Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3723

Appeal PA14-408-2

Ministry of Community Safety and Correctional Services

April 26, 2017

Summary: The ministry received a request under the *Act* for access to records relating to surveillance cameras at an identified detention centre. The ministry granted partial access to the responsive records. It claimed that some of the records were excluded from the scope of the *Act* by virtue of the application of the exclusion for labour relations and employment-related matters at section 65(6) and that other records or portions of the records were exempt from disclosure pursuant to the exemption for advice or recommendations at section 13(1), the law enforcement exemptions at sections 14(1)(i), (j) and (k), and the personal privacy exemption at section 21(1). The appellant appealed the ministry's decision and raised the possible application of the public interest override provision at section 23. In this order, the adjudicator upholds the ministry's decision and finds that the public interest override provision does not apply to the information that is exempt.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of "personal information"), 13(1), 14(1)(i), (j), and (k), 21(1), 23, and 65(6)3.

Orders and Investigation Reports Considered: Orders PO-2332 and PO-2911.

Cases Considered: *Ontario (Attorney General) v. Toronto Star,* 2010 ONSC 991 (Div. Ct.) and *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

OVERVIEW:

The Ministry of Community Safety and Correctional Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for

access to information relating to surveillance cameras at the Elgin Middlesex Detention Centre (EMDC). Subsequently, the request was clarified as being for the following specific information:

> EMDC security camera assessments, EMDC employee relations committee meeting minutes / reports regarding security cameras, any reports on the EMDC security camera procedures and briefing materials relating to the need for security cameras at EMDC.

The timeline for the information sought was established as records dated from January 1, 2102 to April 9, 2014.

The ministry granted partial access to the responsive records, withholding portions of them under the exemption for advice or recommendations at section 13(1), the law enforcement exemptions at sections 14(1)(i), (j), and (k), the third party information exemption at section 17(1), the exemption for information relating to an institution's economic interests at section 18(1)(c), and the exemption for information that would reveal the proposed plans, projects or policies of an institution at section 18(1)(g) of the *Act*. The ministry also advised that it was claiming that some of the information was related to labour relations or employment-related matters and therefore excluded from the scope of the *Act* as a result of the application of section 65(6). Finally, the ministry advised that some information was also withheld as it was determined not to be responsive to the request.

The requester, now the appellant, appealed the ministry's decision to deny access to portions of the responsive records.

During mediation, the appellant advised that he believed that there was a compelling public interest in the disclosure of information that had been withheld. Accordingly, the possible application of the public interest override at section 23 of the *Act* was added as an issue on appeal.

As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry under the *Act*. Prior to issuing a Notice of Inquiry to the parties setting out the facts and issues on appeal, the adjudicator previously assigned to this appeal noted that although it had not been claimed in the ministry's decision letter, notations on the records partially disclosed to the appellant indicated that on page 39 the ministry relies on the mandatory personal privacy exemption at section 21(1) to deny access to the surname of a deceased individual whose death, which occurred while he was in custody at the EMDC, resulted in an inquest. As a result, the possible application of section 21(1) was added as an issue to the appeal.

Representations were sought from both the ministry and the appellant. In its representations, the ministry withdrew its reliance on sections 17(1), 18(1)(c) and 18(1)(g) to withhold portions of the records. As a result, these exemptions are not longer at issue. Also in its representations, the ministry advised that it was now claiming

that the exemptions at sections 14(1)(i), (j) and (k) apply to additional portions of the records. As a result, the preliminary issue of the raising of discretionary exemptions during an appeal was added to the scope of the appeal.

The ministry's representations were shared with the appellant pursuant to the sharing principles set out in this office's *Practice Direction 7.* The appellant chose not to submit representations.

Appeal PA14-408-2 was then assigned to me to dispose of the issues on appeal. In this order, I find that the ministry appropriately applied the exclusion and the exemptions it claimed to the information that it has withheld and that the public interest override does not apply. Accordingly, I uphold the ministry's decision and dismiss the appeal.

RECORDS:

The records at issue in this appeal include the withheld portions of briefing documents (including briefing notes and a briefing slide deck), a decision note, an action plan tracking document, meeting notes and minutes, a strategic facilities plan business case and correspondence.

