Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-3231-I

Appeals PA-980338-1 and PA-990137-I

Ministry of the Solicitor General and Correctional Services

July 11, 2013

Summary: Pursuant to the Supreme Court of Canada decision in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, the ministry's claim of section 14 to exempt an entire police brief relating to the disappearance of an audio tape and the conduct of police officers and the Crown Attorney during a murder trial was returned to the IPC for reconsideration of the ministry's exercise of discretion under that section. This order considers the ministry's exercise of discretion and finds that the ministry's decision took into account irrelevant factors and failed to take into account relevant considerations. The ministry is ordered to re-exercise its discretion.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 14(2)(a).

Orders and Investigation Reports Considered: Order PO-1779

Cases Considered: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23; *Chandler v. Alberta Association of Architects,* [1989] 2 S.C.R. 848.

OVERVIEW:

[1] The Ministry of the Solicitor General and Correctional Services, now the Ministry of Community Safety and Correctional Services (the ministry) received three requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to

information relating to an investigation into the disappearance of an audio tape and the conduct of police officers and the Crown Attorney during a murder trial.

[2] The ministry identified three records as being responsive to the request and denied access pursuant to sections 14(1)(c), (d), (e), (g) and (l), 14(2)(a), 19, 20 and 21(1) of the *Act*. In its decision regarding section 21, the ministry relied on the "presumed unjustified invasion of personal privacy" in sections 21(3)(b) and (d) and the criteria listed in sections 21(2)(e), (f) and (h).

[3] The three records, which were responsive to the requests, are described as follows:

- Record 1 is a 318 page police brief. Pages 1 to 24 contain the history, investigation and summary of the investigation into the missing tape; pages 24 to 46 consist of the "Disclosure Final Report," and pages 47-318 consist of notes relating to 11 identified individuals who were interviewed during the investigation

- Record 2 is a letter dated March 24, 1998

- Record 3 is a memorandum dated March 12, 1998

[4] The requesters appealed the ministry's decision to this office and three appeal files were opened: PA-980338-1, PA-990137-1 and PA-990218-1. The appellants in appeals PA-980338-1 and PA-990218-1 also raised the public interest override in section 23 of the *Act* and it was added as an issue.

[5] In addition, sections 49(a) and (b) of the *Act* were relevant to the circumstances of appeal PA-990218-1 and were also added to the appeal.

[6] During the inquiry stage of the process, the ministry provided representations on the application of sections 14(2)(a), 19 and 21 of the *Act*. Consequently, the other exemptions claimed in the ministry's decision were no longer at issue in the appeals.

[7] In addition, the appellant in PA-980338-1 raised the constitutional validity and/or constitutional applicability of sections 10, 14, 19 and 23 of the *Act* under section 2(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*).

[8] After the inquiry was completed, former Assistant Commissioner Tom Mitchinson issued Order PO-1779, in which he upheld the ministry's decision not to disclose the records. The Assistant Commissioner found that all three records contained personal information. He also found that the public interest in disclosure clearly outweighed the purpose of the exemption on the facts, and would have applied the section 23 override

with respect to the section 21 personal privacy exemption, subject to limited exceptions[1].

[9] However, he upheld the ministry's decision to withhold the three records because the other claimed exemptions (sections 14 and 19) are not included within the section 23 override. He also concluded that the omission of sections 14 and 19 from the section 23 override did not constitute a breach of the appellants' *Charter* right to freedom of expression.

[10] The appellant in PA-980338-1 sought judicial review of Order PO-1779. The Divisional Court upheld the decision not to disclose the records. A further appeal was allowed by the Ontario Court of Appeal, who concluded that the exemption scheme in the *Act* violated the *Charter*.

[11] In 2007, the appellant in PA-990218-1 abandoned the appeal and that appeal file was closed.

