

Information and Privacy Commissioner,  
Ontario, Canada



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

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## RECONSIDERATION ORDER PO-3362-R

Appeal PA09-122-2

Order PO-3306

Ministry of Community Safety and Correctional Services

July 22, 2014

**Summary:** The appellant requested a reconsideration of Order PO-3306 on the basis that all the responsive records had not been considered, resulting in a fundamental defect in the adjudication process under section 18.01(a) of the IPC's *Code of Procedure*. The adjudicator allowed the reconsideration on this basis and found the records to be exempt under section 14(1)(g) (law enforcement intelligence information) of the *Act*. The ministry is ordered to re-exercise its discretion regarding the application of the exemption.

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

### OVERVIEW:

[1] The appellant, a representative of a human rights organization, made a multi-part request to the Ministry of Community Safety and Correctional Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to specified land claims protests that occurred in 2008.

[2] The appellant subsequently provided the ministry with signed consent forms from a number of the protestors consenting to the disclosure of their personal information to the appellant. The ministry identified responsive records and issued

decision letters denying access to them. The ministry claimed the application of the mandatory exemption in section 21(1) (personal privacy) of the *Act*, citing the non-application of the exception in section 21(1)(a)(consent) and the relevance of the factor in section 21(2)(f) (highly sensitive).

[3] This appeal only deals with the part of the appellant's request relating to access to 13 Ontario Provincial Police (OPP) videotapes taken at the protests.

[4] The ministry issued 13 separate decision letters to the appellant in relation to the videotapes. In its decision, the ministry denied access to them on the basis of the discretionary exemptions in sections 49(a), with reference to the law enforcement exemptions at sections 14(1)(c), (e) and (l) and the personal privacy exemption in section 49(b). The ministry also claimed the application of the mandatory exemption in section 21(1) (personal privacy), citing the presumption in section 21(3)(b) and the factor in section 21(2)(f).

[5] After the inquiry into this appeal was completed, I issued Order PO-3306, upholding the ministry's decision in part, and specifically ordering the disclosure of one of the two video recordings that were at issue.

[6] Following the issuance of that order, I received a reconsideration request from the appellant arguing that there had been a fundamental defect in the adjudication process which is a ground for reconsideration described in section 18.01(a) from the IPC's *Code of Procedure*.

[7] During my reconsideration, I sought representations from both parties. I received representations from the appellant only as the ministry declined to make additional representations.

[8] In this decision, I uphold the ministry's decision to withhold the records under section 14(1)(g) of the *Act*, but order the ministry to re-exercise its discretion.

## **RECORDS:**

[9] The records at issue consist of videotapes which correspond to the following parts of the appellant's request:

CSCS-2008-03743 (2 disks)  
CSCS-2008-03744 (2 disks) – April 21 – 22, 2008  
CSCS-2008-03745 – April 21 - 22, 2008  
CSCS-2008-03746 – April 21, 2008  
CSCS-2008-03747 – April 21, 2008  
CSCS-2008-03748 – April 22, 2008  
CSCS-2008-03750 – April 25, 2008

CSCS-2008-03751 - clips  
CSCS-2008-03752 - clips  
CSCS-2008-03753 - clip  
CSCS-2008-03754 - clips  
CSCS-2008-03755 - clips  
CSCS-2008-03756 - clip  
CSCS-2008-03757 - clips  
CSCS-2008-03758 - clips  
CSCS-2008-03759 - clips  
CSCS-2008-03760

## **ISSUES:**

- A. Are there grounds under section 18.01 of the IPC's *Code of Procedure* to reconsider Order PO-3306?
- B. Does the law enforcement exemption at section 14(1)(g) apply to the records?
- C. Was the ministry's exercise of discretion proper in the circumstances?

## **DISCUSSION:**

### **A. Are there grounds under section 18.01 of the IPC's *Code of Procedure* to reconsider Order PO-3306?**

[10] In Order PO-3306, I addressed the ministry's decision to withhold two videotapes. I ordered the ministry to disclose one of the videotapes and I upheld its decision to withhold the other tape.

[11] The appellant submits that his request to the ministry was for 16 videotapes consisting of ministry request numbers CSCS-2008-03743 to CSCS-2008-03748 and CSCS-2008-03750 to CSCS-2008-03759. In Order PO-3306, I only dealt with records responsive to CSCS-2008-03743 which were here at the IPC's office. The fact that Order PO-3306 failed to address all of the responsive records was brought to my attention by the appellant following his receipt of the order. The ministry does not dispute the fact that there were additional responsive records that were at issue in the appeal and that Order PO-3306 failed to address these records.

[12] The additional responsive records were not originally provided to the IPC as the ministry deemed them too sensitive to send to the IPC. However, for the purposes of this reconsideration, the ministry provided a copy of the records which I have listed in the "Records" section above.

