Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3424-I

Appeal PA13-88-2

Ministry of Community Safety and Correctional Services

November 14, 2014

Summary: The requester made an access 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 information relating to a specific investigation conducted by the Ontario Provincial Police. The ministry denied access to the records requested in their entirety, claiming the application of the discretionary exemptions in section 49(a) in conjunction with sections 14 (law enforcement), 15 (relations with other governments), 16 (national security), 17(1) (third party information) and 19 (solicitor-client privilege), as well as section 49(b) in conjunction with section 21(1) (personal privacy). The ministry also advised the requester that no records exist in response to the last part of the request dealing with the costs of the investigation.

During the mediation of the appeal, the appellant advised the mediator that he believed that records exist relating to the costs of the investigation. Consequently, reasonable search was added as an issue in the appeal. During the inquiry, the ministry claimed for the first time that all of the records are excluded from the *Act* due to the application of the exclusion in section 65(5.2) (ongoing prosecution).

In this interim order, the adjudicator finds that the exclusion in section 65(5.2) does not apply to exclude the records from the scope of the *Act*. The adjudicator also finds that the ministry's search for records was not reasonable, and orders it to conduct another search for responsive records. The adjudicator remains seized of the matter and will continue the inquiry by ordering the ministry to submit representations relating to the exemptions claimed in its decision letter, and to provide copies of the records to the office of the Information and Privacy Commissioner/Ontario.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 24 and 65(5.2).

Orders and Investigation Reports Considered: Order PO-2703.

OVERVIEW:

[1] This interim order disposes of some of the issues raised as a result of an appeal from a decision made in response to an access 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 the following information:

> The complete and un-redacted investigation file or files related to the criminal investigation of [the requester] of the Royal Canadian Mounted Police, some or all of which was named "Project ["name"] . . . this expressly includes all files associated to this matter whether criminal investigation files or not, or files under the control of the Ontario Provincial Police (includes file#) . . . all un-redacted personal notes, emails, and any other communications of all OPP employees involved in this matter, specifically including but in no way limited to [five named individuals] . . . a complete financial record indicating the complete cost of the investigation of [the requester] by the OPP. This includes all salary costs (including overtime pay), meals, travel costs (hotel, incidentals, etc.), of every OPP employee having worked on this investigation for its entire duration.

[2] In response, the ministry denied access to the records requested in their entirety, claiming the application of the discretionary exemptions in section 49(a) in conjunction with sections 14 (law enforcement), 15 (relations with other governments), 16 (national security), 17(1) (third party information) and 19 (solicitor-client privilege), as well as section 49(b) in conjunction with section 21(1) (personal privacy). The ministry also advised the requester that no records exist in response to the last part of the request dealing with the costs of the investigation.

[3] During the mediation of the appeal, the appellant advised the mediator that he believed that records exist relating to the costs of the investigation. Consequently, reasonable search was added as an issue in the appeal.

[4] The appeal was then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. I provided the ministry and the Royal Canadian Mounted Police (the RCMP) with the opportunity to provide representations in response to the issues set out in the Notice of Inquiry, which included the exemptions claimed in the ministry's decision letter. In the ministry's representations, it claimed for the first time, that all of the records are excluded from the *Act* due to the application of

the exclusion in section 65(5.2) (ongoing prosecution). Therefore, I added the exclusion as an issue in this appeal. The ministry also stated that if the application of the exclusion is not upheld, it reserved the right to withhold the records on the basis of the exemptions identified in the Notice of Inquiry, although it did not provide representations in regard to the noted exemptions. The ministry did not provide copies of the records at issue to this office.

[5] The RCMP indicated in their representations that all RCMP material was provided to the ministry in confidence, and that under the corresponding federal legislation, the records would be exempt under the law enforcement and investigation exemption. I then received representations from the appellant and further reply and sur-reply representations from the ministry and the appellant, which were shared in accordance with this office's *Practice Direction 7*.

[6] For the reasons that follow, I find that the exclusion in section 65(5.2) of the *Act* does not apply and that the ministry did not conduct a reasonable search for records. I remain seized of this appeal to continue the inquiry with respect to the exemptions claimed by the ministry in its decision letter. I also order the ministry to conduct another search for records that are responsive to the second part of the appellant's request, and to submit representations and provide copies of the records at issue to this office.

ISSUES:

A: Does section 65(5.2) apply to exclude the records from the application of the *Act*?