[12] The ministry then sought, and was granted, leave to appeal the matter to the Supreme Court of Canada (the Supreme Court), which rendered its decision on June 17, 2010[2]. The Supreme Court allowed the ministry's appeal and held that:

- the Assistant Commissioner's order confirming the constitutionality of section 23 of the *Act* should be restored;
- the records protected by section 19 of the *Act* should be exempt from disclosure (records 2 and 3); and
- the claim under section 14 should be returned to the Commissioner for reconsideration of the ministry's exercise of discretion under section 14 (record 1).

[13] These appeals were remitted to this office for determination as a result of the decision of the Supreme Court. Because the Supreme Court upheld the Assistant Commissioner's decision with respect to section 19, records 2 and 3 are no longer at issue.

[14] Upon remittance to this office, the appeals were assigned to a mediator. During mediation, the ministry advised that it would issue a revised decision with respect to record 1. As part of this process, the ministry notified the Ministry of the Attorney General, the Ontario Provincial Police (the OPP), the Halton Regional Police Service, the Hamilton Police Service and 11 individuals who were interviewed as part of the

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[1] PO-1779, pages 22 to 25.

[2] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23. ("*Criminal Lawyers' Association*").

investigation. However, the matter was not resolved in a timely fashion, and was subsequently moved to the adjudication stage of the process, where an adjudicator conducts an inquiry.

[15] Initially, I asked the ministry to provide written representations on the issues in this appeal. I also asked the ministry to issue a revised decision letter relating to the Ministry's exercise of discretion over record 1.

[16] In December 2011, the ministry issued a revised decision letter and disclosed portions of the record.

[17] The appellant submitted written representations in response to the revised decision letter. In its representations, the appellant raised a number of issues with regard to the ministry's revised decision.

[18] The ministry submitted representations in reply.

[19] For the reasons that follow, I find that the ministry's decision was flawed. I order it to re-exercise its discretion in accordance with my directions set out in this order.

RECORDS:

[20] One record remains at issue. Record 1 is a 318 page police brief. Pages 1 to 24 of the record contain the history, investigation and summary of the investigation into the missing tape; pages 25 to 46 consist of the "Disclosure Final Report," and pages 47 to 318 consist of notes relating to 11 identified individuals who were interviewed.

PRELIMINARY ISSUES

Does this office have jurisdiction to consider the application of the section 21 exemption to the record?

[21] In its representations, the appellant submits that the IPC does not have jurisdiction to consider the application of the exemption in section 21 of the *Act* to the record in this reconsideration inquiry.

[22] As part of the reconsideration process, I sent a Notice of Inquiry to the ministry and asked it to:

> … issue a revised decision letter relating to the application of sections 14 and 21 of the *Act*, explaining in detail the reasons for the decision, including all the factors and circumstances taken into account, and how they were weighed.

[23] In its decision letter, the ministry advised that it notified the 11 individuals who were interviewed as part of the investigation to ascertain if these individuals were of the view that disclosure of their personal information contained in the record would constitute an unjustified invasion of their personal privacy, as per section 21(1) of the *Act*. The ministry advised that it received responses from nine of the individuals, of which five consented to the disclosure of their personal information contained in the report subject to the severance of certain identifiers, while the remaining four did not consent. The ministry advised that two individuals did not respond to the consultation. With regard to the personal information belonging to those individuals who consented, the ministry submits that the information falls within section 21(1)(a). With regard to the remaining personal information, the ministry advised that it found that the disclosure of the personal information would constitute a presumed unjustified invasion of personal privacy under section 21(3)(b) of the *Act* and that therefore section 21(1) would apply to exempt it.

[24] The ministry states that it is aware that Order PO-1779 concluded that there was a compelling public interest under section 23 of the *Act* in the disclosure of most of the personal information contained in the report. However, the ministry submits that the Assistant Commissioner did not consider the views of the 11 individuals interviewed by the OPP as to whether disclosure of the report would constitute a presumed unjustified invasion of their privacy.

[25] Upon a review of the parties' representations and the Supreme Court's decision in *Criminal Lawyers' Association*, I find that the doctrine of *functus officio* bars me from reconsidering the issue of whether section 21 of the *Act* applies to the record at issue.