[13] Section 18.01(a) of the IPC's *Code of Procedure* (the *Code*) states the following:

The Commissioner may reconsider an order or other decision where it is established that there is:

a fundamental defect in the adjudication process;

[14] In Order PO-3306, I only considered two videotapes which were responsive to only a small part of the appellant's request. In failing to consider all of the responsive videotapes, I find that there was a fundamental defect in the adjudication process within the meaning of section 18.01(a) and I will now proceed to consider the additional videotapes not addressed in my decision in Order PO-3306.

[15] The appellant also argues that I failed to consider some of his arguments regarding the issue of whether the records contain "personal information" and whether individuals could have an expectation of privacy in the circumstances of the protests. The appellant further submits that I failed to properly consider the consents he provided to the ministry in my determination of section 21(1)(a) of the *Act*. While these arguments were relevant to my decision in Order PO-3306 where I considered the personal privacy exemption in section 21(1), they are not relevant to this decision where I only consider the application of the law enforcement exemption in section 14(1)(g). However, as I have found that there was a fundamental defect in the adjudication process, I will further reconsider my findings with respect to the two records I dealt with in Order PO-3306, including any relevant arguments made by the appellant on the law enforcement exemption.

[16] Accordingly, as the appellant has established one of the grounds for reconsideration in section 18 of the *Code*, I will now reconsider my decision in Order PO-3306.

**B. Does the law enforcement exemption at sections 14(1)(g) apply to the records?**

[17] The ministry claimed the application of sections 14(1)(c), (e), (g), and (l) to exempt the records from disclosure. Based on my review of all the records, I find that section 14(1)(g) is most relevant. It states:

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

interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

[18] 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)

[19] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.<sup>1</sup>

[20] Where section 14(1)(g) 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.<sup>2</sup>

[21] The term "intelligence information" means:

Information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the 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.<sup>3</sup>

[22] The ministry submits that the records were created for law enforcement intelligence purposes, and as such should be treated as police intelligence records. The ministry also submitted representations which were not shared with the appellant due to confidentiality concerns.

[23] The appellant submits that while some parts of the video might be related to intelligence gathering, the videotaping of the Mohawk protests and occupations was

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<sup>1</sup> *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

<sup>2</sup> 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.).

<sup>3</sup> 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.).

quite open and visible and not covert. The appellant further submits that, in his view, the records were primarily taken for the purpose of gathering evidence, and not intelligence, as the records were used extensively in the prosecution of some of the protesters.

[24] In Order PO-3306 I found that section 14(1)(g) did not apply to the records and stated at paragraph 36:

Based on my review, I find the ministry has not established the application of the exemption in section 14(1)(g). There is nothing in the records indicating that they were meant to be a covert collection of information. In fact, the night time video contains a reference by a protester to the fact that they were aware they were being filmed. The ministry itself acknowledged in its representations that, in the event of a prosecution, the records were to be used as evidence.

[25] Having reviewed all the records, I find that the OPP officers who were recording the protests were not doing so in a covert manner. As I stated above, the protesters often comment on the recording that they are aware they are being recorded or make gestures indicating their disapproval of the officers recording their actions. Furthermore, one of the recordings shows a confrontation between a group of protesters and an officer regarding the recording being made.

[26] I further find that portions of the videos were also used in court proceedings. The appellant refers to this fact in his representations. The appellant's request was for the unedited video records containing recorded images of the following:

- an altercation between several Mohawk activists and an OPP photographer and videographer on the morning of April 21, 2008;
- a vehicle pass through the same blockade and being surrounded by Mohawk activists on the morning of April 21, 2008;
- a woman walking through the same blockade and Mohawk activists shouting at her on the morning of April 21, 2008;
- Mohawk activists dumping wooden pallets [near specified location] on April 21;
- a woman setting a fire on [specified location] on April 21;
- the conversations between OPP officers and Mohawk activists on [specified location] on the morning of April 22, 2008, when the OPP officers were ordering the protestors to take down their barricades;

- the pandemonium which occurred on the morning of April 22, 2008 when the OPP's Public Order Unit advanced from [specified location] and the Mohawk activists were at first unable to start one of the vehicles which was being used to block the highway near [specified location];
- the incident on April 22, 2008 when a respected Mohawk elder in the company of one of the Mohawk activists walked to the front of the Public Order Unit and sang a "song of peace" in the Mohawk language;
- the discussions on [specified location] between a number of Mohawk activists and concerned Mohawk citizens with [named officers] on the afternoon of April 25, 2008;
- the sudden arrest – led by [named officer] on the afternoon of April 25 – of [named individuals] and the resulting fighting...;
- the concurrent chaos which erupted during the arrests on the afternoon of April 25 when an officer thought that he had seen a person pointing a gun from the ridge.

