Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3065

Appeal PA09-332

Ministry of Community Safety and Correctional Services

March 23, 2012

Summary: The appellant made a request to the Ministry of Community Safety and Correctional Services for records relating to a child pornography investigation. Partial access was granted and the ministry relied on a number of exemptions in denying access to the remaining information. The appellant claimed that the public interest override at section 23 applied to the information. In its submissions as part of the inquiry, the ministry argued that issue estoppel applied to some of the information in the records, in addition to a number of exemptions. In this order, the adjudicator finds that issue estoppel does not apply and upholds the ministry's decision, in part, under sections 14(1)(c), 19 and 21(1). The remaining exemptions are not applicable and the public interest override does not apply. The ministry is ordered to disclose portions of the records to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, the definition of personal information in section 2(1), sections 14(1)(c), 14(1)(d), 14(1)(e), 14(1)(g), 14(1)(l), 15(a), 15(b), 19, 21(1), 23, *Municipal Act, 2001* S.O. 2001, c. 25, section 2.

Orders and Investigation Reports Considered: M-202, MO-2494, PO-2412, PO-2456, PO-2470, PO-2474, PO-2751, PO-2858-I.

Cases Considered: *Duncanson v. Ontario (Information and Privacy Commissioner)*, (1999) 175 D.L.R. (4th) 340, *Liquor Control Board of Ontario v. Magnotta Winery Corporation* 2010 ONCA 681, *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, *R. v. Mentuck*, [2001] 3 S.C.R. 442.

OVERVIEW:

[1] In 1999, police in Dallas, Texas closed down Landslide Productions, an American company, for selling child pornography. When the police seized the company's assets, they discovered a database containing more than 100,000 names, including over 2,000 from Canada. This database became the foundation for an international child pornography police investigation. In Canada, the investigation was called Project Snowball.

[2] In 2006, the Ministry of Community Safety and Correctional Services (the ministry) received two requests from the same requester for records relating to an investigation into child pornography. The first request was for briefing material regarding the National Strategy Briefing in Ottawa in 2001, and the second was for minutes, agendas and other records with respect to this Briefing. The ministry issued a decision which was appealed to this office by the requester, resulting in Order PO-2751.[1]

[3] During the inquiry stage of the appeal process leading to Order PO-2751, the ministry identified additional records which it claimed were non-responsive to the request. Order PO-2751 upheld the ministry's position with respect to the non-responsive records, with the exception of one record, in whole and another, in part.

[4] The ministry subsequently received a new request from the appellant for the nine non-responsive records listed in Order PO-2751.

[5] The ministry issued a decision providing partial access to these records, citing sections 14(1)(c), 14(1)(d), 14(1)(e), 14(1)(g), 14(1)(l), 15(a), 15(b), 19 and 21(1) of the *Act*.

[6] The appellant appealed this decision, resulting in the present appeal being opened.

[7] At the appellant's request, the appeal was placed on hold during the mediation stage pending the outcome of the Supreme Court of Canada's decision in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23. Once that decision was issued, the appellant requested that the appeal remain on hold, and subsequently asked that it be reactivated. The appeal was then reactivated and the mediation stage proceeded.

[1] Two appeal files were opened, and both appeals were disposed of in Order PO-2751.

[8] During mediation, the appellant advised that the ministry's search for responsive records was not an issue in the appeal. She also indicated that she was not interested in accused/suspect information; accordingly, pages 000001, 000002, 000003, 000012 (record 1) and 000013 (record 2) were removed from the scope of the appeal. Page 000103 (record 9) was disclosed in full and is also not at issue.

[9] The ministry advised that although the records at issue in this appeal were determined to be non-responsive to the earlier request, portions of these records are the same or contain very similar information to that which was found to be exempt in Order PO-2751. The ministry identified which portions of the records fell into this category for the mediator, who then relayed this information to the appellant. However, the appellant advised that she continues to object to all of the ministry's severances. Accordingly, all responsive records, in their entirety, remain at issue in this appeal.

[10] No other mediation was possible, and the appeal was moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. The adjudicator assigned to this appeal sought and received initial representations from both parties, which were shared in accordance with the IPC's *Practice Direction 7*. The appeal was then transferred to me to continue the inquiry. Further representations were received from the ministry and shared with the appellant, who also provided further representations.

[11] For the reasons that follow, I find that issue estoppel does not apply and I uphold the ministry's decision to deny access, in part. I also uphold the ministry's exercise of discretion and find that the public interest override does not apply.

RECORDS:

Page #	Related Record # per PO-2751	Description	Withheld in full or severed	Exemption(s)
14 – 32	3	Project Plan – final report, 9 May 2003	Severed	14(1)(c),14(1)(g), 14(1)(l), 15(a) and (b), 19
33 – 57	4	Funding Request, 13 December 2000	Severed	14(1)(c), 14(1)(d), 14(1)(l), 19
58 – 67	5	Memo with minutes of 4 January 2001 meeting	Severed	14(1)(c), 14(1)(e), 14(1)(g), 14(1)(l), 15(a) and (b)
68 – 85	Additional Record	Operational Plan	Severed	14(1)(c), 19

86 – 91	6	Memo with minutes of 13 February 2001 meeting	Withheld in full	14(1)(c), 14(1)(e), 14(1)(g), 14(1)(l), 15(a) and (b), 19, 21(1)
92 – 94	7	Signature sheet for investigative package received	Severed	14(1)(c), 14(1)(e), 14(1)(g), 14(1)(l), 15(a) and (b)
95 – 102	8	Summary with fax, 8 May 2000	Severed	14(1)(c), 14(1)(l), 15(a) and (b), 19

ISSUES:

A: Does the doctrine of issue estoppel or *res judicata* apply in this appeal?

B: Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

C: Does the mandatory exemption at section 21(1) apply to the information at issue?

D: Do the discretionary exemptions at section 14(1) (c), (d), (e), (g) and (l) apply to the records?

E: Does the discretionary exemption at section 15 apply to the records?

F: Does the discretionary exemption at section 19 apply to the records?

G: Did the institution exercise its discretion under sections 14, 15 and 19? If so, should this office uphold the exercise of discretion?

H: Is there a compelling public interest in disclosure of the records as contemplated by section 23 that clearly outweighs the purpose of the sections 15 and 21 exemptions?

DISCUSSION:

A: Does the doctrine of issue estoppel or *res judicata* apply in this appeal?

[12] The ministry has raised the doctrine of issue estoppel and submits that it applies to some of the records at issue. In particular, the ministry states that certain portions of the records at issue in this appeal are identical or substantially the same as portions of records that were found to be exempt in Order PO-2751.

[13] The ministry submits that a three-part test has been developed as a threshold for issue estoppel. The three requirements that must be met are that the same question must have already been previously decided, the decision creating the estoppel must be final and the parties must be the same parties in both proceedings. The ministry states:

> First, the same appellant already tried to access records that are the same or substantially the same. To the extent that there may be differences in some of the wording, these differences are superficial and relate to a choice of words or the fact that the records appear in different documents, albeit all related to, and prepared for Project Snowball. From a FOIPPA perspective, we contend that these kinds of differences are irrelevant, especially as these records were prepared for the same law enforcement investigations.
>
> Second, the IPC already upheld the Ministry's decision to exempt these substantially similar or identically worded records in Order PO-2751 made in January 2009 . . . The Ministry's position is that the same reasons apply for exempting the records in 2009 as apply now. In other words, the factual circumstances that led to the Ministry exempting the records in the last appeal that led to Order PO-2751 still exist, and there is no reason to have the adjudicated once again.
>
> Third, the parties in this appeal are the same ones as in Order PO-2751.

[14] In addition, the ministry submits that the policy objectives in support of issue estoppel are applicable in this case. Those objectives are, the ministry states, achieving judicial finality, and avoiding duplicative litigation, inconsistent results and undue costs.

[15] The appellant argues that parts one and two of the three-part test have not been met and, therefore, issue estoppel does not apply. The appellant submits that Order PO-2751 did not determine whether any exemptions apply to the records at issue in the current appeal. Instead, it was found that the records now at issue were non-responsive to the requests that formed the basis of the previous appeals. Whether any exemptions apply to the records presently at issue, the appellant argues, was not even considered, let alone decided, in the previous order.

[16] The appellant also submits that, even if the records are the same or similar to portions of the records decided upon in the appeal leading to Order PO-2751, this is not sufficient to meet the first part of the test. The appellant states that previous orders have found that a record may or may not be exempt depending on the form, context or circumstances in which the record or information appears.[2]

[2] Order MO-2494 and Interim Order PO-2858-I.

[17] The appellant further states that there are different questions raised in this appeal, and relies on the fact that the ministry has not relied on exactly the same exemptions as in the previous appeals.

[18] Lastly, with respect to part two of the test, the appellant submits that there was no decision at all as to the applicability of the exemptions with respect to the records at issue, let alone a final one.