PRELIMINARY ISSUE:

Is the ministry entitled to claim sections 14(1)(i), (j) and/or (k) apply to additional pages of the record at this stage in the appeal?

This office's *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals. Section 11.01 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. This section states:

> In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where an institution had notice of the 35-day rule, no denial of natural justice was

found in excluding a discretionary exemption claimed outside the 35-day period.[1]

In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must balance the relative prejudice to the ministry and to the appellant.[2] The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.[3]

Representations

The ministry submits that, as a result of an oversight, it omitted to claim section 14(1)(i) for pages 1-16 of the records, and sections 14(1)(i), (j), and (k) for pages 52 and 57 of the records. The ministry submits that it acknowledges that it is claiming these discretionary exemptions beyond the 35-day period stipulated in the *Code* but requests the ability to do so in light of the following considerations:

a. The appellant should not be prejudiced because access was already denied to the records.

b. Only a small percentage of the total number of records is subject to this request.

c. As a result of this request, the ministry will be claiming the same exemptions for these records, as it has for similar records, which are at issue.

Analysis and finding

This office has the power to control the manner in which the inquiry process is undertaken.[4] This includes the authority to set a limit on the time during which an institution can raise new discretionary exemptions not originally raised in the decision letter. The adoption and application of this policy was upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg.*[5] Nevertheless, this office will consider the circumstances of each case and may exercise its discretion to depart from the policy in appropriate cases.

I am required to weigh and compare the overall prejudice to the parties. In doing so, I must consider any delay or unfairness that could harm the interests of the appellant, as against harm to the ministry's interests that may be caused if the exemption claim is not allowed to proceed. In order to assess possible prejudice, the importance of an

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[1] *Ontario (Ministry of Consumer and Commercial Relations v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).
[2] Order PO-1832.
[3] Orders PO-2113 and PO-2331.
[4] Orders P-345 and P-537.
[5] December 21, 1995, Toronto Doc. 220/95, leave to appeal to the Court of Appeal refused at [1996] O.J. No. 1838 (C.A.). See also *Duncanson v. Toronto (Metropolitan) Police Services Board*, [1999] O.J. No. 2464 (Div. Ct.).

exemption claim and the interests the exemption seeks to protect in the circumstances of the particular appeal can be important factors.

For the following reasons, I allow the ministry to raise the applicability of the exemption at section 14(1)(i) to pages 1-16 of the records and the exemptions at sections 14(1)(i), (j), and (k) to pages 52 and 57 of the records.

First, as noted by the ministry, the appellant had notice before the expiration of the 35-day period that the ministry wished to exempt the information for which it now claims the section 14(1) exemptions. Although the ministry only later revised its decision to specify that it was withholding the information on pages 1-16 and 52 and 57 under these exemptions, the appellant knew from the outset that this information was at issue. Further, as the ministry initially claimed the application of sections 14(1)(i), (j) and (k) to other pages of the records, the appellant had notice from the outset that the ministry was claiming a law enforcement exemption for some information in the records.

I also note that the ministry raised the new exemption claims before the appellant made his representations. Therefore, the inclusion of the newly claimed exemptions for these records has not resulted in any delays to the adjudication process and the appellant has been provided with an opportunity to respond to the ministry's representations and to provide full representations as to whether the information qualifies for exemption under sections 14(1)(i), (j) and (k).

I have also considered the potential prejudice to the ministry if I do not allow the section 14(1) exemptions to be claimed with respect to the information. To disallow the ministry's late exemption claim could result in my ordering disclosure of records which fall within the law enforcement exemption, which I accept may prejudice the operations of the EDMC.

Having weighed the comparative prejudice of each of the parties, I am satisfied that while the appellant will not be prejudiced and the integrity of the adjudication process will not be compromised if I allow the ministry to raise the application of the section 14(1)(i), (j), and (k) exemptions beyond the 35-day time period, there could be some prejudice to the ministry if I do not allow the ministry to raise these exemptions. Therefore, I will consider the application of sections 14(1)(i) for pages 1-16 of the records and sections 14(1)(i), (j), and (k) for pages 52 and 57 of the records under Issue F below.