[26] In response to the original access request, the ministry applied the personal privacy exemption in section 21(1) of the *Act* to the entire report. The Assistant Commissioner found that the presumption in section 21(3)(b) of the *Act* applied to the record and largely upheld the ministry's application of section 21(1) to the personal information in the record. However, the Assistant Commissioner also considered the application of the public interest override in section 23 of the *Act* and found:

> … the essence of the compelling public interest in this case is the need to assure the public that the OPP investigation was conducted in a thorough and fair manner, and that despite the strongly worded judgment of Glithero J., criminal charges were not warranted.
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> ….
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> In all the circumstances, based on the very compelling nature of the public interests that are at stake, and subject to a number of exceptions to protect personal privacy, I am of the view that the compelling public interest in disclosure of the records at issue clearly outweighs the purpose

> of the section 21 exemption, including the important public policy basis for that exemption relating to the protection of individual privacy.[3]

[27] The Assistant Commissioner's finding in relation to sections 21(1) and 23 was not challenged as part of the judicial review process that led to the Supreme Court's decision in *Criminal Lawyers' Association*.

[28] As such, upon the completion of the judicial review process, the IPC directed the ministry to issue a revised decision. I have not re-opened the Assistant Commissioner's finding that the public interest override in section 23 applies to the information exempt under section 21(1).

[29] Reviewing the ministry's decision letter and representations, it does not appear that the ministry argues that I should re-open the section 23 finding in Order PO-1779. However, the ministry does argue that section 21(1) applies to the record in its revised decision letter. To the extent that the ministry argues that section 23 does not apply to parts of the record (beyond those portions specifically identified in Order PO-1779), I find that the doctrine of *functus officio* applies.

[30] In determining whether a tribunal is empowered to reconsider its earlier decision, the Supreme Court has found that it is "necessary to consider (a) whether [the tribunal] had made a final decision, and (b), whether it was, therefore, *functus officio*"[4]. In this case, Order PO-1779 was a final disposition of the application of section 21(1) to the personal information at issue in the record and the application of section 23 to override that exemption. Order PO-1779 was subject to judicial review and was reviewed by the Supreme Court in *Criminal Lawyers' Association*.

[31] As a result, I must consider whether the doctrine of *functus officio* prevents me from reconsidering issues related to section 21 and 23. As a general rule, *functus officio* ensures finality in the decision-making process. Guidance on the application of this doctrine is found in the Supreme Court's decision in *Chandler v. Alberta Association of Architects*, where Justice Sopinka stated:

> … As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions

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[3] Order PO-1779, page 24.
[4] *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, page 855 ("*Chandler*").

enunciated in *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, [1934] S.C.R. 186].[5]

[32] This office is not authorized by the *Act* to revisit its decision nor is it argued that there was a clerical or mathematical error in Assistant Commissioner Mitchinson's finding that the public interest override in section 23 applies to the information exempt under section 21(1). As a result, the doctrine of *functus officio* bars me from re-adjudicating issues related to section 21 and 23.

[33] For the sake of completeness, I would note that I have reviewed all responses that the ministry received from persons or institutions that were notified by it following the Supreme Court's decision in *Criminal Lawyers' Association*. From that review, even if I were permitted to re-open issues related to section 21 and 23, I would have no reason to depart from the Assistant Commissioner's finding that the public interest override applied to all but the few sections of the record identified in Order PO-1779.

[34] In its decision letter and representations, the ministry also argues that even if I find that I am *functus officio* in relation to the application of section 23 to the record, the disclosure of personal information is a factor that should be considered in exercising its discretion under section 14(2)(a).

[35] I agree with this view. Previous orders from this office have affirmed that the list of factors to be considered by institutions in their exercise of discretion is not exhaustive and additional considerations may be relevant.[6].