[19] In reply, the ministry submits that Order MO-2494, which the appellant is relying on to support her position that the doctrine of issue estoppel does not apply to the records at issue, can be distinguished from this appeal. Order MO-2494, the ministry states, related to a proposal submitted in response to a request for proposals, which later became part of a contractual agreement. The record did not qualify for issue estoppel because the nature of the record changed once it went from being a stand-alone proposal to part of a larger commercial agreement.

[20] In contrast, the ministry states, the records at issue in this appeal have not changed in form, context or circumstances as did the record in Order MO-2494. In addition, the ministry submits that the record in Order MO-2494 was disposed of pursuant to a mediated settlement. Mediation, the ministry argues, is not a final decision for the purpose of issue estoppel, whereas Order PO-2751 was a final decision and disposed of portions of the records that are the same as in this appeal.

Findings with respect to Issue Estoppel

[21] Section 52(1) states:

> The Commissioner may conduct an inquiry to review the head's decision if,
>
> > (a) the Commissioner has not authorized a mediator to conduct an investigation under section 51; or
> >
> > (b) the Commissioner has authorized a mediator to conduct an investigation under section 51 but no settlement has been effected.

[22] In Order PO-2858-I, Senior Adjudicator John Higgins set out the historical approach this office has taken with respect to the doctrine of issue estoppel. He stated:

> In Order P-1392, Adjudicator Anita Fineberg concluded that "the doctrine of issue estoppel does not apply to requests or appeals under the *Act*," but she decided that this office could decline to conduct an inquiry under

section 52(1) "… if the appeal involves the same parties, issues and records which had previously been considered."

After Order P-1392 was issued, several judgments clarified that issue estoppel could apply to administrative proceedings, and these decisions (*Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267, 112 D.L.R. (4th) 683 (Ont. C.A.) and *Minott v. O'Shanter Development Co.*, (1999), 42 O.R. (3d) 321 (C.A.)) are mentioned in Orders PO-1676 and MO-1907. Neither of those orders reaches a definitive conclusion about whether issue estoppel applies to appeals under the *Act*.

In Order MO-1907, referred to by the OPG, Adjudicator Sherry Liang excluded records from the scope of an appeal on the basis that the same records had been the subject of a previous appeal involving the same parties. She stated:

> This appeal and Appeal No. MA-010272-2 involve the same institution (the Board) and the same appellant. Orders MO-1574-F and 1595-R, issued in the context of Appeal No. MA-010272-2, decided the issue of the appellant's entitlement to have access to a number of records, approximately 80 of which are also before me. Whether as a matter of issue estoppel, or the application of section 41(1) (the equivalent to section 52(1) of the provincial *Act)*, I find that the policy of judicial finality would be undermined if I were to review the issue of access to these 80 records once again. These records are therefore excluded from the scope of this appeal.

In Order MO-1907, Adjudicator Liang quotes the following passage from *Minott* (cited above):

> Issue estoppel has pervasive application and extends not just to decisions made by courts but, as this court's judgment in *Rasanen* affirms, also to decisions made by administrative tribunals. Whether the previous proceeding was before a court or an administrative tribunal, the requirements for the application of issue estoppel are the same.

In my view, therefore, issue estoppel would provide a proper basis for concluding that an appeal under the *Act* ought not to proceed in respect of all or part of a requested record if the criteria in *Danyluk* are satisfied. The OPG's argument under section 52(1) is made on exactly the same

> basis as its issue estoppel argument, and therefore, the question is whether the three conditions enunciated by Justice Binnie have been met in this case. To reiterate, the three conditions are:
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> (1) that the same question has been decided,
>
> (2) that the judicial decision which is said to create the estoppel was final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies."

[23] I agree with and adopt Senior Adjudicator Higgins' approach to the doctrine of issue estoppel. For the reasons that follow, I am not satisfied that the first condition has been met, and for this reason, I conclude that the doctrine of issue estoppel does not apply.

[24] As set out above, the first requirement of Justice Binnie's three-part test is that the same question has been decided. In Order PO-2751, Senior Adjudicator Higgins determined that the records at issue in this appeal were non-responsive to the requests in the appeals that resulted in the order. I have reviewed both sets of records, that is, the records that formed the basis of Order PO-2751 and the records at issue in this appeal. I note that there is duplication of some of the content, as stated by the ministry in its representations. However, I am not satisfied that the first part of the three-part test has been met, as it cannot be said that the same question has been decided. Senior Adjudicator Higgins did not consider the possible application of any exemptions with respect to the records at issue in this appeal. The question he decided was whether they were responsive to the requests in the previous appeals.

[25] Therefore, I find that issue estoppel does not apply in this appeal and I will consider the exemptions claimed by the ministry to all of the records at issue.

B: Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[26] The ministry submits that page 86 contains information that qualifies as personal information. In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,

> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[27] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

[28] Section 2(3) also relates to the definition of personal information and states:

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[29] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[3]

[30] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[4]

[31] As stated above, the ministry submits that there is personal information in one record, which is a note that was prepared by a Toronto police officer, attached to minutes of a meeting. The personal information, the ministry states, consists of the personal views of the officer about himself and others. The personal views, the ministry argues, are not about work, or about policing, but stem from and relate to the friendships that formed between him and a small group of other officers who attended the same meeting on Project Snowball.

[32] The appellant disputes the ministry's position and submits that the views of a police officer about himself and others on an investigative team do not constitute "personal information" within the meaning of the *Act*. The note, the appellant states, seems to have been made in the course of the police officer's professional duties and reveal that officer's analysis of himself and members of the Project Snowball team. Such notes, the appellant argues, do not constitute "personal information."

[33] In reply, the ministry submits that an employee's views can be their personal information if those views reveal something of a personal nature about the individual. Whether the record is appended to meeting minutes or whether the police officer is part of an investigative team, the ministry submits, is not determinative.

[34] I have reviewed the record and I find that there are some limited portions that reveal something of a personal nature about the police officer who drafted the record. In particular, I find that the police officer states his personal opinions or views in the record, which would bring it within the ambit of paragraph (e) of the definition of personal information set out in section 2(1) of the *Act*.

C: Does the mandatory exemption at section 21(1) apply to the information at issue?

[35] Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

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[3] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[4] Orders P-1409, R-980015, PO-2225 and MO-2344.

[36] If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21. The ministry submits that the information does not fit within any of paragraphs (a) to (f) of section 21(1). I agree that sections 21(1)(a) to (e) do not apply in this appeal.

[37] The ministry further submits that it has not disclosed the personal information contained in the record on the grounds that it would constitute an unjustified invasion of personal privacy under section 21(1)(f). Section 21(1)(f) states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

[38] The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1)(f). The ministry's position is that the police officer's personal information is "highly sensitive," and it concludes that the factor at section 21(2)(f) should be considered and therefore, weighs against the disclosure of his personal information.

[39] Section 21(2)(f) states:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> > the personal information is highly sensitive;

[40] The ministry states that the police officer expressed his private views with a legitimately founded belief that his personal information would not be made public, but that it would only be shared between him and his colleagues. The ministry is of the view that the release of this information would cause the officer distress because his views could be taken out of context, as they are unrelated to the request and because individuals who write personal things about themselves do not expect their personal views to be widely disseminated.

[41] The appellant disagrees with the ministry's position and notes that the ministry is not relying on a presumed invasion of privacy pursuant to section 21(3) of the *Act*. The appellant submits that police officers are well aware that their work notes are in many instances subject to disclosure, perhaps with portions severed to remove identifying personal information, such as victims or witnesses and that the argument that the personal information at issue is "highly sensitive" should be rejected. In addition, the appellant states that to the extent that the personal information may assist the public in

scrutinizing Project Snowball, which includes scrutiny of the "actors" therein, this factor ought to have been considered by the ministry.

[42] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[5] It is not sufficient that release might cause some level of embarrassment to those affected. [6]

[43] In my view, the ministry has not met the threshold required by section 21(2)(f). Having reviewed the personal information at issue, I find that it is not "highly sensitive." In fact, in my view, the limited personal information in the record is quite innocuous. I am not convinced that its disclosure would cause the police officer significant personal distress or even embarrassment. Accordingly, I find that the factor listed in section 21(2)(f) has no application to the personal information on page 86.

[44] Furthermore, I do not accept the ministry's argument that the police officer should expect confidentiality of his personal information contained in records he created during the course of his work duties. This is a factor weighing against the disclosure of personal information that has been supplied by the individual to whom the information relates in confidence, regardless of whether the ministry raised it or not because section 21(1) is a mandatory exemption.

[45] The appellant argues that the factor at section 21(2)(a) should have been considered by the ministry. Section 21(2)(a) is a factor weighing in favour of disclosure and applies where disclosure is desirable for the purpose of subjecting the activities of the government and its agencies to public scrutiny. Having found that the limited personal information in the record is innocuous, I find that its disclosure would not be of any assistance in subjecting the activities of the government or Project Snowball to public scrutiny.