ISSUES:

A. Are portions of the records not responsive to the request?

B. Does the exclusion for information relating to employment or labour relations set out in section 65(6) apply to exclude any of the records from the scope of the *Act*?

C. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does the information relate?

D. Does the mandatory personal privacy exemption at section 21(1) apply to the information at issue?

E. Does the discretionary exemption relating to advice or recommendations at section 13(1) apply to the records?

F. Do any of the discretionary law enforcement exemptions at section 14(1)(i), (j) or (k) apply to the records?

G. Did the ministry exercise its discretion under section 13(1), and/or sections 14(1)(i), (j), and (k)? If so, should this office uphold the exercise of discretion?

H. Is there a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the exemptions at sections 13(1) and 21(1)?

DISCUSSION:

A: Are portions of the records not responsive to the request?

The ministry has identified portions of pages 17 -19, 24, 25-28, 29, 30, 33, 34, 35, 36-37, 39, 40, 43-44, and 64, as being not responsive to the request.

To be considered responsive to the request, records must "reasonably relate" to the request. It has previously been established that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.

I have reviewed the records and have considered the severed portions that the ministry claims are not responsive to the appellant's request. I am satisfied that these portions of the records are not responsive to the request. I find that this information relates to matters that are not those identified in his request, specifically, it does not relate to security cameras at EDMC. Consequently, I find that all of the information that the ministry has severed as non-responsive is, in fact, not responsive to the request. I uphold the ministry's decision to withhold it.

B: Does the exclusion for information relating to employment or labour relations set out in section 65(6) apply to exclude any of the records from the scope of the Act?

Section 65(6) of the *Act* removes any records containing information about labour relations and employment related matters from the scope of the *Act*. The ministry claims that paragraph 3 of section 65(6) applies to exclude pages 1-16, 17, 19, 20-23, 24, 29, 30, 34, 35, 36-37, 45-51, 52, and 65-69. Section 65(6)3 reads:

> Subject to subsection (7), this *Act* does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

If section 65(6)3 applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*.

For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 3 of this section, it must be reasonable to conclude that there is "some connection" between them.[6]

IPC orders had previously found that the term "in relation to" in section 65(6) means "for the purpose of, as a result of, or substantially connected to."[7] However, in the 2010 decision, *Ontario (Attorney General) v. Toronto Star,*[8] the Divisional Court addressed the meaning of the term "relating to" in section 65(5.2) of the *Act* and found that it requires "some connection" between the records and the subject matter of that section. It rejected the imputation of a "substantial connection" requirement into the meaning of "relating to."

The IPC has concluded that the Division Court's findings in *Toronto Star* also apply to the words, "in relation to" in section 65(6).[9] Consequently, for section 65(6) to apply, an institution must show that there is "some connection" (not a "substantial connection") between the records and the subjects mentioned in paragraph 1, 2, or 3 of this section.

The types of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.[10]

The *Act* still applies to the records if they fall within any of the exceptions in section 65(7).

Representations, analysis and findings

[1] The ministry submits that the records for which it has claimed section 65(6)3 were collected for meetings, consultations, discussions or communications about labour relations or employment related matters in which it has an interest. It states that "[t]he

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[6] Order MO-2589; see also *Ontario (Attorney General) v. Toronto Star,* 2010 ONSC 991 (Div. Ct.).
[7] For example, see Order P-1223.
[8] Cited above, note 1.
[9] Order MO-2589.
[10] *Ontario (Ministry of Correctional Services) v. Goodis*, (2008), 89 OR (3d) 457 (Div. Ct.).

records consist of Minister's staff briefing slide decks, notes of meetings with the Minister, and meeting minutes of a Local Employee Relations Committee (LERC)."

[2] For section 65(6)3 to apply, the ministry must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meeting, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

My analysis on how all three parts of the requisite test for section 65(6)3 apply to the records for which it has been claimed follows.

Part 1: collected, prepared, maintained or used

The ministry submits that all of the records were prepared and used by the ministry, and they are identifiable as such. The ministry submits therefore, that the records meet part one of the test.