B: Did the ministry conduct a reasonable search for records?

DISCUSSION:

Issue A: Does section 65(5.2) apply to exclude the records from the application of the *Act*?

[7] Section 65(5.2) states:

> This Act does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

[8] The purposes of section 65(5.2) include maintaining the integrity of the criminal justice system, ensuring that the accused and the Crown's right to a fair trial is not infringed, protecting solicitor-client privilege and litigation privilege, and controlling the

dissemination and publication of records relating to an ongoing prosecution.[1] The term "prosecution" in section 65(5.2) of the *Act* means proceedings in respect of a criminal or quasi-criminal charge laid under an enactment of Ontario or Canada and may include regulatory offences that carry "true penal consequences" such as imprisonment or a significant fine.[2]

[9] The words "relating to" require some connection between "a record" and "a prosecution." The words "in respect of" require some connection between "a proceeding" and "a prosecution."[3] Only after the expiration of any appeal period can it be said that all proceedings in respect of the prosecution have been completed. This question will have to be decided based on the facts of each case.[4]

Representations

[10] The ministry submits that the records at issue were created or collected by the Ontario Provincial Police (the OPP) in respect of an OPP law enforcement investigation of a member of the RCMP. The OPP investigation, the ministry states, has led to the RCMP member being charged with disgraceful conduct, in contravention of the RCMP's code of conduct. This code of conduct, the ministry submits, governs the conduct of RCMP members and is prescribed in section 38 of the *Royal Canadian Mounted Police Act*[5] (the *RCMP Act*) and in Part III of the *Royal Canadian Mounted Police Regulations, 1998* (the *RCMP Regulations*).

[11] The ministry goes on to state that as a result of the alleged contravention of the code of conduct, the RCMP member is subject to formal disciplinary action under section 43 of the *RCMP Act*. At the time the ministry submitted its representations, it states that the RCMP member was to appear at a hearing before an adjudication board. If the hearing establishes that the charges are made out, sanctions may be imposed as set out in section 45.12(3) of the *RCMP Act*, including, but not limited to, dismissal from the RCMP. The ministry advises that it contacted legal counsel representing the RCMP, who advised that the records that were collected or created by the OPP are being used for the purpose of the hearing.

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[1] *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991, March 26, 2010, Tor. Doc. 34/91 (Div. Ct.).
[2] Order PO-2703.
[3] *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, cited above. See also *Canada (Information Commissioner) v. Canada (Commissioner, RCMP)*, 2003 SCC 8, [2003] 1 S.C.R. 66 at para. 25.
[4] See note 2.
[5] R.S.C., 1985, c.R-10.

[12] Accordingly, the ministry is claiming that the exclusion in section 65(5.2) of the *Act* is applicable for the following reasons:

- There is a connection[6] between the records collected by the OPP as part of its law enforcement investigation and the use of the records by the RCMP as part of the code of conduct hearing against the RCMP member;
- The code of conduct hearing must be interpreted as a prosecution for the purposes of section 65(5.2) of the *Act*; and
- The code of conduct hearing has not yet begun.[7]

[13] The appellant submits that the ministry is incorrect when it states that the OPP's investigation led to the charges under the code of conduct. Rather, the appellant submits that the RCMP conducted their own lengthy internal investigation and it was this investigation that resulted in charges of disgraceful conduct being laid by the RCMP. The appellant argues that the OPP began their investigation after the RCMP had concluded their investigation and laid charges. The appellant also advises that the two-year OPP investigation did not result in criminal charges being laid against him.

[14] The appellant further states:

> . . . [P]lease be advised that the Hearing concluded on January 31, 2014 with my being cleared by the RCMP Board of any wrongdoing on all allegations, no evidence being introduced to support any of the alleged actions. What is of significant importance is that **not one** witness from the OPP investigation attended to provide any testimony or evidence throughout the proceedings, **nor was any document created by the OPP ever introduced into the proceedings**. In short, no OPP elements of [the name of the OPP investigation] were used by the "prosecutors" of the RCMP in this matter.

[15] The appellant goes on to argue that although the transcript of the hearing is not available,[8] the decision was rendered orally, and therefore, the prosecution has concluded.