[46] In summary, I find that the factor at section 21(2)(f) weighing against disclosure is not applicable to the personal information. Similarly, I find that the factor favouring disclosure at section 21(2)(a) is equally inapplicable to the personal information at issue. As there are no factors favouring the disclosure of this personal information, I find that its release would result in an unjustified invasion of personal privacy and the mandatory exemption in section 21(1) applies to it. However, as the exemption applies to only part of the record, I will consider the other exemptions claimed for the remaining portions of the record that are not exempt under section 21(1).

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[5] Orders PO-2518, PO-2617, MO-2262 and MO-2344.
[6] Order P-434.

D: Do the discretionary exemptions at section 14(1) (c), (d), (e), (g) and (l) apply to the records?

[47] The ministry is relying on sections 14(1) (c), (d), (e), (g) and (l) to deny access to some of the records. Sections 14(1)(c), (d), (e), (g) and (l) state:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (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;
>
> (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organization or persons;
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

[48] 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)

[49] The term "law enforcement" has been found to apply to a police investigation into a possible violation of the *Criminal Code*.[7]

[50] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[8]

[51] The ministry submits that it is settled jurisprudence that "law enforcement" includes police investigations into possible violations of the Criminal Code,[9] which was the purpose of Project Snowball. I agree with the ministry that the records for which section 14 is claimed relate to the Project Snowball police investigation and are, therefore, related to "law enforcement." The appellant does not dispute this.

[52] Turning to the threshold required to be met to exempt disclosure under section 14, 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.[10]

[53] 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.[11]

Section 14(1)(c): investigative techniques and procedures

[54] In order to meet the "investigative technique or procedure" test, the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public.[12]

[55] The ministry is relying on section 14(1)(c) for pages 20-22, 24, 25, 30, 37, 40, 42, 47, 54, 58-67, 69-70, 73, 75, 79-80, 83, 85, 86, 87-94 and 96-102. The ministry submits that the disclosure of the above records would reveal detailed information about the investigative techniques and procedures used in Project Snowball, including: how Project Snowball suspects were targeted (pages 20-22, 25); how information was stored and shared (pages 25, 58); what security procedures were put in place to

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[7] Orders M-202, PO-2085.
[8] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[9] Order PO-2967.
[10] 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.).
[11] Order PO-2040; Ontario (Attorney General) v. Fineberg.
[12] Orders P-170, P-1487, MO-2347-I and PO-2751.

protect the information (pages 93, 94); and how future projects of this type might be executed (page 30).

[56] In addition, the ministry states:

> [T]he disclosure of the record would reveal a broad spectrum of techniques and procedures, including both those used by the Dallas police and Canadian law enforcement authorities, those used by individual police services when they targeted suspects in their own jurisdictions, along with the specific techniques and procedures that were developed by police services when they collaborated on Project Snowball.
>
> The [m]inistry submits that these techniques and procedures are not widely known, and that they could be used for future investigations of this type. The ministry submits that the release of these records could assist offenders in evading prosecution, and could eliminate the element of surprise which law enforcement officials have long used to catch criminals operating on the internet who do not think they are being targeted by police.
>
> [emphasis added]

[57] The appellant submits that in order to demonstrate that the records should not be disclosed, the ministry must provide "detailed and convincing evidence" that disclosure "could reasonably be expected to" cause the kind of harm contemplated by the exemptions relied on. There must, the appellant states, "exist a reasonable expectation of probable harm. The mere possibility of harm is not sufficient. At a minimum, the [p]olice must establish a clear and direct linkage between the disclosure of the specific information and the harm which is alleged."[13] In addition, the appellant states that the ministry must provide sufficient information and reasoning to the adjudicator to permit him/her to "make an informed assessment of the reasonableness of the expectations required by s. 14."[14]

[58] The appellant argues that the ministry has not satisfied the above criteria with respect to any of the section 14 exemptions it relies on. In addition, the appellant notes that given the public interest override cannot apply to the law enforcement exemption, the need to exempt records only where the ministry has presented clear and direct evidence of probably harm is even more acute.

[59] With respect to section 14(1)(c), the appellant submits that the ministry's representations do not provide sufficient information for an adjudicator to make an informed assessment of the reasonableness of the harm alleged. In addition, the appellant submits that the ministry has not demonstrated that the techniques or

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[13] Order M-202.
[14] *Ontario (A.G.) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.) at p. 4.

procedures, which are over a decade old, are currently in use or likely to be used in the future, as is required under section 14(1)(c). There have been, the appellant states, numerous and substantial changes in the Internet since 2001.

[60] The appellant further argues that an investigative technique or procedure is not simply any procedure. It must be such that, if disclosed, would hinder or compromise its effective utilization. A technique or procedure, the appellant states, that is generally known to the public would not normally be compromised by disclosure and, therefore, not exempt.[15] The appellant states:

> Further, where the techniques and procedures contained in the records are known to the public through "common sense perceptions" or "similar situations depicted in popular films and books,"[16] they ought not to be exempted from disclosure.[17]

[61] In reply, the ministry submits that, while there may have been substantial changes in the Internet since 2001, the nature by which online child pornography offences are committed remains largely the same. It consists, the ministry states, of the downloading or sharing of images depicting children that are of a sexually explicit nature. The ministry states that the investigative techniques used by the OPP a decade ago remain in use today.

Findings with respect to section 14(1)(c)

[62] For the reasons that follow, I uphold the section 14(1)(c) exemption with respect to pages 20, 21, 22, 24, 25, 37, 40, 42, 47, 54, the middle portion of 58, the bottom portion of 59, 60, 61-64, 69, 70, 73, 75, 79, 80, 83, 85, 86-91 and 96-102. I also note that there is a substantial amount of duplication of information contained in the above pages. Having reviewed the records, I am satisfied that the records or portions of records as the case may be, consist of detailed information about investigative techniques and procedures used to investigate child pornography.

[63] In Order PO-2751, Senior Adjudicator Higgins considered the application of the exemption at section 14(1)(c) in the context of the child pornography investigation that is the subject matter of this appeal. Similar to this appeal, the appellant argued that where the techniques and procedures contained in the records are known to the public through "common sense perceptions" or "similar situations depicted in popular films and

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[15] Order P-170.
[16] *R. v. Mentuck*, [2001] 3 S.C.R. 442 at para. 43 (*Mentuck*).
[17] As per the appellant's representations in appeals PA06-286 and PA06-286-2, a number of the techniques used by the police are well known and/or have been reported in the media and in police press releases.

books,"[18] they ought not to be exempted from disclosure.[19] Senior Adjudicator Higgins considered the arguments of both parties and stated:

> Given the extremely serious nature of the crimes of producing or possessing child pornography, and its very distressing social and personal consequences, I believe it would be inconsistent with the purpose of this exemption to go too far in speculating what might be a "common sense" perception or "similar situation depicted in books or the media" as discussed in *Mentuck*. In my view, any information of this nature in the records that has not been clearly identified in the public domain, or is not a sufficiently obvious technique or procedure to clearly qualify as being subject to inference based on a "common sense perception" as referred to in *Mentuck*, falls under this exemption.
> . . .
>
> I am also satisfied that the strategies for catching those involved in child pornography identified in the records are "investigative" rather than "enforcement" techniques, since they pertain to methods of gathering evidence to assist in determining whether the individuals identified as clients of the American website should be charged with *Criminal Code* offences.
>
> In addition, I have considered the appellant's arguments about the age of the records and the advances in technology since these records were prepared. However, having carefully reviewed the records and the representations, I am satisfied with the evidence of the Ministry that these techniques are currently in use.
> . . .
>
> As noted above, however, because of the serious crimes being investigated, I have been cautious in considering what would be a "common sense perception." In my view, therefore, the conclusions I have reached in applying section 14(1)(c) in this appeal are equally consistent with the lower evidentiary threshold for section 14(1)(e) articulated in the *Office of the Worker Advisor* decision . . . That standard only requires the Ministry to demonstrate a reasonable basis for believing that endangerment will result from disclosure, and that its concerns are not frivolous or exaggerated. Under that standard, I would not exempt any additional information, having taken the serious nature of child pornography-related crimes into account in reaching my conclusions.

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[18] *Mentuck* at para. 43.

[19] As per the appellant's representations in appeals PA06-286 and PA06-286-2, a number of the techniques used by the police are well known and/or have been reported in the media and in police press releases.

[64] I agree with and adopt Senior Adjudicator Higgins' approach to this appeal. In my view, the records cited above contain investigative techniques that are currently in use and their disclosure would reveal these techniques, which could impede future investigations.

[65] Section 10(2) of the *Act* requires that non-exempt information that can "reasonably be severed" without disclosing exempt information must be disclosed. I do not uphold the exemption in relation to page 30, the top and bottom of page 58, the top and middle of page 59, and pages 65-67 and 92-94.

[66] The portion of page 30 for which this exemption was claimed, in my view, does not reveal an investigative technique. Instead, it consists of general evaluative information about the investigation. Therefore section 14(1)(c) does not apply to this record. As no other exemption has been claimed, I will order the ministry to disclose this portion of page 30 to the appellant.