[36] However, I note that Order PO-1779 found that, absent other factors, the public interest clearly outweighed the presumed invasion of personal privacy for all but a few portions of the record[7]. Therefore, without further factors that favour withholding the record from disclosure, personal privacy interests are an insufficient basis to withhold most of the report when compared with the compelling public interest in disclosure.

[37] Ultimately, the ministry's exercise of discretion should involve a consideration of a myriad of relevant factors and the proper weighing of these factors, and this exercise is reviewed below.

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[5] *Ibid.*, page 861-; see also *Jacobs Catalytic Ltd. v. International Brotherhood of Electrical Workers, Local 353,* 2009 ONCA 749, paras. 32-33.
[6] See Orders P-344 and MO-1573.
[7] See Order PO-1779, pages 24-25.

Does the section 14 exemption apply to the entire record, or only parts thereof?

[38] In its submissions, the appellant argues that only parts of the record at issue can be characterized as a "report" within the meaning of section 14(2)(a) and that the law enforcement exemption does not apply to the other parts of the record.

[39] This appears to be an attempt to re-open an issue that was already adjudicated as part of Order PO-1779. In that order, the Assistant Commissioner found that the entire record qualifies as a "report" within the meaning of section 14(2)(a): "I am satisfied that the record consists of a formal statement or account of the results of the collation and consideration of the information gathered during the investigation, and includes findings, summaries, analyses and recommendations."[8]

[40] The Assistant Commissioner's findings with regard to whether the record qualified as a "report" within the meaning of section 14(2)(a) were not challenged. As a result, the doctrine of *functus officio* applies to this issue and I am barred from re-opening the issue of whether the entire 318 page brief qualifies as a "report".

DISCUSSION:

Should this office uphold the ministry's exercise of discretion?

[41] The exemption in section 14(2)(a) is discretionary, and permits an institution to disclose information that is subject to the exemption, despite the fact that it could be withheld. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[42] The Commissioner may find that the institution erred in exercising its discretion and return the matter to the institution for reconsideration where

- The decision was made in bad faith or for an improper purpose;
- The decision took into account irrelevant considerations; or
- The decision failed to take into account relevant considerations.[9]

[43] This office may not, however, substitute its own discretion for that of the institution[10].

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[8] Order PO-1779, page 7.
[9] See *Criminal Lawyers' Association*, para. 71.
[10] Section 54(2) of the *Act*.

[44] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant[11]:

- the purposes of the *Act*, including principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- 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

[45] In *Criminal Lawyers' Association*, the Supreme Court provided guidance as to how statutorily granted discretion should be exercised:

> A discretion conferred by statute must be exercised consistently with the purposes underlying its grant: *Baker v. Canada (Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 87, at paras. 53, 56 and 65. It follows

[11] Orders P-344, MO-1573.

> that to properly exercise this discretion, the head must weigh the considerations for and against disclosure, including the public interest in disclosure.

[46] With regard to section 14(2)(a), the exemption applied by the ministry to withhold the entire record, the Supreme Court commented:

> [Section 14(2)(a)] provides that a head "may refuse to disclose a record… that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law". The main purpose of this section is to protect the public interest in getting full and frank disclosure in the course of investigating and reporting on matters involving the administration of justice; an expectation of confidentiality may further the goal of getting at the truth of what really happened. At the same time, the discretion conferred by the word "may" recognizes that there may be other interests, whether public or private, that outweigh this public interest in confidentiality.[12]

[47] Having reviewed the revised decision letter and representations, I find that the ministry's exercise of discretion was flawed as it was based, in part, on irrelevant considerations and also failed to consider relevant factors.

(i) The fact that the section 14(2)(a) is a record specific exemption is an irrelevant consideration

[48] In its decision letter, the ministry stated that it accorded "significant weight" to "the fact that section 14(2)(a) is a record-specific exemption and while [there] is no obligation for the ministry to consider severing the report, the ministry may decide to exercise its discretion to release the report in part or in full".