[16] In reply, the ministry concedes that the appellant has correctly pointed out that the OPP investigation began after the RCMP investigation, and not beforehand. However, the ministry argues that the sequence of the investigations is immaterial for the purpose of this appeal, and that the records have been properly excluded under section 65(5.2) of the *Act*. In addition, the ministry disagrees with the appellant's

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[6] Citing *Ministry of the Attorney General and Toronto Star*, 2010 ONS 991 (*Toronto Star*), in which the Divisional Court held that the words "relating to" in section 65(5.2) require "some connection" between a record and a prosecution.
[7] As of January 2014.
[8] As of February 2014.

position that there is no link between the OPP criminal investigation and his being charged internally by the RCMP. The ministry states:

> What we are told by RCMP counsel is that at the RCMP hearing this past January, some RCMP records which the OPP uncovered as part of its investigation were provided to RCMP counsel, and were used by RCMP counsel as evidence during the hearing. We submit that this creates the requisite link between the records and the hearing under the *RCMP Act*.
>
> These records were not created by the OPP, which is what the appellant correctly notes, but they were uncovered, collected and used by OPP officers as part of an OPP investigation. We submit that these factors bring them within the scope of the exclusion in subsection 65(5.2).

[17] The ministry also submits that while the charges of disgraceful conduct were dismissed at the conclusion of the hearing, the written decision has not yet been issued. The ministry advises that the RCMP can appeal the written decision, once issued, to the Commissioner of the RCMP. The ministry continues to assert that the exclusion in section 65(5.2) applies until all appeal proceedings have completed, or until the time limitation for filing an appeal has expired.

[18] In sur-reply, the appellant states that his request is for the entire OPP investigation file and any associated files, and not only for records that were provided to the RCMP at the conclusion of the OPP investigation. The appellant advises that he received records as part of the mandatory disclosure[9] in the RCMP internal discipline proceeding, and that he seeks access to the OPP records that were not provided as part of that process.

[19] In particular, the appellant submits that:

- No new material from the OPP was used in the RCMP proceeding;
- The OPP did not collect material from the RCMP, but rather took possession of material already collected by the RCMP;
- The exhibits entered into evidence at the RCMP proceeding are the originals of what the RCMP made available to the OPP at different times;
- RCMP counsel did not rely on any witness transcripts from the OPP interviews, but relied solely on *viva voce* evidence from each witness;
- Some of the records at issue were seized by the OPP pursuant to a search warrant. These records were not entered into evidence in any form during the RCMP internal proceeding; and
- Even if there was an appeal of the discipline proceeding, no new material can be submitted as evidence on appeal.

[9] The appellant refers to these records as comprising the "OPP Crown Brief."

[20] In response, the ministry argues that in the *Toronto Star*[10] case, the Divisional Court held that records that are excluded under section 65(5.2) can include records that are not part of the Crown Brief. In other words, the ministry submits that the fact that the records the appellant seeks are not part of the Crown Brief does not affect its decision to exclude them under section 65(5.2).

Analysis and finding

[21] In Order PO-2703, former Senior Adjudicator John Higgins interpreted and applied section 65(5.2) of the *Act* for the first time. In that order, he elaborated upon the purpose of section 65(5.2) as follows:

> In my view, section 65(5.2) is aimed at protecting prosecutors from having to address access-to-information request for records that are part of their prosecution file where the matter is ongoing. The apparent rationale for doing this would be avoidance of the distractions that would be caused to Crown prosecutors, who are well known to have heavy caseloads, if they were required to address access-to-information requests, including which exemptions to claim, while proceedings are ongoing. Similar considerations apply to provincial offences officers, who prosecute provincial offences such as the outstanding charges under the WSIA [*Workplace Safety and Insurance Act*] in this case. The fact that materials of this kind can be voluminous, to say the least, provides further reinforcement for this rationale.

[22] Former Senior Adjudicator Higgins went on to address four questions that he felt were relevant to the interpretation and application of section 65(5.2). These questions are:

> (1) What constitutes a "prosecution"?
>
> (2) What is required to find that a record is "relating to" a prosecution?
>
> (3) Where records are not part of a court brief or Crown brief, what criteria apply to determine whether a record may be described as "relating to" a prosecution?
>
> (4) What considerations must be taken into account in determining whether all proceedings in respect of a prosecution have been completed?

[23] I agree with and adopt this four-part test for purposes of this appeal.

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[10] See note 5.

(1) What constitutes a "prosecution"?