[67] The top and bottom portions of page 58 consist of the name, title and contact numbers of one of the investigators involved in Project Snowball. The top and middle portions of page 59 contain the name of one of the investigators, a general statement about the nature of a document and the attendance of one of the police forces at a meeting. Pages 65-67 and 92-94 consist of the names, ranks, signatures and contact numbers of various investigators involved in carrying out Project Snowball. I find that this information does not reveal or contain any investigative techniques. Therefore, section 14(1)(c) does not apply to these records. However, I will be considering the other exemptions the ministry has claimed for these records later in this order.

Section 14(1)(d): confidential source

[68] The ministry is claiming section 14(1)(d) with respect to the bottom part of page 50, which lists the name of a member of the OPP's Child Pornography section who worked as an on-line Internet investigator for Project Snowball. The ministry submits that police on-line investigators are a confidential source of information used to track on-line uses of child pornography. The identity of this member of the OPP is not publicly known, the ministry states and it is critical that the identity not be revealed.

[69] The appellant submits that section 14(1)(d) contemplates potential scenarios; namely where the release of information would disclose the identity of a confidential source in respect of a law enforcement matter or disclose information provided only by the confidential source. The appellant states that the ministry only raises the first scenario in its representations.

[70] The appellant submits that in order for this exemption to apply, the ministry must provide "detailed and convincing" evidence to establish a reasonable expectation

of harm and evidence of the circumstances in which the informant provided the information to the institution in order to establish confidentiality.[20] The appellant submits that the ministry has not provided evidence concerning the surrounding circumstances to explain how the individual named in the record qualifies as a confidential source.

[71] The appellant states:

> Previous orders have found that section 14(1)(d) is a recognition of the common law informer privilege.[21] Police agents – such as the member of the Child Pornography [s]ection the [m]inistry seeks to protect – are not entitled to the benefit of informer privilege at common law. The privilege exists "to protect and encourage citizens who come forth with important information. It is the duty of individual police officers to provide such information.[22]
>
> [emphasis added]

[72] In reply, the ministry submits that the appellant's interpretation of section 14(1)(d) is inconsistent with the fundamental principles of statutory interpretation. The ministry submits that the wording of section 14(1)(d) does not support limiting the common law informer privilege and that the Ontario Court of Appeal rejected this type of narrow interpretation of a different exemption in the *Act* in *Liquor Control Board of Ontario v. Magnotta Winery Corporation.*[23]

[73] The ministry states that the Court of Appeal overturned the IPC's interpretation of the second branch of section 19 of the *Act* as being limited to records that fall within the ambit of litigation privilege. The Court, the ministry states, held that when the legislature wished to exempt records based on privilege, it did so using clear language and that the second branch of section 19, which states that records are exempt if "prepared by or for Crown counsel . . . for use in litigation" should not be taken to be limited to records that fall within the common law litigation privilege.

[74] The ministry argues that applying the Court of Appeal's reasoning, if the legislature wished for section 14(1)(d) to be limited to common law informer privilege, it would have done so using clear language. Section 14(1)(d), the ministry states, does not refer to this privilege and for that reason, ought to be interpreted exactly as it is written, which includes applying it to records that may not be subject to common law informer privilege.

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[20] Order PO-2412.
[21] Order PO-2591.
[22] Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 3rd ed. (Markham: LexisNexis, 2009) at § 15.99.
[23] 2010 ONCA 681 (*Magnotta*).

[75] In sur-reply, the appellant states that the *Magnotta* case is of no assistance to the ministry and that the principles of statutory interpretation referred to in *Magnotta* support the appellant's position that section 14(1)(d) is not directed at police investigators, but rather at third party sources of information. In addition, the appellant submits that the ministry's interpretation of section 14(1)(d) is not plausible, does not promote the legislative purpose of the section, and is not an acceptable interpretation considering the overall legislative context.

[76] First, the appellant submits that a police investigator cannot plausibly be seen as a "confidential source of information *in respect of a law enforcement matter*," as a "law enforcement matter" includes "policing" under section 2(1) of the *Act*.

[77] Second, the appellant submits that the purpose of the first portion of section 14(1)(d) is to protect the identities of confidential police informants, encouraging the creation and maintenance of these relationships. An OPP member does not provide information in exchange for a promise of confidentiality, but rather as a result of his/her employment duties.

[78] Third, the appellant submits that a review of section 14 as a whole demonstrates that it is not reasonable to interpret section 14(1)(d) as including police investigators. Other subsections of section 14 apply to circumstances where disclosure of a record would interfere with aspects of law enforcement[24] or would endanger the safety of a law enforcement official.[25] Therefore, the appellant argues, the ministry's interpretation of section 14(1)(d) is not consistent with the overall legislative context of section 14(1)(d).

Findings with respect to section 14(1)(d)

[79] In order for the ministry to rely on section 14(1)(d) of the *Act*, the definition of "law enforcement", in section 2(1) must be considered in assessing whether the exempt information could reasonably be expected to disclose the identity of a confidential source of information *in respect of a law enforcement matter*, which includes policing, or disclose information furnished only by the confidential source.

[80] The exemption in section 14(1)(d) may apply in two different sets of circumstances, namely, where disclosure could reasonably be expected to:

(1) disclose the identity of a confidential source of information in respect of a law enforcement matter, or

(2) disclose information furnished only by the confidential source.

[24] Sections 14(1)(a), (c), (g) or (l) of the *Act*.
[25] Section 14(1)(e).

[81] Having reviewed the record, only the first set of circumstances applies. The ministry argues that the identity of the OPP's on-line investigator is subject to this exemption and to the informer privilege at common law. In order for this exemption to apply, the ministry must establish a reasonable expectation that the identity of the source, an OPP officer participating on-line in a child pornography investigation, would remain confidential.[26]

[82] In Order PO-2412, Senior Adjudicator Higgins found that police officers working in a casino and employees of the casino were not confidential sources of information as contemplated by section 14(1)(d). I agree with and adopt that reasoning for the purpose of this appeal. I also find that the common law informer privilege does not apply to police officers acting in the course of their duties for purposes of this *Act*. The purpose of section 14(1)(d) is to protect the identity and information provided by citizens in respect of a law enforcement matter. Section 14(1)(d) is not designed to protect the identity of police officers engaged in their duties. I agree with the appellant that there are other subsections of section 14 that may apply to protect police officers who provide confidential information.

[83] Therefore, I find that section 14(1)(d) is not applicable in this appeal. The ministry has claimed section 14(1)(l) for this record, which I will consider below.

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

[84] The ministry argues the application of section 14(1)(e) for the severed portions of pages 65, 66, and 67, which consist of the rank, name and contact numbers of various investigators involved in Project Snowball. Similarly, this exemption is being claimed for portions of pages 92, 93 and 94, which also consist of the name, signature and contact number of various investigators involved in Project Snowball. In addition, the ministry is claiming section 14(1)(e) with respect to page 59. I have already found some of the information on page 59 to be exempt under section 14(1)(c). The remaining portions of page 59 consist of the name of an officer involved in Project Snowball, as well as general information about the nature of a document used at a meeting and information about attendance at the meeting.

[85] The ministry submits that it 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. The ministry states that the above pages contain the names of police officers from different police services across Canada who worked on Project Snowball. The ministry submits that it is conceivable that these officers could be involved in undercover operations or other police work where the disclosure of their names could endanger their lives or safety. In addition, the ministry

[26] Order MO-1416.

argues, as it did not consult with the police services that employ these officers, it believes that it should not be identifying them.

[86] The ministry states:

> In *Duncanson v. Ontario (Information and Privacy Commissioner)*,[27] the Divisional Court upheld Order M-913, when the IPC ruled that the identification of police officers could, depending on what they do, make their work more dangerous such that their names should be withheld.[28] Since we do not know whether or not the disclosure of the names of police officers listed in the above-noted records could cause them harm, we have withheld them.

[87] The appellant submits that the test for section 14(1)(e) was set out by the Court of Appeal as follows:

> 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.[29]

[88] The appellant states that the ministry has only indicated that it is "conceivable" that some of the officers identified in the records could be involved in undercover operations or other work such that disclosure of their names could endanger their safety. The ministry, the appellant argues, admits it has not attempted to determine whether either of those scenarios actually exists with respect to the named officers. The appellant submits that, in these circumstances, there cannot be a "reasonable" expectation of harm.

[89] The appellant also distinguishes *Duncanson*, because in that case the appellant sought a list of all police officers on the force. In that case, the police acknowledged that:

> Had the requester asked for the names of specific individuals who had been involved in specific actions or recorded certain things on behalf of the Service, obviously our response would have been different and we would probably not have objected to the provision of this information.[30]

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[27] (1999), 175 D.L.R. (4th) 340.
[28] Ibid. at para. 4.
[29] *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)*, [1999] O.J. No. 4560 at para. 25.
[30] See note 20.

[90] In addition, the appellant states that she is seeking information relating to the specific actions of specific individuals in relation to a specific project, arguing that there are serious questions about Project Snowball and that she has a legitimate interest in knowing the identities of the officers and agencies involved. Lastly, the appellant submits that some or all of the withheld names of the police officers have already been publicly disclosed.[31]

Findings with respect to section 14(1)(e)

[91] I have reviewed the news articles and press releases provided by the appellant and there are references to particular police officers in those items. However, I note that the investigators listed in the records are not the same as those identified in the press items.