Having reviewed the records for which section 65(6)3 has been claimed, I accept that they were all collected, prepared, maintained and used by the ministry. The slide decks in particular are prepared on ministry stationary and the titles and content of the other records including briefing notes, business cases, and LERC meeting notes make it clear that they were collected, prepared, maintained and used by the ministry. Accordingly, I accept that the first requirement of the section 65(6)3 test has been met.

Part 2: meetings, consultations, discussions or communications

With respect to the second part of the section 65(6)3 test, the ministry explains that the records were collected, prepared, maintained and used, "in relation to meetings, consultations, discussions or communications." Specifically, the ministry submits that they were collected, prepared, maintained and used to brief senior ministry officials or to record discussions that took place in meetings, which the ministry submits, satisfies the requirement that they be used for discussion and communication purposes.

As noted above, the Divisional Court in *Toronto Star*,[11] instructs that for the collection, preparation, maintenance or use of a record to be considered to be "in relation to" any of the circumstances identified in section 65(6), including the meetings, consultations, discussions or communications referred to in paragraph 3, that it must be reasonable to conclude that there is "some connection" between them.

In my view, it is evident on the face of the records for which section 65(6)3 has been

[11] Cited above, note 1.

claimed that they were collected, prepared, maintained and used "in relation to meetings, consultations, discussions or communications" within the ministry. Some of those records clearly were prepared for the purpose of providing information during meetings, consultations and discussions between ministry staff, others can more accurately be characterized as communications prepared and collected for the purpose of recording discussions between ministry staff. Having reviewed their content, I accept that there is "some connection" between their collection, preparation, maintenance or use and the meetings, consultations, discussions or communications held by the ministry. Accordingly, I find that the second requirement of the section 65(6)3 test has been met.

Part 3: labour relations or employment-related matters in which the institution has an interest

I will first assess whether the records have some connection to meetings, consultations, discussions or communications about "labour relations or employment-related matters."

The records collected, prepared, maintained or used by the institution are excluded only if the meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees' actions.[12]

The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.[13]

The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.[14] Examples of contexts in which the phrase "labour relations or employment-related matters" has been found to apply include a job competition,[15] an employee's dismissal,[16] and disciplinary proceedings under the *Police Services Act*.[17]

The ministry submits that the records which it claims are excluded under section 65(6)3 relate to labour relations or employment-related matters in which it has an interest. It submits:

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[12] *Ontario (Ministry of Correctional Services) v. Goodis,* cited above, note 5.
[13] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner),* [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.
[14] Order PO-2157.
[15] Orders M-830 and PO-2123.
[16] Order MO-1654-I.
[17] Order MO-1433-F.

> [T]he installation and use of security cameras was an important issue that affected the working relationship between the ministry as an employer and its workforce at EMDC at the time the records were created. The installation of security cameras and the records they generate can be used for the purpose of protecting employees' safety, and also monitoring their conduct, and therefore, we submit the records are of great interest to both the ministry and its employees. The union that represents the workforce at EMDC is a ministry partner in protecting the security of correctional institutions. As such, discussions about security cameras at EMDC involved consultations between management and representatives of the union.

Specifically addressing each type of records for which it has claimed section 65(6)3 to demonstrate how they relate to labour relations or employment-related matters, the ministry submits:

a. The responsive briefing records document briefings of senior ministry officials regarding meetings that took place with the union to discuss security cameras and related workplace issues of mutual concern, and how these issues would be resolved, as part of the EMDC action plan.

b. The notes of a meeting with the Minister describe the discussion between the Minister and union representatives, which again related to security cameras and other issues of mutual interest.

c. The LERC meeting minutes document a meeting of the LERC. The purpose of the LERC is to facilitate resolution of workplace problems at EMDC, and to promote communications between the management and the union. The meeting was attended by management and union representatives.