[24] The appellant was charged by the RCMP with disgraceful conduct, in contravention of the RCMP's code of conduct, which is prescribed in section 38 of the *RCMP Act* and in Part III of the *RCMP Regulations*.

[25] In Order PO-2703, former Senior Adjudicator Higgins found that a "prosecution" in the context of section 65(5.2) the *Act* means "the prosecution of an offence under an enactment of Ontario or Canada." In considering what would qualify as an "offence" under that section, he relied upon section 11 of the *Canadian Charter of Rights and Freedoms* (the *Charter*), which sets out rights accruing to persons charged with "an offence", as well as the case *R. v. Wigglesworth*, [1987] 2 S.C.R. 541. In that case, the Supreme Court of Canada discussed the criteria for deciding that something constitutes an "offence" within the meaning of section 11 of the *Charter*. In making this assessment, Wilson J., for the majority, discusses the distinction between regulatory proceedings and offences of a penal nature. She states:

> In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity. … Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which s. 11 is applicable. But all prosecutions for criminal offences under the Criminal Code and for quasi-criminal offences under provincial legislation are automatically subject to s. 11. They are the very kind of offences to which s. 11 was intended to apply. [para. 23]
>
> This is not to say that if a person is charged with a private, domestic or disciplinary matter which is primarily intended to maintain discipline, integrity or to regulate conduct within a limited private sphere of activity, he or she can never possess the rights guaranteed under s. 11. Some of these matters may well fall within s. 11, not because they are the classic kind of matters intended to fall within the section, but because they involve the imposition of true penal consequences. In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited

> sphere of activity. . . . If an individual is to be subject to penal consequences such as imprisonment -- the most severe deprivation of liberty known to our law -- then he or she, in my opinion, should be entitled to the highest procedural protection known to our law.[11]

[26] As the *Act* does not define the term "prosecution," in addition to a consideration of the term "offence," former Senior Adjudicator Higgins considered the meaning of the term "prosecution" in Order PO-2703. In doing so he reviewed the approach applied in orders issued by the British Columbia Information and Privacy Commissioner as that province's *Freedom of Information and Protection of Privacy Act* has a similar provision that has been interpreted.

[27] Following his review of the approach taken by the British Columbia Commissioner and, after having considered the specific circumstances of the inclusion of section 65(5.2) in the *Act*, former Senior Adjudicator Higgins adopted the definition of "prosecution" used by the British Columbia Commissioner for the purposes of interpreting the provision. He stated:

> [The] term "prosecution" in section 65(5.2) of the *Act* means proceedings in respect of a criminal or quasi-criminal charge laid under an enactment of Ontario or Canada and may include regulatory offences that carry "true penal consequences" such as imprisonment or a significant fine . . .
>
> [T]he provisions of the statute governing the proceedings and stipulating the penalty to be applied must be considered.

[28] I adopt former Senior Adjudicator Higgins' interpretation of a "prosecution" in section 65(5.2) and apply it to the circumstances of this appeal. The relevant statutory provisions of the *RCMP Act* state:

> 38. The Governor in Council may make regulations, to be known as the Code of Conduct, governing the conduct of members.
>
> 43(1) Subject to subsections (7) and (8), where it appears to an appropriate officer that a member has contravened the Code of Conduct and that appropriate officer is of the opinion that, having regard to the gravity of the contravention and to the surrounding circumstances, informal disciplinary action under section 41 would not be sufficient if the contravention were established, the appropriate officer shall initiate a hearing into the alleged contravention and notify the officer designated by the Commissioner for the purposes of this section of that decision.

[11] At para. 24.

> 45.12(1) After considering the evidence submitted at the hearing, the adjudication board shall decide whether or not each allegation of contravention of the Code of Conduct contained in the notice of the hearing is established on a balance of probabilities.
>
> (2) A decision of an adjudication board shall be recorded in writing and shall include a statement of the findings of the board on questions of fact material to the decision, reasons for the decision and a statement of the sanction, if any, imposed under subsection (3) or the informal disciplinary action, if any, taken under subsection (4).
>
> (3) Where an adjudication board decides that an allegation of contravention of the Code of Conduct by a member is established, the board shall impose any one or more of the following sanctions on the member, namely,
>
> (a) recommendation for dismissal . . .
>
> (b) direction to resign from the Force . . .
>
> (c) recommendation for demotion . . . or
>
> (d) forfeiture of pay for a period not exceeding ten work days.
>
> (4) In addition to or in substitution for imposing a sanction under subsection (3), an adjudication board may take any one or more of the informal disciplinary actions referred to in paragraphs 41(a) to (g).