[92] I have carefully considered both parties' representations. I find that the ministry has not provided sufficient evidence to establish a reasonable basis for believing that endangerment of the investigators will result from the disclosure of their name, title and contact number.

[93] Section 14(1)(e) of the *Act* gives an institution the discretion to refuse to disclose a record if doing so could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person. The quality and cogency of the evidence that an institution must adduce to prove that the section 14(1)(e) exemption applies is not as stringent as is required for the other section 14 exemptions, which require "detailed and convincing evidence." 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, it must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated.[32]

[94] In my view, the ministry's representations amount to a paraphrasing of section 14(1)(e) rather than evidence as to how or why disclosure of the withheld information in the records at issue could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person. Although the nature of the section 14(1)(e) exemption allows an institution to submit evidence that is less stringent than that required to satisfy the other section 14 exemptions, an institution must still provide some evidence beyond a mere paraphrasing of the words of the exemption. The ministry states in its representations that it does not know if the disclosure of this information could cause harm. In my view, the ministry's generic submissions on section 14(1)(e) do not meet this minimum threshold.

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[31] The appellant refers to the news articles and press releases included with her representations in appeals PA06-286 and PA06-286-2.

[32] 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.).

[95] Therefore, I do not uphold this exemption. The ministry has claimed further exemptions in denying access to these records, which I will also consider in this order.

Section 14(1)(g): law enforcement intelligence information

[96] This exemption is being claimed for the portions of pages 58 and 59 and for pages 65-67 and 92-94.

[97] The ministry states that pages 58, 59 and 65-67 form part of the minutes of a meeting hosted by the Criminal Intelligence Service of Ontario, which is part of the ministry. Pages 92-94 are related to the minutes of a meeting held between law enforcement officers to discuss Project Snowball.

[98] The ministry submits that these records relate to law enforcement intelligence because they pertain to "information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime . . .[33] The ministry also submits that the disclosure of the records could lead to the key harm of law enforcement agencies no longer sharing information for fear that what they discuss between each other could be subject to disclosure under the *Act*. Law enforcement agencies, the ministry states, must be able to speak frankly when they are working together on gathering or sharing intelligence information.

[99] The appellant submits that the definition of intelligence information also states that the information is distinct from that compiled and identifiable as part of the investigation of a specific occurrence.[34]

[100] In addition, the appellant submits not all information gathered by police in a covert manner can be "intelligence" information and that such a reading would result in a blanket exemption for all information held by police. The language of section 14(1)(g), the appellant argues, limits the application of the exemption to intelligence information "respecting organizations or persons."

[101] Further, the appellant submits that the ministry has failed to provide "detailed and convincing" evidence of probable harm and that the ministry's concerns about agencies not sharing information with the OPP is speculative.

Findings with respect to section 14(1)(g)

[102] The term "intelligence information" means information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the

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[33] Order PO-2470. The ministry states that this definition of intelligence information that has been accepted in a number of IPC orders.
[34] Order M-202.

detection and prosecution of crime or the prevention of possible violations of law. It is distinct from information compiled and identifiable as part of the investigation of a specific occurrence.[35]

[103] Order M-202 offers the following background information before adopting the above definition:

> The Williams Commission in its report entitled Public Government for Private People, the Report of the Commission on Freedom of Information and Protection of Privacy/1980, Volume II at pages 298-99, states:
>
> > Speaking very broadly, intelligence information may be distinguished from investigatory information by virtue of the fact that the former is generally unrelated to the investigation of the occurrence of specific offenses. For example, authorities may engage in surveillance of the activities of persons whom they suspect may be involved in criminal activity in the expectation that the information gathered will be useful in future investigations. In this sense, intelligence information may be derived from investigations of previous incidents which may or may not have resulted in trial and conviction of the individual under surveillance. Such information may be gathered through observation of the conduct of associates of known criminals or through similar surveillance activities.

[104] Having reviewed the records carefully, I find that the information at issue for which this exemption has been claimed does not meet the definition of "intelligence information." It is not information that was gathered by the police in a "covert" manner such as the use of surveillance. As previously set out, pages 65, 66, 67, 92, 93 and 94 consist of the name, rank, signature and contact number of various investigators involved in Project Snowball.

[105] The top and bottom portions of page 58 set out the name and contact information of one of the officers involved in Project Snowball. Page 59 sets out the name of an officer involved in Project Snowball, as well as general information about the nature of a document and information about one party's attendance at the meeting in question.

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[35] Orders M-202, MO-1261, MO-1583, PO-2751; see also Order PO-2455, confirmed in *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.).

[106] The information is essentially a record of who attended meetings related to the Project Snowball investigation. In my view, in addition to being information that was not gathered in a "covert" manner, it is also information that relates to a specific investigation; namely Project Snowball.

[107] Therefore, as I have already upheld section 14(1)(c) with respect to information that could reveal investigative techniques, I find that the exemption in section 14(1)(g) does not apply to those portions of the records not already found exempt under section 14(1)(c). The ministry has claimed further exemptions in denying access to these records, which I will also consider in this order.

Section 14(1)(l): commission of an unlawful act or control of crime

[108] The ministry is claiming section 14(1)(l) with respect to pages 21-24, 25, 50, 54, 58, 59, 60-67, 85-94 and 96-102. The ministry submits that the disclosure of these records could hamper the control of crime related to child pornography because the disclosure of these records would reveal detailed information about police investigative techniques. For this reason, the ministry states, it has also claimed section 14(1)(c) for all of the above records, except page 50.

[109] The ministry submits that in Order PO-2751, this office found that records it upheld as exempt under section 14(1)(c) could also be exempt under section 14(1)(l) because these records "contain detailed information about investigative techniques that is not already in the public domain or sufficiently obvious to be inferred," and that disclosing them could facilitate internet-based exploitation crimes. The ministry submits that this same reasoning applies to the records for which the ministry has claimed section 14(1)(c), meaning that they could also be exempted under section 14(1)(l).

[110] The appellant submits that the ministry has not provided "detailed and convincing" evidence that the release of the records could reasonably be expected to "facilitate the commission of an unlawful act or hamper the control of crime." Instead, the appellant states, the ministry asserts that the disclosure would reveal "investigative techniques" although the ministry has not shown that the techniques set out in the records are not publicly known or a matter of common sense and currently in use.

[111] The appellant submits that the exemption at section 14(1)(l) is subject to a fact-driven analysis and that there must be a connection between the released information and a crime, making it reasonable, and not just possible, that the release of the information will lead to the commission of an unlawful act.

Findings with respect to section 14(1)(l)

[112] As previously noted, I have found pages 21-22, 24-25, 54, 60-64, 85-91 and 95-102 to be exempt under section 14(1)(c) of the *Act*. The ministry's representations on section 14(1)(l) are not detailed. However, I have carefully reviewed the records and I find that the information I exempted under section 14(1)(c), which consists of investigative techniques and procedures currently in use could facilitate the commission of a crime, if disclosed.

[113] The remaining records for which section 14(1)(l) is being claimed are pages 50, 58, 59, 65-67 and 92-94. Pages 65, 66, and 67 consist of the rank, name and contact numbers of various investigators involved in Project Snowball. Similarly, pages 92, 93 and 94 consist of the name, signature and contact number of various investigators involved in Project Snowball.

[114] The bottom portion of page 50 sets out the name of Project Snowball's OPP on-line investigator. The top and bottom portions of page 58 set out the name and contact information of one of the officers involved in Project Snowball. Page 59 sets out the name of an officer involved in Project Snowball, as well as general information about the nature of a document and information about one party's attendance at an investigator's meeting.

[115] In my view, the ministry has not provided sufficiently detailed evidence to allow me to conclude that disclosing the names, rank, and contact information of various investigators, general information about a document and the attendance of one party to a meeting could facilitate the commission of an unlawful act or hamper the control of crime. I will not, therefore, uphold this exemption with respect to pages 50, 58, 59, 65-67 and 92-94.

[116] The appellant also submits that section 14(5) provides that the section 14(1) exemptions do not apply to a record on the degree of success achieved in a law enforcement program. The bottom portion of page 50 does contain information of this nature. As I did not find it exempt under section 14(1) and ordered its disclosure, there is no need to consider section 14(5).

[117] In summary, I do not uphold section 14(1)(l) with respect to pages 50, 58, 59, 65-67 and 92-94. As no other exemptions were claimed by the ministry with respect to the bottom portion of page 50, the top and bottom portions of page 58, and the top and middle portions of page 59, I will order these to be disclosed to the appellant.

[118] The ministry is claiming other exemptions in relation to pages 65-67 and 92-94, which I will also consider below.

E: Does the discretionary exemption at section 15 apply to the records?

[119] The ministry is claiming sections 15(a) and (b) with respect to pages 65-67 and 92-94. Section 15 states, in part:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
>
> (b) reveal information received in confidence from another government or its agencies by an institution;
>
> and shall not disclose any such record without the prior approval of the Executive Council.