[49] This is not an appropriate consideration. The fact that the exemption in section 14(2)(a) applies is not a factor that should be given "significant weight" when considering whether or not to exercise one's discretion and release the record. The issue of whether section 14(2)(a) applies to the record is not in dispute at this stage. The fact that the ministry is able to claim the section 14(2)(a) exemption over the entire record is not a relevant consideration as to whether it **should** claim the exemption over the entire record. Such an approach is inconsistent with one of the clearly stated purposes of the *Act,* namely that "exemptions from the right of access should be limited and specific…".[13]

(ii) The publication ban is only a relevant consideration for limited parts of the report

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[12] *Ibid*, at para. 50.
[13] Section 1(a)(ii).

[50] The ministry states that it accorded "significant weight" to the fact that "the court ordered [a] publication ban in relation to the names and evidence of certain informant witnesses in the underlying criminal proceeding". To the extent that the information withheld is the subject of a court issued publication ban, I agree. However, this consideration must be limited to information that is the subject of the ban and not wholly unrelated information.

[51] Upon my review of the publication ban and the record at issue, I find that the publication ban, while a relevant consideration, is applicable to very limited portions of the record. As the appellant points out in its submissions the scope of the information subject to the publication ban is very narrow and covers only the names, evidence and penal institutions of five witnesses. Furthermore, the appellant suggests that, if these individuals are not amongst the 11 witnesses interviewed by the OPP, the information subject to the publication ban could very easily be redacted, if necessary. The appellant submits that it would be content with the ministry taking this approach.

[52] However, even though the publication ban applies to discrete portions of the record, the ministry appears to assert that because one aspect of the criminal trial was subject to the publication ban, there exists a basis for it to withhold other information unrelated to the ban. If this is the case, I disagree with the ministry's view. While the publication ban is a relevant consideration, it appears that the ministry, by affording it "significant weight", may have applied it to information that was not subject to the publication ban. Accordingly, for the portions of the record that were not subject to the publication ban, the ministry should not have considered this factor at all.

(iii) The Ministry failed to consider the nature of the relationship between interviewees and the government

[53] In its representations, the ministry advised that it accorded "significant weight" to ensuring cooperation from the public in future investigations and protecting the privacy of persons who supply investigators with information. While I agree that this can be a relevant consideration, this is not necessarily a relevant consideration in the circumstances of this appeal.

[54] In my view, the ministry has failed to consider the unique circumstances posed by this investigation. There is no basis to find that disclosure of information relating to interviews with individuals who are/were members of the public service, in their capacity as Crown attorneys, police officers or court officials could have the same "chilling effect" on public cooperation with future law enforcement investigations that would result from the disclosure of information received from the general public. The ministry has offered no evidence that would support a finding that interviews with public servants relating to performing their professional duties will negatively impact the general public's cooperation in future law enforcement investigations. I would further

note that the ministry has already provided the appellant with those parts of the record which disclose information concerning five current/former public servants who consented to the disclosure of the parts of the report relating to interviews with each of them.

(iv) The Ministry failed to consider the "absurd result" principle

[55] The ministry does not have appear to have considered the possible application of the "absurd result" principle to the information that it continues to withhold. Previous orders of this office have found that where a requester originally supplied the information at issue or is otherwise aware of it, the information may be found not exempt under the *Act*, because to find otherwise would be absurd and inconsistent with purpose of the exemption[14]. The absurd result principle has been applied where, for example, the information is clearly within the requester's knowledge[15].

[56] Reviewing the record at issue, I find that large amounts of information have been redacted that should be within the knowledge of the requester as it is already available in other public sources, such as the Ontario Court of Appeal's decision issued in 1995 and Justice Glithero's decision issued in 1997. I note that the appellant has provided a detailed chart listing information that is already publicly available and within its knowledge.