[29] In my view, allegations and findings of a contravention of the Code of Conduct under these provisions are not offences that may lead to "true penal consequences," such as imprisonment or a significant fine. The most severe penalty for a contravention of the Code of Conduct is dismissal from the RCMP, which does not meet the threshold of being an offence leading to true penal consequences. In addition, I do not interpret the potential imposition of the loss of ten day's pay as being equivalent to the imposition of a "significant fine." Therefore, I find that a proceeding in respect of charges against an RCMP member under the *RCMP Act* and its Code of Conduct does not constitute a "prosecution" within the meaning of section 65(5.2) of the *Act*.

[30] Having found that the first part of the test enunciated by former Senior Adjudicator Higgins has not been met, it is not necessary for me to consider the remaining questions. Therefore, I find that the exclusion in section 65(5.2) does not apply to exclude the records from the application of the *Act*.

[31] As indicated in the ministry's representations, if I find that section 65(5.2) does not apply, it reserves the right to withhold the records on the basis of the exemptions claimed in its decision letter, which are set out in the Notice of Inquiry that I sent to the ministry on December 4, 2013. Consequently, I remain seized of this appeal and will continue the inquiry by ordering the ministry to submit representations in response to that portion of the Notice of Inquiry of December 4, 2013 which addresses the possible application of the exemptions claimed to the records. I will require that the ministry provide its representations no later than three weeks from the date of this order. In addition, I order the ministry to provide copies of the records at issue to this office.

Issue B: Did the ministry conduct a reasonable search for records?

[32] As previously indicated, part of the appellant's request was for a complete financial record indicating the cost of the OPP investigation, including salary (including overtime pay), meals and travel costs of every OPP employee who worked on this investigation for its entire duration. The ministry advised the appellant that no records exist in response to the part of his request dealing with the costs of the investigation. During the mediation of the appeal, the appellant advised the mediator that he believed that records exist relating to the costs of the investigation. Consequently, reasonable search was added as an issue in the appeal.

[33] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 of the *Act*.[12] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[34] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[13] To be responsive, a record must be "reasonably related" to the request.[14]

[35] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[15] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[16]

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[12] Orders P-85, P-221 and PO-1954-I.
[13] Orders P-624 and PO-2559.
[14] Order PO-2554.
[15] Orders M-909, PO-2469 and PO-2592.
[16] Order MO-2185.

[36] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[17] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.[18]

Representations

[37] The ministry provided an affidavit sworn by the Manager of Strategic Financial Services Section of the Business and Financial Services Bureau of the OPP, who oversees the OPP Daily Activity Reporting (DAR) system. The Manager advises that the DAR system is designed to record, compile and permit analysis of daily operations. DAR entries are to be completed by officers at the end of each shift. The purpose of the system is to capture the type of work performed by staff and the amount of time allocated to each type of duty/activity by location.

[38] The Manager goes on to state:

> Only where there is a major event or incident is a special tracking registry number created for purposes of the detailed tracking of hours, resources and costs. A major event or incident is defined as large scale or preplanned events where a large number of employees, vehicles and/or materials are required. An example could be a homicide investigation.

[39] The Manager also advises that the investigation at issue in this appeal was not tracked in the DAR system using a registry number as it was not classified as a major event or incident. In addition, the Manager states that she had further discussions with staff from the Investigations and Organized Crime Command to confirm that hours for the investigation were not tracked specifically within their Command (and outside of DAR). The Manager further states that this was confirmed by the Project Support Centre and staff of the Investigation and Support Bureau.

[40] The appellant submits that the ministry is hiding behind technical jargon, and that refusing to provide any information about the costs associated with the investigation is not within the spirit of access to information. The appellant further submits that there must be some easy and logical way to produce the information requested or, at the very least, an estimate of the total costs based on basic elements of the investigation. He also states that he has received many access requests as an RCMP member and several have been in relation to costs associated with a particular project, investigation or activity.

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[17] Order MO-2246.
[18] Order MO-2213.

