through 87 because these severed records contain detailed procedures for tear gas use, and firearm storage, repair and use. The Ministry believes that the widespread dissemination of these records could invite countermeasures from individuals who want to thwart law enforcement, and who, as a result of receiving these records might now have the knowledge to do so. The Ministry believes that if would-be-criminals have this sort of information, they may use it to take calculated risks about the available firepower of the OPP in any kind of altercation. The Ministry submits that this sort of disclosure puts OPP officers and the general public at risk.

[15] The ministry did not provide any evidence as to the harm that would occur should the specific information on page 86 of the record be disclosed until it submitted its reconsideration request. As stated above, the ministry provided an affidavit with its reconsideration request from a Superintendent who is the OPP Director of Corporate Communications and Executive Services, as well as Interim Commander of Operation Policy and Strategic Planning Bureau. The affiant speaks to the possible harm that could reasonably be expected to occur should the information be disclosed.

[16] The affidavit contains confidential information that cannot be set out in this order. However, the affiant discusses the significance of the information on page 86 and how it could be used by individuals wishing to thwart law enforcement officers. The first and fourth severance of page 86, relate to firearm policies for officers on patrol and firearm policies relating to repair and servicing. Based on my review of the information and the evidence provided in the affidavit, I find that section 14(1)(e) applies to the extent that disclosure of this information could reasonably be expected to endanger the life or physical safety of a law enforcement officer.

[17] The ministry did not provide me with the affidavit evidence during the inquiry into this appeal. It is unclear whether this was an oversight on the part of the ministry or if the ministry expected the harm to be apparent from either the record or from the general statement in its representations about the possible harm from disclosure. The ministry's general statement about the possible harm that would result from disclosure in regard to the policies and procedural manual was insufficient evidence of the harm of disclosure in section 14(1)(e). It is unfortunate that the ministry did not provide the affidavit evidence during the inquiry into this appeal.

[18] While I did not need to reconsider Order PO-3010 based solely on this new evidence, I have determined that the harm set out in section 14(1)(e) could reasonably be expected to occur should I order disclosure and uphold my finding in Order PO-3010, in its entirety. Accordingly, I find that section 14(1)(e) applies only to the first and fourth severance on page 86 and this information should not be disclosed to the appellant. However, the remaining portions of page 86 can be disclosed.

C. WAS THE MINISTRY'S EXERCISE OF DISCRETION PROPER?

[19] As I have found that portions of the information on page 86 are exempt under section 14(1)(e), I must consider the ministry's exercise of discretion to withhold it. The section 14(1)(e) exemption is discretionary and permits the ministry to disclose the information, despite the fact that it could withhold it. The ministry must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[20] 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

[21] 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)].

[22] As stated in Order PO-3010, the ministry submits that it properly exercised its discretion, taking into consideration the fact that disclosure of the information at issue could jeopardize the security and safety of OPP officers and the general public. Based on my review of the information at issue and the way in which the ministry applied the exemption, I find that the ministry properly exercised its discretion under section 14(1)(e). The ministry properly considered the interests protected by the exemption, the fact that the record did not contain the appellant's personal information, and the historical practice in disclosing this type of information. Accordingly, I uphold the ministry's exercise of discretion.

ORDER:

1. I uphold the ministry's decision to deny access to portions of the record on page 86 which I have identified on the highlighted copy of that page of record sent with this order. This includes the information I found exempt under section 14(1)(i) in Order PO-3010.
2. I order the ministry to disclose the remaining information on pages 80 – 90 (with the exception of the information exempt on page 86) to the appellant by **April 25, 2012** by providing him with a copy of the record.
3. In order to verify compliance with order provision 2, I reserve the right to require the ministry to provide me with a copy of the record sent to the appellant.

Original Signed By: _____

Stephanie Haly
Adjudicator

March 26, 2012