[120] Section 15 recognizes that the Ontario government will create and receive records in the course of its relations with other governments. Section 15(a) recognizes the value of intergovernmental contacts, and its purpose is to protect these working relationships.[36] Similarly, the purpose of section 15(b) is to allow the Ontario government to receive information in confidence, thereby building the trust required to conduct affairs of mutual concern.[37]

[121] A municipality is not a "government" for the purpose of section 15.[38] Municipal police forces have been found not to qualify as agencies of another government for the purposes of this section.[39]

[122] The ministry describes the records as being the list of attendees at a meeting attended by representatives of police services across Ontario[40] and the names of police officers from different police services across Canada who received investigative packages in connection with Project Snowball.[41]

[123] The ministry submits that orders of this office have consistently found that neither municipal governments nor police services are a "government" for the purpose of section 15 and that this interpretation of section 15 is "restrictive." The ministry submits that this office's interpretation of section 15 dates back over 30 years to the

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[36] Orders PO-2247, PO-2369-F, PO-2715 and PO-2734.
[37] Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.); see also Orders PO-1927-I, PO-2569, PO-2647, and PO-2666.
[38] Orders P-69, PO-2715 and PO-2751.
[39] Orders PO-2715, PO-2751.
[40] Pages 65-67.
[41] Pages 92-94.

Report of the Williams Commission (the Williams Commission report) and that Order PO-1915-F cites the Williams Commission in support of its conclusion that municipalities are not a level of government for the purpose of section 15.

[124] The ministry further submits that the *Magnotta*[42] decision questions the continued relevance of the Williams Commission report as an aid to statutory interpretation. The ministry quotes from the Divisional Court's decision that "what may have been true in 1980 is not necessarily true in 2009. Almost thirty years have passed.[43]

[125] The ministry also states that Order PO-1915-F states that "clear statutory direction" would be required to deviate from its finding that municipalities are not a level of government for the purpose of section 15. The ministry submits that there is now clear statutory direction for changing this finding provided by the *Municipal Act, 2001* and revisions to it introduced by the *Municipal Statute Law Amendment Act, 2006.*

[126] The ministry states:

> The *Municipal Act, 2001*, introduced the principle enshrined in section 2 of the Act, which states that municipalities are now considered by law to be a level of government.
>
> The *Municipal Statute Law Amendment Act, 2006*, amended section 2 of the *Municipal Act, 2001* so that it is pared down in length but arguably strengthened in its meaning and purpose. It now states:
>
> > Municipalities are created by the Province of Ontario to be responsible and accountable governments with respect to matters within their jurisdiction and each municipality is given powers and duties under this Act and many other Acts for the purpose of providing good government with respect to those matters.
>
> When the *Municipal Statute Law Amendment Act, 2006* was introduced for third reading into the Legislature, on December 18, 2006, the Hon. John Gerretsen, the then Minister of Municipal Affairs and Housing left no doubt as to the purpose of the bill when he said:
>
> > I think the bill as a whole recognizes the fact that municipalities and their councils play an extremely important role in the day-to-day lives of Ontarians and, I would dare

[42] See note 23.
[43] (2009), 3 O.R. (3d), 59 (Div. Ct.) at para. 62; decision was upheld by the Court of Appeal 2010 ONCA 681.

> say, play as important a role as the provincial and federal governments do at their levels. That's why we have been starting to talk about it being truly an order of government, the municipal order of government. Bill 130 creates a framework of broad powers for the municipality that balances the current and future interests of the province and all Ontario municipalities.[44]

[127] The ministry submits that section 2 of the *Municipal Act, 2001* should be interpreted as a legislative statement of purpose and, therefore, ought to receive the same weight as are accorded to legislative statements of purpose when they are being statutorily interpreted. The ministry states that the importance of a legislative statement of purpose has been described by Ruth Sullivan as follows:

> The most direct and authoritative evidence of legislative purpose is found in formal purpose statements appearing in the body of legislation. Such statements often appear at the beginning of the Act . . . Purpose statements typically take one of the following forms: they set out the goals the legislature hopes to achieve, or they set out the policies and principles that are to guide any discretion conferred on officials, tribunals and courts in applying the legislation.[45]

[128] The ministry also submits that given the fact that the Ontario government has now recognized municipalities as being another level of government and had provided express statutory direction in the form of a legislative statement of purpose in section 2 of the *Municipal Act, 2001*, there is no lawful basis to treat municipalities differently than any other government for the purpose of section 15 of the *Act*. Consequently, the ministry states, police services should also be considered as another level of government for the purpose of section 15, as they are part of a municipality.

Section 15(a)

[129] With respect to section 15(a), the ministry submits that a three-part test must be met. First, the ministry must demonstrate that the disclosure of the record could give rise to an expectation of prejudice to the conduct of intergovernmental relations. Second, the relations, which it is claimed would be prejudiced, must be intergovernmental. Third, the expectation that prejudice could arise as a result of disclosure must be reasonable.

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[44] Available on-line at http://www.ontla.on.ca/web/house-proceedings/house_detail.do?locale=fr&Date=2006-12-18&Parl=38&Sess=2&detailPage= /house-proceedings/transcripts/files_html/2006-12-18_L138B.htm#P77_3261.

[45] Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes* (Fourth Edition). Markham, Ontario:Butterworths, 2002 at page 210.

[130] The ministry states that the records are the result of cooperation between law enforcement organizations in different jurisdictions working together to fight internet-based child pornography. Law enforcement agencies, the ministry submits, share information with the expectation that information they share will not be used or disclosed except for a law enforcement purpose. The ministry states:

> If Ontario became known as a jurisdiction that disclosed law enforcement information that it received about child pornography because its privacy laws were improperly applied, this trust relationship could be irreparably harmed, and along with it, intergovernmental relationships.

[131] In addition, the ministry states that fighting child pornography is also a policy issue for the provincial government and that Ontario has been a policy leader in protecting children through various pioneering initiatives.[46] If Ontario law enforcement agencies can no longer be trusted with the information they receive, the ministry submits, not only are relationships in the law enforcement community threatened, but so too would the relationships between Ontario and other governments.

[132] The appellant submits that police forces cannot be considered to be "governments" within the meaning of section 15 of the *Act*. The change to section 2 of the *Municipal Act, 2001*, the appellant argues, is not an expression of a clear legislative intention that changes the analysis that has been applied in previous orders to hold that municipal police forces are not agencies of another government for the purposes of section 15 of the *Act*. The appellant states that the ministry has overstated the significance of the amendment to section 2 of the *Municipal Act, 2001* as its prior version also referred to municipalities as "government."

[133] The appellant also submits that previous orders of this office have held that, given the differences between the *Municipal Freedom of Information and Protection of Privacy Act* and the *Act*, the ministry's position is "inconsistent with the overall scheme of the two freedom of information statutes."[47]

[134] Further, the appellant submits that the ministry has failed to adduce "detailed and convincing evidence" that the disclosure could reasonably be expected to lead to the specific harm it asserts could flow from disclosure. The records, the appellant states, are approximately 10 years old. The appellant states that she is not seeking information that was recently shared between Canadian and American authorities, and the OPP. In addition, it is not reasonable to expect that other Canadian or American police agencies will decline to exchange information important to their mandates because the information may not be exempt from disclosure under the *Act*. The

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[46] The ministry cites as examples of the initiatives as the creation of the provincial sex offender registry and commemorating Safer Internet Day.
[47] Order PO-2456 and noted in Order PO-2751.

appellant submits that the risk the ministry describes is speculative given other police agencies are likely also subject to freedom of information regimes in their jurisdictions.

[135] In reply, the ministry states that the changes brought about by the *Municipal Act, 2001* and further enhanced by the 2006 amendments were "transformative." The ministry provides the following commentary on the effect of the *Municipal Act, 2001*:

> Municipalities are, for the first time, recognized in legislation as 'responsible and accountable governments with respect to matters within their jurisdiction" [s.2]. This is a recognition of a reality, but it does not alter the legal status of municipalities or confer additional powers on them. However, it may prove significant in future dealings between the province and municipalities since it is a formal, legislative statement that municipalities are more than, in strict constitutional terms, "creatures of the province." They are legitimate governments with authority and responsibilities and, in this sense, they are comparable to senior levels of government (underlining added).[48]

[136] The ministry concludes that if the above commentary, along with the statements made by the government of the day referred to above and the wording of section 2 of the *Municipal Act, 2001*, is not an expression of "a clear legislative intention" to make municipalities another form of government, then the ministry cannot imagine what would be such an intention.

[137] The ministry states:

> [I]t is the time that the enactment of the Municipal Act, 2001, as well as the 2006 amendments be given their due in the interpretation of section 15, and that municipalities be recognized for what they now are, another level of government.
>
> [emphasis added]

[138] In summary, the ministry has advanced the argument that municipalities and, consequently, municipal police forces should be considered to be governments for the purpose of section 15 of the *Act*.