The second component of part 3 of the test derives from the phrase "in which the institution has an interest." This phrase has been established to mean more than a "mere curiosity or concern," and refers to matters involving the institution's own workforce.[18]

The ministry submits that:

> [T]he records reveal the inherent interest the ministry has, in its capacity as an employer, in working with employees to achieve resolution of workplace issues such as security cameras, in order to support the development of a harmonious and productive workplace. The ministry submits that this is part of its statutory mandate under the *Public Services of Ontario Act, 2006,* and the *Ministry of Correctional Services Act*. In

[18] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner),* (2001) 55 O.R. (ed) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.

> conclusion, the ministry has an obligation to manage and direct its workforce.

In support of its position that section 65(6)3 applies, the ministry refers to Order PO-2057 where Adjudicator Laurel Cropley found that records related to a joint review of workplace issues were excluded pursuant to section 65(6). The ministry submits that the reasoning contained in the following statement made by Adjudicator Cropley at page 4 of that order should be adopted in the circumstances of this appeal:

> I accept that the ministry, as an employer, has an interest in addressing and resolving [workload and other human resource] issues as part of the overall management of its workforce.

Having reviewed the records for which the exclusion at section 65(6)3 has been claimed, it is clear that they are related to matters in which the ministry is acting as an employer, and human resources questions, namely the working conditions of EMDC staff and their security, are at issue. I agree with the ministry's position that the briefing documents, the notes from a meeting between the Minister and union representatives and the LERC meeting minutes are all communications about labour relations and employment-related matters in which the ministry has an interest that amounts to "more than a mere curiosity or concern." Accordingly, I find that the third part of the test has been met.

For the reasons set out above, I accept that all three parts of the three-part test have been met.

As all three parts of the test under section 65(6)3 have been met and I am satisfied that none of the exceptions in section 65(7) apply, the records at issue are excluded from the scope of the *Act* by virtue of the operation of the exclusion.

C. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does the information relate?

Under the *Act*, different exemptions may apply depending on whether a record at issue contains or does not contain the personal information of the requester. Where the records contain the personal information of individuals other than the requester but do not contain the personal information of the requester, access to the records is addressed under the mandatory exemption at section 21(1).

For section 21(1) to apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) of the *Act*:

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

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

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[19]

Section 2(2) also relates to the definition of personal information. That section states:

> Personal information does not include information about an individual who has been dead for more than thirty years.

To qualify as personal information, it must be reasonable to expect that an individual maybe identified if the information is disclosed.[20]

Representations

The ministry submits that on page 39 of the record it severed the name of a deceased

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[19] Order 11.

[20] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

individual pursuant to section 21(1) of the *Act*. For section 21(1) to apply, it must first be determined that the name of the individual qualifies as personal information under the definition of that term at section 2(1) of the *Act*.

The ministry submits that the last name of the deceased individual appears in the record in association with a particular inquest. It submits that in the context of the record, disclosure of the name would identify the deceased individual, the fact that he was a former inmate and other information regarding his criminal history. The ministry submits that for this reason the deceased individual's name qualifies as his personal information within the meaning of the definition of that term in section 2(1) of the *Act.*

Analysis and findings

I have reviewed page 39 of the record and accept that the name that has been severed from that record amounts to the personal information of a deceased individual. I find that pursuant to paragraph (h) of the definition of personal information at section 2(1) of the *Act*, the severed name falls into the category of "the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual." Read with the other information contained in the page at issue, I accept that disclosure of the deceased individual's name would reveal other personal information about him, including, as suggested by the ministry, information relating to the criminal history of the individual (paragraph (b)).

Additionally, it is clear that the individual whose name appears on page 39 has not been deceased for more than 30 years, as contemplated by the exception to the definition of "personal information" at section 2(2) of the *Act*, mentioned above.

Accordingly, I find that the name of the deceased individual qualifies as personal information within the meaning of that term as set out in the *Act*.

D. Does the mandatory personal privacy exemption at section 21(1) apply to the information at issue?

Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraph (a) to (f) of section 21(1) applies. As noted above, in this case, the ministry claims that section 21(1) applies to a surname that has been withheld on page 39 of the record. In the circumstances, it appears that the only exception that could apply is section 21(1)(f), which allows disclosure if it would not be an unjustified invasion of personal privacy.

The factors and presumptions in section 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1)(f). Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy.