[41] Further, the appellant submits that investigators travelled extensively on this matter and would have submitted claims for hotels, flights, other types of travel, meals and overtime and that these records should be located. The appellant states:

> It is not unreasonable to expect that the OPP employees take a few minutes of their time to summarize their hours, claims and expenses on [the investigation]. In fact, it should be the appropriate response to a request from a member of the Ontario public.

[42] In reply, the ministry reiterates its position that there is no responsive financial record indicating the cost of the investigation. The ministry goes on to say that in order to create such a record, the nine OPP officers who were involved in the two-year investigation would have to manually go through their daily notebook entries compiled during the investigation, and estimate how much time they spent each day on the investigation. The ministry argues that this type of record creation would take many hours and not the "few minutes" the appellant asserts, and that this exercise would have the effect of taking investigating officers away from their normal policing duties.

[43] The ministry submits that it relies on section 2 of Regulation 460, which excludes records from the *Act*, where creating them would unreasonably interfere with institutional operations.

[44] In sur-reply, the appellant submits that all actions relating to the investigation conducted by the nine OPP officers should be recorded and located in the investigation file itself. Therefore, the appellant argues, the officers would not have to go through their notebooks to see when they worked on the investigation; they could simply look in the file to locate and compile that information, which is not unreasonable.

[45] The appellant also states:

> Perhaps it is time for the OPP to think about creating such a record, or an application that can do the work in "a few minutes." As I stated, to not create such a computer application and then use that as the excuse for not responding to a request is rather self-serving. The position is that they don't want to gather the information, not that it doesn't exist. This is unacceptable as a response from an institution such as the OPP.

Analysis and findings

[46] The ministry's decision letter to the appellant regarding the costs of the investigation states:

> With respect to part two of your request, please be advised that the OPP have confirmed that costs specifically associated with this investigation are not available. No such records exist.

[47] During the inquiry, the ministry's position was that this investigation was not specifically tracked on the DAR system and so the costs associated with it are not available. The ministry's position is also that if the nine OPP officers involved in the investigation were to manually set out the number of hours worked on the investigation, the time required to do that would unreasonably interfere with institutional operations.

[48] The appellant's position is that the officers should be able to summarize the hours worked on the investigation by reviewing the work product ostensibly located in the investigation files. The appellant also argues that there should be records of expenses submitted by the officers to the OPP, such as travel, hotels and meals.

[49] I am satisfied with the ministry's search for records that relate to the number of hours spent by officers on the investigation. Given that OPP officers are paid by salary and not through the submission of billable hours, it is reasonable to expect that there would not be records relating to the number of hours spent conducting investigations. I also find that requiring the officers involved in the investigation that is the subject matter of this appeal to attempt to re-create the number of hours spent on the investigation would essentially require the creation of a new record. I agree with the ministry that the time required to create this record would unreasonably interfere with institutional operations.

[50] However, I also find that the appellant's representations present a reasonable basis for concluding that other records responsive to the request might exist. I have reviewed the ministry's representations regarding its search for the responsive records and the supporting affidavit. In my view, I have not been provided with sufficient explanation from the ministry as to why the scope of the ministry's search was not more expansive. There is no explanation as to why no records exist with respect to the hotel, meal, travel and other incidental expenses related to a two-year investigation involving nine OPP officers. Records relating to expenses of this nature would be kept as part of the ongoing investigation, and as such, ought to have resulted in the location of some type of record.

[51] Accordingly, I am not satisfied that the ministry's search for responsive records was reasonable. I order the ministry to conduct a further search for records relating to the hotel, meal, travel and other incidental expenses of the officers, in accordance with the terms of this Order outlined below.

ORDER:

1. I find that the exclusion in section 65(5.2) does not apply to exclude the records from the application of the *Act*.

2. I remain seized of this matter, and order the ministry to provide representations in response to issues set out in the Notice of Inquiry of December 4, 2013, and to provide copies of the records at issue to this office no later than **December 5, 2014**.

3. I order the ministry to conduct a further search for records relating to the hotel, meal, travel and other incidental expenses incurred by OPP officers during the investigation.

4. If, as a result of this further search, the ministry identifies additional records responsive to the request, I order the ministry to provide a decision letter to the appellant regarding access to these records in accordance with sections 26, 27 and 28 of the *Act*, treating the date of this order as the date of the request. I also order the ministry to provide me with a copy of any new decision letter that it issues to the appellant.

Original Signed By: November 14, 2014
Cathy Hamilton
Adjudicator