[139] For the reasons set out in relation to the application of section 15(b), below, I find that municipal police forces are not agencies of another government. Therefore, the relationship between the various police forces identified in the records cannot be said to be "intergovernmental" for the purpose of section 15(a) of the *Act*.

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[48] *The Ontario Municipal Act: A Comprehensive Guide* by John Chipman. (Aurora, Ontario: Canada Law Book) at section 1:10.

[140] In addition, I conclude that the ministry has not provided detailed and convincing evidence that disclosure of the name, rank, signature and contact information of investigators who attended two meetings could reasonably be expected to result in harm to relations between the Government of Ontario and other provinces, states or countries.

[141] Further, I have already exempted all of the portions of the records that contain detailed information about investigative techniques, which was shared between the various police forces involved in Project Snowball. Given that this material is exempt, I am not persuaded that disclosure of the remaining information in the records, set out above, could reasonably be expected to cause the harm set out in section 15(a).

[142] Therefore, I do not uphold the exemption at section 15(a) with respect to pages 65-67 and 92-94.

Section 15(b)

[143] The ministry states that in Order PO-2751, Senior Adjudicator Higgins refused to apply section 15(b) in part because of a finding that the OPP could not have "received" a record for the purpose of this section if the OPP was involved in its creation. The ministry submits that this overly formalistic interpretation of section 15 does not take into account the reality of Project Snowball, which is that it was a collaborative effort between law enforcement agencies. This type of collaboration, the ministry states, involved records containing both information that the law enforcement agency had a hand in creating and in also receiving from another law enforcement agency. The ministry submits that the primary purpose of this exemption is to safeguard information received from other levels of government, in this case other police services. In this case, the ministry submits that the names of police officers who signed the attendance list is also considered as having been provided in confidence.

[144] The appellant submits that, as found on Order PO-2751, the records do not appear to have been "received" by the OPP, as the OPP had a role in their creation.

[145] In order for section 15(b) to apply, there must be a reasonable expectation that disclosure could reveal information "received in confidence from another government or its agencies." Previous orders of this office have consistently found that municipal entities do not constitute "another government or its agencies" for the purpose of section 15(b) of the *Act*. Adjudicator Frank DeVries made this finding in Order PO-2474,[49] in which he referred to the extensive analysis of the issue by Adjudicator John Swaigen in Order PO-2456.[50] In that appeal, Adjudicator Swaigen considered the issue of whether a municipal police force could be regarded as a "government agency" for the purpose of section 15(b). Adjudicator Swaigen cited the potential for

[49] Senior Adjudicator Higgins made the same finding in Order PO-2751.
[50] Subject to a judicial review application on another point – Tor. Doc. 163/06 (Div. Ct.).

inconsistency between the *Act* and its municipal counterpart in concluding that section 15(b) did not include a municipal police force. He stated:

> When the Legislature passed the *Municipal Freedom of Information and Protection of Privacy Act* in 1991, it included a parallel provision to section 15 of the *Act.* Section 9 of the *Municipal Freedom of Information and Protection of Privacy Act* provides:
>
> > (1) A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,
> >
> > (a) the Government of Canada;
> >
> > (b) the Government of Ontario or the government of a province or territory in Canada;
> >
> > (c) *the government of a foreign country or state;*
> >
> > (d) *an agency of a government referred to in clause (a), (b) or (c); or*
> >
> > (e) an international organization of states or a body of such an organization.
> >
> > (2) A head shall disclose a record to which subsection (1) applies if the government, agency or organization from which the information was received consents to the disclosure.
>
> Under the *Municipal Freedom of Information and Protection of Privacy Act*, it is clear that a municipality cannot claim the "relations with governments" exemption for information it receives from another municipality or municipal board. That is, section 9 does not apply to information received from another municipality.
>
> It would be inconsistent with the overall scheme of the two freedom of information statutes if a provincial institution could claim the "relations with other governments" exemption for information received from a municipality when a municipality cannot.

> Therefore, the Legislature implicitly reaffirmed its intention that information received from municipalities is not covered by this statutory regime when it passed the *Municipal Freedom of Information and Protection of Privacy Act*, incorporating section 9.
>
> Accordingly, I find that the municipal police service that provided these records to the Ministry is not an agency of another government for the purposes of section 15 of the *Act*. Therefore, I find that the exemption claimed under section 49(a) in conjunction with section 15(b) does not apply to these records. [Emphasis added.]

[146] I adopt the approach in Orders PO-2474 and PO-2456, which reflects the interpretation of section 15(b) by this office dating back to Order 69. This interpretation is also consistent with the legislative history of the *Act*, cited in Order 69, which refers to a statement by then Attorney General Ian Scott in the Legislature, that the purpose of the exemption was "to protect intergovernmental relations between the provinces or with the feds or with international organizations."[51]

[147] While I appreciate the ministry's novel argument that a municipality and, consequently, a municipal police force should be found to be a "government" for the purpose of section 15 of the *Act*, I do not accept it. In my view, the legislature's clear legislative intention is that municipalities are not considered to be a "government" for the purpose of section 15 of the *Act*. I make this finding based on the distinct differences between section 15 of the *Act* and section 9 of the *Municipal Freedom of Information and Protection of Privacy Act* as described by Adjudicator Swaigen, above.

[148] Consequently, I find that a municipality is not a "government" and that a municipal police service is not "an agency of another government" for the purpose of section 15 of the *Act*.

[149] Some of the investigators who attended a meeting worked for the Criminal Intelligence Service of Canada (CISC), which the ministry identifies as a service consisting of RCMP employees and seconded police officers from other law enforcement agencies.[52] Even if I were to find that CISC is an organization that qualifies as an agency of the government of Canada, which I am not, as there is not sufficient evidence to make that finding, I am not persuaded that disclosure of the name, signature and contact phone number of these investigators could reasonably be expected to reveal information received "in confidence" from an agency of another government.

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[51] Hansard, March 23, 1987, after second reading of the bill.
[52] See www.cisc.gc.ca. CISC is located at the RCMP headquarters in Ottawa, Ontario.

[150] Lastly, some of the investigators attending one of the meetings worked for the RCMP, which is an organization that qualifies as an agency of the government of Canada. However, as is the case with the CISC investigators, I am not persuaded that the disclosure of the name, signature and contact phone number of these investigators could reasonably be expected to reveal information received "in confidence" from an agency of another government.

[151] For all of these reasons, I find that pages 65-67 and 92-94 are not exempt under section 15(b).

F: Does the discretionary exemption at section 19 apply to the records?

[152] The ministry is claiming that some of the records are subject to solicitor client privilege, relying upon section 19(a) of the *Act*, which states:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;

[153] Section 19 contains two branches as described below. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b). The institution must establish that at least one branch applies.

[154] The ministry submits that portions of the records are subject to common law solicitor client privilege, as they reflect confidential communications between members of the OPP working on Project Snowball and a named Assistant Crown Attorney who provided legal advice to the police on the project. The ministry also notes that there is virtual duplication of most of the information in the records for which it claims this exemption.

[155] The ministry further states that the Assistant Crown Attorney also provided legal advice to other Ontario police services that were working on Project Snowball with the OPP. The ministry submits that solicitor client privilege was not waived, as the officers from the other police services qualify as a "common interest" given that they were all similarly tasked with targeting suspects associated with Project Snowball. In Order PO-2751, the ministry states, Senior Adjudicator Higgins applied this reasoning to uphold solicitor client privilege for other Project Snowball records and, therefore, the same reasoning should apply to the records at issue in this appeal.

[156] The appellant submits that without access to the records at issue, she is unable to assess whether solicitor client privilege applies, but notes that the privilege may have been waived if the records were shared outside the solicitor client relationship. In addition, the appellant states that to the extent that portions of the records over which

section 19 is claimed are subject to the lesser protection of litigation privilege, the question of whether that privilege has lapsed ought to be considered.

Branch 1: common law privilege

[157] Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue.[53]

[158] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[54]

[159] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[55]

[160] The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.[56]

[161] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[57]

[162] Having reviewed the portions of the records for which the ministry is claiming the exemption at section 19, I find that portions of pages 30, 41, 42, 43, 45, 50, 76, 81, 89 and 98 contain confidential legal advice given by Crown counsel to the OPP. Past orders of this office have held that advice given by Crown counsel may be privileged when given to the OPP.[58]

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[53] Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).
[54] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[55] Orders PO-2441, MO-2166 and MO-1925.
[56] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[57] General Accident Assurance Co. v. Chrusz (1999), 45 O.R. (3d) 321 (C.A.).
[58] See Orders PO-1931 and PO-2751.

[163] As was the case in Order PO-2751, one of the records consists of minutes of a meeting attended by representatives of several police services in Ontario, raising the question of waiver.

