Information and Privacy Commissioner,
Ontario, Canada

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

FINAL ORDER PO-3542-F

Appeal PA14-381

Ministry of Community Safety and Correctional Services

October 22, 2015

Summary: In Interim Order PO-3521-I, the adjudicator upheld the ministry's decision to refuse to confirm or deny the existence of records relating to intelligence gathering activities involving a First Nation under section 14(3). The ministry was ordered to exercise its discretion with respect to that decision and provide the adjudicator with an explanation as to the considerations it relied upon in doing so. Based on the ministry's arguments, the adjudicator upholds its exercise of discretion in claiming the application of section 14(3) and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 14(3).

Orders and Investigation Reports Considered: P-344

DISCUSSION:

[1] On August 13, 2015, I issued Interim Order PO-3521-I in which I upheld the Ministry of Community Safety and Correctional Services' (the ministry) decision to refuse to confirm or deny the existence of records that were responsive to the appellant's request under section 14(3) of the *Act*. However, in that decision, the ministry declined to exercise its discretion and failed to provide me with an explanation as to the considerations it chose to reflect upon when it made its decision to refuse to confirm or deny the existence of responsive records. As a result, I found that I was unable to determine whether the ministry properly exercised its discretion in accordance

with the principles set forth in the *Act*. Based on that conclusion, I included the following order provision in Interim Order PO-3521-I:

> I order the ministry to exercise its discretion under section 14(3) based on proper considerations and to provide both the appellant and me with an explanation of the factors it considered in doing so by **September 11, 2015.**

[2] In response to that order provision, the ministry stated as follows:

> . . . we submit that we exercised our discretion appropriately in refusing to confirm or deny the existence of records, because confirming or denying their existence could compromise the effectiveness of law enforcement and specifically surveillance operations. Additionally, confirming or denying their existence could harm the safety of affected individuals, including confidential informants and undercover officers. We have exercised our discretion in accordance with our usual practices, and in the interest of protecting public safety.

[3] I then shared this submission with the appellant, who responded in somewhat greater detail. The appellant points out that, contrary to the ministry's statement above, it had indicated in its original representations that it "did not exercise our discretion pursuant to section 14(1)." The appellant submits that as a result of the interim order, the ministry was obliged to undertake a new exercise of its discretion. It also relies on the approach taken by former Assistant Commissioner Tom Mitchinson in Order P-344 in an appeal involving a claim for the application of section 14(3). In that case, the former Assistant Commissioner made the following comments about the manner in which an institution ought to exercise its discretion when applying section 14(3), stating:

> In my view, taking a 'blanket' approach to the application of section 14(3) in cases involving a particular type of record would represent an improper exercise of discretion. Although it may be proper for a decision maker to adopt a policy under which decisions are made, it is not proper to apply this policy inflexibly to all cases. In order to preserve the discretionary aspect of a decision under sections 14(3) and 49(a), the head must take into consideration factors personal to the requester, and must ensure that the decision conforms to the policies, objects and provisions of the *Act*.

[4] The appellant argues that the ministry applied a "blanket approach" to the application of section 14(3) in this case and failed to consider "factors personal to the requester", arguing that this is inherent in the ministry's reference to the exercise of its discretion "in accordance with our usual practices." He submits that the ministry has failed to do what the interim order required it to do, exercise its discretion in accordance with proper factors.

The appellant then went on to address the appropriateness of the application of section 14(3) in this appeal and its use in response to the request, as it was framed.

[5] The ministry's representations on the manner in which it exercised its discretion in response to the directions given in the interim order are sparse. They describe in very general terms the reasons behind the ministry's decision to exercise its discretion to confirm or deny the existence of responsive records, using the language from the exemptions in section 14(1) which is claimed to apply. Contrary to the appellant's position, the ministry has stated that it re-exercised its discretion under section 14(3), as required by Interim Order PO-3521-I. In its earlier submission during the inquiry, it had indeed indicated only that it had not exercised its discretion "under section 14(1)". The ministry's representations in response to the direction contained in the order provision now indicate that it has exercised its discretion under section 14(3), as required.

[6] In Interim Order PO-3521-I, I found that information that would be responsive to the request, if it existed, would fall within the ambit of the exemption in section 14(1)(g), which addresses interference with the gathering of law enforcement intelligence information respecting organizations and individuals. Intelligence information must, by its very nature, be treated in a careful and sensitive manner in order to ensure the continued effectiveness of the law enforcement agencies' intelligence-gathering activities and to protect the identity and safety of those involved in this work. The ministry's submissions on its exercise of discretion under section 14(3) refer, however obliquely, to considerations around the importance of maintaining the safety of the individuals conducting the surveillance and the need to carry on these activities behind a shield of confidentiality.

[7] However, I have some concerns with the ministry's use of the phrase "in accordance with our usual practices" when describing how it exercised its discretion. An inference could be drawn through the use of such language that the ministry has fettered its discretion and limited its ability to exercise discretion in favour of a decision to disclose any information related to intelligence-gathering. I caution the ministry that applying a policy or a "usual practice" in all cases which results in consistent decisions against disclosure when exercising its discretion is not in keeping with the spirit and the intent of the *Act*.

[8] Based on the ministry's representations, as well as my consideration of the appellant's arguments, I am satisfied that the ministry exercised its discretion in deciding to apply section 14(3). I found in Interim Order PO-3521-I that the disclosure of any responsive records, if they exist, could reasonably be expected to result in interference with the ministry's law enforcement intelligence-gathering activities. Accordingly, I am satisfied that the ministry relied upon appropriate considerations when it decided to exercise its discretion in favour of claiming the application of section 14(3). I am not satisfied, based on the appellant's arguments, that it relied upon improper or irrelevant considerations when it exercised its discretion to claim section

14(3). As a result, I uphold the ministry's exercise of discretion and will not disturb it on appeal.

ORDER:

I uphold the ministry's exercise of discretion and dismiss the appeal.

Original Signed by: October 22, 2015

Donald Hale
Adjudicator