If any of paragraphs (a) to (h) or section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies.[21]

Representations

The ministry submits that it did not disclose the name of the deceased individual as it is highly sensitive personal information about an individual in a correctional institution, which could be coupled with other personal information about the deceased that can be found in the public realm.

Analysis and finding

In the circumstances of this appeal, the appellant has not submitted representations. The only representations that I have been provided with (namely, that the information is highly sensitive, as set out in section 21(2)(f)), weigh in favour of finding that section 21(1)(f) does not apply. In the absence of any evidence or argument weighing in favour of finding that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy, I find that the exception contained in section 21(1)(f) does not apply and disclosure of the name of the deceased individual found of page 39 of the record would amount to an unjustified invasion of that individual's personal privacy under the mandatory exemption at section 21(1) of the *Act*.

E: Does the discretionary exemption at section 13(1) apply to the records?

Section 13(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[22]

"Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

"Advice" has a broader meaning than "recommendations". It includes "policy options",

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[21] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).
[22] John Doe v. Ontario (Finance), 2014 SCC 36, at para. 43

which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take. [23]

"Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

Advice or recommendations may be revealed in two ways

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations[24]

The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 13(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 13(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.[25]

Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information[26]
- a supervisor's direction to staff on how to conduct an investigation [27]
- information prepared for public dissemination[28]

Representations

The ministry submits that section 13(1) applies to exempt pages 1-16, 54, and 70-72 of the records on the basis that their disclosure would reveal the advice or recommendations of a public servant. The ministry submits that these records consist of

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[23] See above at paras. 26 and 47.
[24] Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.
[25] *John Doe v. Ontario (Finance)*, cited above, at para. 51.
[26] Order PO-3315.
[27] Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).
[28] Order PO-2677.

a Minister's staff briefing slide deck, a Strategic Facilities Plan business case, and a decision note.

The ministry submits that it has applied section 13(1) to these records for the following reasons:

- they were prepared by ministry staff for decision makers in the ministry; and,
- the records contain recommendations or advice to resolve outstanding issues.

With respect to the Minister's staff briefing (pages 1-16), the ministry submits that "the advice is framed as an action item." It submits that despite the use of that terminology, it is clear from the wording that it is, in fact, advice. The ministry states that "[t]he Minister and her staff would have received this advice during the briefing, and would have either accepted it, or not." The ministry submits that this slide deck contains the "internal evolution of policies ultimately adopted" and was meant to be exempt pursuant to section 13(1).

The ministry submits that page 54 contains both identified options and recommendations from the Strategic Facilities Plan Business Case and that as a result of *John Doe v. Ontario (Finance),* cited above, "it is clear that both options and recommendations are protected under section 13."

Addressing pages 70-72, the ministry submits that they "contain identified recommendations with respect to funding security cameras" and that the "recommendation expressly includes funding." The ministry also submits that the record was prepared by staff for senior decision-makers and, as such, falls within the scope of section 13(1) of the *Act*.

Analysis and finding

I have reviewed the records for which the ministry claims section 13(1) of the *Act* and accept that they reveal advice or recommendations of a public servant as contemplated by that exemption.

As I have found that pages 1 to 16 are excluded from the Act by virtue of the application of the exclusion for labour relations and employment-related matters, it is not necessary for me to determine whether the exemption at section 13(1) applies to them.

I accept that page 54 contains both options and recommendations arising in a document entitled "Strategic Facilities Plan Business Case." I accept that these options and recommendations fall within the meaning of section 13(1) as they appear to have been prepared by ministry staff to present to the Minister, or senior staff, who were free to accept, reject or modify the recommendation.

Pages 70-72 are a Decision Note which seeks to obtain approval for the funding and implementation of security cameras. I accept that this record was prepared by ministry

staff for senior decision-makers and it clearly outlines recommendations with respect to funding amounts and the implementation of security cameras in detention centres such as EMDC. Accordingly, I accept that this record reveals a suggested course of action that could be accepted or rejected by the ultimate decision-maker. Therefore, I find that section 13(1) applies to these pages.