[164] Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege.[59]

[165] Waiver of privilege is ordinarily established where it is shown that the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege.[60]

[166] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[61] Waiver has been found to apply where, for example

- the record is disclosed to another outside party;[62]
- the communication is made to an opposing party in litigation;[63] or
- the document records a communication made in open court.[64]

[167] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party. The common interest exception has been found to apply where, for example:

- the sender and receiver anticipate litigation against a common adversary on the same issue or issues, whether or not both are parties;[65]
- a law firm gives legal opinions to a group of companies in connection with shared tax advice;[66] or
- multiple parties share legal opinions in an effort to put them on an equal footing during negotiations, but maintain an expectation of confidentiality vis-à-vis others.[67]

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[59] Orders PO-2483, PO-2484.
[60] S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd. (1983), 45 B.C.L.R. 218 (S.C.).
[61] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.).
[62] Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[63] Order P-1551.
[64] Order P-1551.
[65] General Accident Assurance Co. v. Chrusz (above); Order MO-1678.
[66] Archean Energy Ltd. v. Canada (Minister of National Revenue) (1997), 202 A.R. 198 (Q.B.).
[67] *Pitney Bowes of Canada Ltd. v. Canada* (2003, 225 D.L.R. (4th) 747 (Fed. T.D.).

[168] In my view, the disclosure of the information to other law enforcement officials also investigating individuals as part of Project Snowball is sufficient to qualify as a common interest. In the circumstances of this appeal, therefore, I find that privilege has not been waived by this disclosure.

[169] Therefore, I find that the information I have identified on the pages set out above is subject to solicitor client privilege and exempt from disclosure under branch 1 of section 19.

G: Did the institution exercise its discretion under sections 14 and 19? If so, should this office uphold the exercise of discretion?

[170] The sections 14 and 19 exemptions are discretionary, and permit 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.

[171] 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.

[172] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[68] This office may not, however, substitute its own discretion for that of the institution.[69]

[173] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[70]

- 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; and

[68] Order MO-1573.
[69] Section 54(2).
[70] Orders P-344, MO-1573.

  - 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.

[174] The ministry submits that it properly exercised its discretion in accordance with all legal principles in exempting records in this appeal. The ministry states that it considered all relevant considerations, including the highly sensitive nature of the information, the harm its release could cause to the trust that has been built between the OPP and other law enforcement agencies, and the harm that it could cause to the overall fight against child pornography. In addition, the ministry submits that it has properly severed the records in accordance with section 10(2) of the *Act*.

[175] The appellant submits that in considering whether an exemption applies, the head must be alive to the fact that an exemption must be "limited" and "specific." Further, the appellant states, the Supreme Court of Canada has stated that even after concluding that an exemption applies, the head must still consider whether disclosure should be made. It is incumbent, the appellant submits, on the head exercising the discretion to consider "all relevant interests, including the public interest in disclosure."[71]

[176] The appellant also submits that the ministry's representations demonstrate that not all relevant considerations were taken into account during the exercise of discretion, including the public interest in open government. The appellant states that public

[71] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 at paras. 46-49, 66 (*Criminal Lawyers'*).

confidence in the OPP is at stake in this appeal, as significant concerns have been raised about the manner in which information was shared between Canadian and American authorities in 2001. The appellant states that the age of the information is a legitimate criterion, as is the consideration that disclosure will increase public confidence[72] in the operation of the OPP.

[177] In reply, the ministry submits that to the extent that there is a public interest at issue in this appeal, it is in ensuring that law enforcement agencies feel comfortable working together without worrying that whatever they write or share is going to be disclosed, bearing in mind that disclosure under the *Act* is effectively disclosure to the world. It is also in the public interest, the ministry submits, to support collaboration between police forces and this can only be accomplished if the confidentiality of records, such as the ones at issue, is preserved.

[178] Crimes associated with child pornography are of a serious nature and have an enormous impact on victims and on society. In my view, there is a considerable public interest in its elimination and the apprehension of those involved. Therefore, I am satisfied that the ministry properly exercised its discretion in relation to the information I have found to be exempt. I am also satisfied that the ministry has disclosed as much of the records as possible without disclosing information that falls within the exemptions I have upheld.

[179] Lastly, the appellant has raised the public interest override at section 23 of the *Act*. However, the majority of the information in the records that I have found to be exempt falls within the ambit of sections 14 or 19. The public interest override cannot be used to override the exemptions at sections 14 and 19 and is, therefore, not applicable with respect to the information found exempt under sections 14 and 19. In any event, I am satisfied that the ministry considered the public interest[73] in exercising its discretion. I will consider the public interest override in relation to the information found exempt under section 21.

H: Is there a compelling public interest in disclosure of the records as contemplated by section 23 that clearly outweighs the purpose of the section 21 exemption?

[180] The appellant has raised the possible application of section 23, which states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[72] Order P-344.
[73] A factor to be considered in the exercise of discretion as held by the SCC in *Criminal Lawyers'*.

[181] The appellant submits that the records at issue clearly meet the test for the application of the public interest override. The appellant submits that there are serious and legitimate concerns with respect to the police publicly naming individuals as consumers of child pornography, only to withdraw and dismiss the charges at a later date. The public, the appellant argues, has a right to know who should be accountable for these decisions and what information was available to police authorities at the time these charges were made.

[182] The appellant states:

> Did the American authorities inform Canadians that not every person on the list may have purchased child pornography? Were Canadian authorities aware that credit card fraud may have incorrectly landed the names of unsuspecting people on the list? Were Canadian authorities instead told that having one's name on the American supplied list was sufficient evidence of having purchased child pornography? These questions and others go to the heart of the controversy around the investigations. It is the central purpose of the *Act* to provide information to the public and shed light on the operations of public institutions.

[183] In addition, the appellant states that given the age of the records, no reasonably expected harm could arise from their disclosure. The appellant further submits that given the serious stigma attached to child pornography charges and the number of acquittals and withdrawn charges associated with Project Snowball, the public is entitled to know what safeguards are in place to protect innocent Canadians from having their own lives disturbed with unsubstantiated charges.

[184] The ministry submits that I ought not to consider the public interest override, as this issue was not addressed in the initial Notice of Inquiry provided to it. In the alternative, the ministry submits that to the extent that there is a public interest at issue in this appeal, it is in ensuring that law enforcement agencies feel comfortable working together without worrying that whatever they write or share is going to be disclosed, bearing in mind that disclosure under the *Act* is effectively disclosure to the world. It is also in the public interest, the ministry submits, to support collaboration between police forces and this can only be accomplished if the confidentiality of records, such as the ones at issue, is preserved.

[185] In reply, the appellant submits that she has a right to have this issue considered and that there is no prejudice to the ministry, given that it has to consider the public interest in all cases where it exercises its discretion.[74] In addition, the appellant states that the ministry was aware that the public interest override would be an issue, as the appellant specifically requested that this appeal be placed on hold pending the

[74] See *Criminal Lawyers'*.

disposition of the Supreme Court of Canada's decision in regard to the public interest override in the *Criminal Lawyers'* case. The ministry agreed to that request during the inquiry.

[186] In any event, the appellant states, this office has the power to control its own process and even if the public interest override could be treated as a "late" issue, despite being raised by her at the outset of this appeal, there is no prejudice to the ministry in considering it. In addition, the appellant submits that "[f]airness to the parties is the overriding factor" in determining whether to consider an issue that may have arisen late.[75]

[187] With respect to whether I should consider the public interest override, in the circumstances of this appeal, for the reasons cited by the appellant, I agree that a consideration of the public interest override would not prejudice the ministry.

[188] I now turn to consider the appellant's argument that section 23 applies.

[189] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[190] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[76] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[77]

[191] A public interest is not automatically established where the requester is a member of the media.[78] The word "compelling" has been defined in previous orders as "rousing strong interest or attention."[79]

[192] Any public interest in *non*-disclosure that may exist also must be considered.[80]

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[75] Order P-1362.
[76] Order P-984.
[77] Order P-984.
[78] Orders M-773, M-1074.
[79] Order P-984.
[80] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

[193] The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[194] The only information that could be subject to section 23 is the personal information of a police officer contained on page 86. The remaining information on page 86 I have found to be exempt under section 14 and is, therefore, not subject to the public interest override.

[195] For the reasons that follow, I find that there is no compelling public interest in the disclosure of the personal information I have found to be exempt under section 21 of the *Act*. The limited amount of the police officer's personal information consists of his opinions. The personal information is not highly sensitive, and is, in fact, innocuous and would cast no light on the public interest concerns raised by the appellant. The personal information does not contain investigative techniques, investigative information or address the efficacy of Project Snowball.

[196] Therefore, I find that section 23 does not mandate the disclosure of the information I have found exempt under section 21.

ORDER:

1. I order the ministry to disclose the withheld portions of pages 65, 66, 67, 92, 93 and 94 by **April 30, 2012** but not before **April 25, 2012**.

2. I order the ministry to disclose portions of pages 30, 50, 58 and 59. I have enclosed copies of the records and have highlighted the information that is to be disclosed to the appellant by **April 30, 2012** but not before **April 25, 2012**.

3. To verify compliance with this order, I reserve the right to require the board to send me a copy of the records disclosed pursuant to order provisions 1 and 2.

Original signed by: March 23, 2012
Cathy Hamilton
Adjudicator