[57] Although the ministry states that it considered the fact that some of the information contained in the record is referenced in the publicly available court decisions arising from the underlying prosecution, as well as Order PO-1779 and the decisions resulting from the judicial review process, I question how this exercise was conducted. For example, the ministry has redacted references to the two individuals that were prosecuted for the 1983 murders that are the subject of the report. The names of these two individuals are identified in the publicly available court decisions, but have been redacted by the ministry in their access decision. In my view, the ministry has failed to properly consider whether information withheld is already within the appellant's knowledge.

(v) General concern about the Ministry's approach in this case

[58] As a final note, I wish to raise general concerns about the manner in which the ministry appears to have exercised its discretion in this appeal. In its representations dated July 20, 2011, the ministry advised as follows:

> Having consulted with the eleven individuals who were interviewed by the OPP in the course of the investigation and whose statements and other personal information appear in the Report, the Ministry has made

[14] Orders M-444 and MO-1323.
[15] Orders MO-1196, PO-1679 and MO-1755.

> redactions in accordance with their wishes. In the case of the two individuals who did not respond to the Ministry's consultation letter, the Ministry has taken the position that they have not consented to the disclosure of their personal information and has therefore redacted that information.

[59] This is not a proper exercise of discretion. It appears from its submissions and a review of the redacted parts of the record that the ministry's exercise of discretion was tied to whether or not the interviewees consented to the disclosure of their names and information about them. The portions of the record that have been disclosed correspond exactly to the parts of the record that contain information relating to the five individuals who consented to the release of their personal information. With regard to the information withheld, this information corresponds to the portions of the record that contain information relating to the remaining individuals who either did not respond to the ministry's inquiry or refused to consent to the release of the information relating to their interview. The ministry's exercise of discretion appears to have been dictated by the interviewees' positions regarding the disclosure of their information, rather than a reasoned consideration of all appropriate factors.

[60] Moreover, a review of the record and the ministry's submissions suggests that the ministry arbitrarily redacted the names of 17 individuals whose names appear in the record. In its representations, the ministry submits that, with respect to the personal information of other individuals in the record, the ministry reviewed the publicly available court decisions in the underlying criminal proceedings, Order PO-1779 and the subsequent court decisions arising from the judicial review proceedings and concluded that a considerable amount of the information in the report about these individuals is in the public domain. Nonetheless, the ministry advised that it chose to redact the individuals' names as they were never consulted about their views on whether disclosure would amount to an unjustified invasion of privacy.

[61] This is not a proper exercise of discretion. In fact, it suggests that the ministry gave little or no consideration to relevant considerations, including whether the release of the withheld information would negatively impact law enforcement's ability to obtain "full and frank disclosure in the course of investigating and reporting on matters involving the administration of justice".[16] Furthermore, the ministry stated that a considerable amount of the information in the report about these individuals is in the public domain. It appears that the ministry did not adequately consider this fact and simply redacted information that it deemed to be the personal information of the individuals it did not notify.

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[16] *Criminal Lawyers' Association*, para. 50

[62] Based on my review of the parties' representations and the record, I find that the ministry did not exercise its discretion in a proper manner. The ministry did not properly consider relevant factors and considered irrelevant factors.

ORDER:

1. I order the ministry to re-exercise its discretion in accordance with the analysis set out above and to advise the appellant of the result of this re-exercise of discretion in writing. If the ministry continues to withhold all or part of the remaining portions of the record, I also order it to provide the appellant with an explanation of the basis for exercising their discretion for each of the parts of the record withheld (i.e. each section of the report withheld should have its own explanation of the factors considered in arriving at that determination) and to provide a copy of these explanations to me. The ministry is required to send the results of its re-exercise of discretion and their explanations to the appellant, with a copy to this office by no later than **August 16, 2013**. If the appellant wishes to respond to the ministry's re-exercise of discretion and/or their explanations for exercising their discretion to withhold information, they must do so within **21 days** of the date of the ministry's correspondence by providing me with written representations.

2. I remain seized of this matter pending the resolution of the issue outlined in provision 1.

Original Signed By: July 11, 2013
Brian Beamish
Assistant Commissioner