Accordingly, I conclude that the exemption at section 13(1) applies to the information that the ministry has withheld under that section and that I have not already found excluded from the *Act*. As indicated, this information is found on pages 54 and 70-72.

F. Do any of the discretionary law enforcement exemptions at section 14(1)(i), (j) or (k) apply to the records?

The ministry has applied sections 14(1)(i), (j), and (k) to pages 1-16 and 52-61 of the records. Those sections read:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> …
>
> (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
>
> (j) facilitate the escape from custody of a person who is under lawful detention;
>
> (k) jeopardize the security of a centre for lawful detention;
>
> …

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[29]

It is not enough for an institution to take the position that the harms under section 14 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.[30] The institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the

[29] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[30] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

consequences. [31]

Representations

The ministry submits that because, in the context of this appeal, the exemptions at sections 14(1)(i), (j) and (k) are similar, it has grouped them together. It submits that both 14(1)(j) and (k) are exemptions related "expressly to the security of a correctional institution,' whereas 14(1)(i) is a "broader-based exemption which allows the ministry to exempt records that endanger building security as well as the systems and procedures related to it."

In support of its position that these three law enforcement exemptions apply, the ministry points to Order PO-2332 where Adjudicator John Swaigen denied access to a correctional institution's security audit stating:

> I accept that even information that appears innocuous could reasonably be expected to be subject to use by some people in a manner that would jeopardize security.

The ministry further submits that Adjudicator Swaigen's finding which advocates a careful and cautious approach to the disclosure of correctional records "compliments the ruling of the Ontario Divisional Court" in *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.), where the court stated:

> [T]he law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.

The ministry also submits that Order PO-2911 is relevant in the circumstances of this appeal. In that order Adjudicator Diane Smith found that the video of a correctional institution was exempt from disclosure because it would reveal the exact layout of a day space area in a correctional institution, and the manner in which the day space was recorded. The ministry submits that Adjudicator Smith found that both of these outcomes could pose security risks to staff, inmates and to the correctional centre as a whole. The ministry submits that disclosure of the records at issue pose a "similar risk" and should therefore be exempt pursuant to the enumerated law enforcement exemptions in section 14(1).

The ministry submits that the records at issue in the current appeal were created by ministry staff to brief senior ministry officials about security, for the purpose of purchasing security equipment at EMDC. It also submits:

> [T]he records contain detailed technical information about the purchase, use, installation and operational challenges associated with security equipment at EMDC. The records describe systems upgrades, as well as

[31].*Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

> the amounts and types of security equipment in use at EMD. The ministry submits that it is concerned that disclosing this kind of information could reveal security vulnerabilities at EMDC, especially to those who are knowledgeable about security systems. Similarly, the ministry is concerned that the disclosure of the records could permit individuals, especially those who are knowledgeable, to draw accurate inferences about the possible absence of other security precautions, which could then be used to aid in the planning or execution of a crime or other disturbances at EMDC.

The ministry submits that it also relies upon section 14 because the records contain sensitive internal communications consisting of

- briefing materials, a critically important method by which issues of operational concern are brought to the attention of senior Ministry official, so that they may discharge their duties, and take appropriate action
- communications between the ministry and its suppliers

The ministry concludes its representations by stating:

> If confidential records such as these are ordered disclosed, it could discourage the kinds of candid communications that are required between staff and management, and between suppliers and correctional officials necessary to ensure the maintenance of safety and order in correctional institutions.

Analysis and findings

Having reviewed the records and portions of records which the ministry claims are exempt pursuant to the law enforcement exemptions at sections 14(1)(i), (j) and (k), I accept that their disclosure could reasonably be expected to endanger the security of the EDMC, facilitate the escape of a person under the lawful detention at EDMC or jeopardize the security of the EDMC.

As I have found that pages 1 to 16 are excluded from the *Act* by virtue of the application of the exclusion for labour relations and employment-related matters, it is not necessary for me to determine whether the exemption at section 14(1) applies to them. I have also found that portions of page 54 qualify for exemption under section 13(1). I will consider the remaining information on page 54 in my analysis of section 14(1).