[27] The responsive videotapes contain the longer unedited recordings of the protests, as well as shorter clips of the protests which contain the images described in the appellant's request. The content of these records includes the recorded images responsive to the appellant's request and additional footage of protesters, individuals other than the protesters, license plate numbers, property, and other OPP officers.

[28] It is now evident to me that the OPP officers, who were recording the protests or the protesters, while not acting covertly, were recording specified images and details that would not be readily apparent to onlookers. It would be difficult for those whose images were recorded to discern the particular images which were being recorded by the officers or where the camera was focused. I find that the recordings do not contain images or recorded events that are identifiable as part of an investigation into a possible violation of law. Instead, I would characterize the recordings as a collection of information about the protesters and the protests which were made for law enforcement purposes.

[29] I have reviewed all of the videos which contain the requested recorded images. Based on my review of the records I find that disclosure of the videos would reveal law enforcement intelligence information gathered regarding the individuals and organization whose images are contained in the recordings. The recordings were made by OPP officers whose role it was to record people, license plate numbers and the various occurrences with a view to creating an intelligence record of the protests and the protesters. The recorded conversations between the officers who were doing the actual recordings and the recorded images establish and reinforce the ministry's

position that the officers were not simply recording in order to collect evidence for a law enforcement investigation.

[30] I find that the records all contain intelligence information gathered for the purposes of section 14(1)(g) and that the disclosure of the records could reasonably be expected to reveal law enforcement intelligence information respecting the Mohawk protest and the protesters. Accordingly, subject to my finding on the ministry's exercise of discretion, I uphold the ministry's claim of section 14(1)(g).

**C. Was the ministry's exercise of discretion proper in the circumstances?**

[31] The sections 14(1)(g) exemption is 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.

[32] 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.

[33] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>4</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>5</sup>

[34] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>6</sup>

- 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

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<sup>4</sup> Order MO-1573.

<sup>5</sup> Section 54(2).

<sup>6</sup> Orders P-344, MO-1573.



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

[35] The ministry submits that it considered the following when exercising its discretion to withhold the records:

- the importance of protecting the integrity of law enforcement operations, including the personal information that is collected as a result of these operations;
- the fact that information collected for intelligence purposes is, by definition, information that is maintained in strict confidence and is not disclosed for non-law enforcement purposes; and
- public expectations that personal information collected by police during law enforcement operations will be kept confidential, except in accordance with strictly construed exemptions.

[36] The appellant submits that the ministry should consider the age of the videos and the fact that many portions of the videos were disclosed in various criminal court proceedings in exercising its discretion. The appellant states:

While [the ministry] may be correct in its contention that the age of the videos “does not prevent the ministry from continuing to apply” the exemption contained in section 14(1)(g) of the *Act*, we would suggest that application of this exemption is discretionary and that at least some disclosure now might be more in keeping with the spirit and intent of the *Act*.

[37] The appellant also submits that the ministry failed to consider that disclosure of any of the records would be to the organization which he represents, Amnesty, and states:

Another factor, which the ministry should, in our view, have taken into account in exercising its discretion not to release any part of the records at issue, is the fact that it is a respected and reputable organization which is seeking access to the records. Amnesty International is a worldwide movement of people dedicated to the protection and promotion of human rights. Amnesty was awarded the Nobel Peace Prize for its human rights work around the world. Amnesty systematically and independently researches the facts of individual cases and patterns of human rights abuses.

[38] Based on my review of the parties’ representations, I find that the ministry did not exercise its discretion in bad faith and it properly considered relevant factors. However, I find that the appellant has raised a number of considerations that the ministry failed to consider:

- the fact that a number of years have passed since the videos were taken and presumably the criminal prosecutions flowing from the protests have long since been completed,
- the fact that large portions of the records were shown in court,
- the fact that the appellant has a number of consents from individuals whose images are contained in the records.

[39] I find these considerations to be properly relevant in the circumstances of this appeal and should have been considered by the ministry in its exercise of discretion in applying section 14(1)(g). Accordingly, I will order the ministry to re-exercise its discretion in section 14(1)(g) with respect to all the records at issue.

**ORDER:**

1. I order the ministry to re-exercise its discretion under section 14(1) in accordance with the factors set out above and to advise the appellant and this

office of the result of this re-exercise of discretion, in writing. If the ministry continues to withhold all or part of the records, I also order it to provide the appellant with an explanation of the basis for exercising its discretion to do so and to provide a copy of that explanation to me. The ministry is required to send the results of its re-exercise, and its explanation to the appellant, and a copy to this office no later than **August 22, 2014**. If the appellant wishes to respond to the ministry's re-exercise of discretion, and/or its explanation for exercising its discretion to withhold information, he must do so within 35 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 2.

Original signed by: \_\_\_\_\_  
Stephanie Haly  
Adjudicator

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July 22, 2014