Pages 52 to 61 of the records consist of a Strategic Facilities Plan Business Case and provide detailed information about the plan to upgrade the CCTV system at EDMC. From my review I accept that, as submitted by the ministry, the business case provides information about the CCTV upgrades that includes a detailed explanation of the pre-existing CCTV including number of cameras, where they are located, and the operational challenges of the system. It also includes details regarding the proposed

upgrade of that system including number of cameras and strategies to respond to the operational challenges of the existing system. In my view, the ministry has provided me with sufficient evidence to demonstrate that disclosure of pages 52 to 61 of the records would reveal security vulnerabilities at EMDC in sufficient detail such that it could reasonably be expected to result in endangering or jeopardizing its security or, alternatively, facilitate the escape of a person under its detention.

Accordingly, I conclude that the exemptions at sections 14(1)(i), (j), and (k) apply to the information that the ministry has withheld under that section and that I have not already found excluded from the *Act*. As indicated, this information is found on pages 52 to 61.

G. Did the ministry exercise its discretion under section 13(1), and/or sections 14(1)(i), (j), and (k)? If so, should this office uphold the exercise of discretion?

The exemptions at section 13(1) and sections 14(1)(i), (j), and (k) are discretionary. They 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.

[3] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it exercises its discretion in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper consideration.[32] This office may not, however, substitute its own discretion for that of the institution.[33]

Representations

The ministry submits that it exercised its discretion appropriately in accordance with the following considerations:

- the ministry has a strong security interest in exempting correctional records, especially records that reveal how security issues are addressed in correctional institutions.
- The ministry has a strong policy interest in encouraging candid and open communications between staff and management and between the ministry and

[32] Order MO-1573.
[33] See section 54(2) of the *Act*.

its suppliers and is concerned that disclosure of the records would interfere with this interest.

- The ministry has exercised its discretion in accordance with its usual practices.

Analysis and finding

Having considered both the submissions prepared by the ministry and the content of the withheld portions of the records at issue, I am satisfied that the ministry has not erred in the exercise of its discretion not to disclose the information that is subject to the exemptions at section 13(1) and sections 14(1)(i), (j), and (k). I find that the ministry did not act in bad faith or for an improper purpose. I am also satisfied that the ministry did not take into account irrelevant considerations or failed to take into account relevant considerations.

Accordingly, I find that the ministry properly exercised its discretion in applying the section 13(1) and 14(1) exemptions, and I uphold its decision to withhold records or portions of the records at issue pursuant to these sections.

H. Is there a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the exemptions at sections 13(1), and 21(1)?

During the mediation of this appeal, the appellant raised the possible application of the public interest override at section 23. Section 23 states:

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

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

Representations

The ministry submits that:

> … it is not aware of any compelling public interest that would warrant the disclosure of the records we have protected pursuant to section 13. The records describe internal security matters at EMDC. These records do not have any impact on the general public. Security is inherently of critical importance to a correctional institution like EMDC. As such, the ministry submits that there is no compelling public interest in the record, and that in no sense can any interest in disclosure be characterized as outweighing the purpose of the exemption.

As indicated above in the background section to this order, despite raising the potential

application of the compelling public interest override, the appellant chose not to make representations on this or any other issue.

Analysis and finding

To order disclosure of the information which I have found exempt under either section 13(1) or section 21(1), I must be persuaded that there is a compelling public interest in the disclosure of that information. Further, if a compelling public interest exists, that compelling public interest must clearly outweigh the purpose of the exemptions. In my view, in the current appeal, this threshold has not been met and section 23 does not apply.

In considering whether there is a public interest in the disclosure of the records, the first question to ask is whether there is a relationship between the records and the *Act*'s central purpose of shedding light on the operations of government. Previous orders of this office have stated that in order to find a compelling public interest in disclosure the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices[34].

In the absence of representations from the appellant, and on my review of the records, I find that a compelling public interest in the disclosure of the records at issue in this appeal has not been established. Accordingly, I find that section 23 does not apply to override the exemptions at either section 13(1) or section 21(1).

ORDER:

I uphold the ministry's decision and dismiss the appeal.

Original signed by: April 26, 2017
Catherine Corban
Adjudicator

[34] Orders P-984 and PO-2556.