Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-3791-I

Appeals PA14-245 and PA14-245-2

Ministry of Community Safety and Correctional Services

November 29, 2017

Summary: The appellant seeks access to records relating to a search executed by the Ontario Provincial Police (the OPP) at his residence on a specified date. The ministry located responsive records and granted the appellant access to them, in part. The ministry claimed a number of exemptions to withhold portions of the records, including the discretionary exemptions in sections 49(a), read with 14(1)(c) (reveal investigative techniques), (h) and (l) (security), 14(2)(a) (law enforcement report) and 19 (solicitor-client privilege), and 49(b) (personal privacy). The appellant appealed the ministry's exemption claims. The appellant also claimed that additional responsive records ought to exist. The adjudicator upholds the ministry's decision, in part. The adjudicator upholds the ministry's application of sections 49(a), read with sections 14(1)(c) and 19, and 49(b) to withhold some of the information at issue and orders the ministry to disclose the remainder of the information at issue to the appellant. In addition, the adjudicator generally upholds the ministry's search for responsive records as reasonable, but finds that the search for three specific records was not reasonable. The adjudicator orders the ministry to conduct another search for these three records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 2(1) (definition of "personal information" and "record"), 14(1)(c), 14(1)(h), 14(1)(l), 14(2)(a), 19, 21(1)(a), 21(2)(f), 21(3)(b) and (d), 24, 49(a) and (b).

Orders and Investigation Reports Considered: MO-2461, P-1238, P-1618, PO-2474, PO-3662

Cases Considered: *R. v. Menuck*, [2001] 3 SCR 442.

OVERVIEW:

[1] The appellant filed two requests under the *Freedom of Information and Protection of Privacy Act* with the Ministry of Community Safety and Correctional Services (the ministry) for records relating to his client and a search executed by the Ontario Provincial Police (the OPP) at his client's residence on an identified date. I will refer to the appellant and his client as "the appellant" in this order because the appellant filed the request on his client's behalf and provided the ministry with his client's consent to obtain access to his personal information. The appellant clarified his request to the following:

> All records in the possession of [the OPP] pertaining to the communication and/or the provision and/or sharing of information between the OPP and [the Canada Revenue Agency or the CRA] relating directly or indirectly to [the appellant and/or his] Medicine Professional Corporation.
>
> In addition, records responsive to the requests would include the following:
>
> > All copies of all inventories of things seized by the OPP at [the appellant's] residence and all records in the possession and/or control of any OPP officer who took part in the search, pertaining to the said search.

The ministry and the appellant confirmed that any "case specific agreements" relating to the appellant should also form part of the records responsive to the clarified request.

[2] After locating responsive records, the ministry issued a decision letter to the appellant granting him partial access to them. The ministry advised the appellant it withheld certain information under the discretionary exemptions in sections 15(b) (relations with other governments), 49(a) read with sections 14(1)(a) (law enforcement matter), (c) (reveal investigative techniques and procedures), (h), (j) and (l) (security) and 14(2)(a) (law enforcement report), and 49(b) (personal privacy) of the *Act*. In support of its section 49(b) claim, the ministry raised the application of the presumptions in sections 21(3)(b) (investigation into a possible violation of law) and (d) (employment or educational history) as well as the factor weighing against disclosure in section 21(2)(f) (highly sensitive). The ministry also advised the appellant that some of the information was not responsive to his request. Finally, the ministry advised the appellant it applied the labour relations exclusion in section 65(6) to some of the information.

[3] The appellant appealed the ministry's decision and the IPC opened appeal file PA14-245. In his appeal letter, the appellant challenged the ministry's application of the exemptions in the *Act* to the responsive records and claimed additional responsive records ought to exist.

[4] During mediation, the appellant confirmed that he does not take issue with the

ministry's claim that certain records are excluded from the scope of the *Act* under section 65(6). In addition, the appellant confirmed he does not take issue with the ministry's claim that certain information is not responsive to his request. Accordingly, these portions of the records are no longer at issue in this appeal.

[5] Mediation did not resolve the appeal and it was transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*. The adjudicator originally assigned to the appeal sent a Notice of Inquiry to the ministry, inviting it to submit representations on the issues under appeal. The ministry submitted representations. In its representations, the ministry abandoned its sections 14(1)(a) and 15(b) claims. It also appears the ministry no longer claims section 14(1)(j) to withhold portions of the records. As a result, sections 14(1)(a) and (j) and 15(b) are no longer at issue in this appeal.

[6] The adjudicator then invited the appellant to submit representations in response to the Notice of Inquiry and the ministry's representations, which were shared in accordance with *Practice Direction Number 7* of the IPC's *Code of Procedure*. The appellant submitted representations as well as a third party's consent to the disclosure of their personal information to the appellant.

[7] The appellant's representations were shared with the ministry in accordance with *Practice Direction Number 7* and the adjudicator invited the ministry to submit representations in reply. The ministry submitted representations and identified additional records, specifically officers' notebook entries, it located in another search for records. The ministry issued a supplementary decision granting the appellant partial access to the officers' notes. The ministry withheld portions of the records pursuant to the exemptions in 49(a), read with sections 14(1)(c), (h) and (l) and 18(1)(d) (economic and other interests), and section 49(b) of the *Act*. The ministry also noted that it removed some information, such as other police matters, because it was not responsive to the request.

[8] The appellant appealed the ministry's supplementary decision and appeal PA14-245-2 was opened. The appellant challenged the ministry's exemption claims. The appellant continued to take issue with the ministry's search for responsive records, claiming that additional responsive records should exist.

[9] During the mediation stage of appeal PA14-245-2, the appellant confirmed he does not pursue access to the information withheld as non-responsive and is satisfied with the ministry's search for officers' notes. Accordingly, responsiveness and reasonable search are not at issue in relation to PA14-245-2, although search remains an issue in relation to the other items the appellant raised in PA14-245.

[10] The appellant confirmed his interest in pursuing access to the information the ministry identified as exempt from disclosure.

[11] Mediation did not resolve PA14-245-2 and the appeal was transferred to the inquiry stage. The adjudicator invited the ministry to submit representations on the

application of the exemptions claimed. The ministry submitted representations. The adjudicator then invited the appellant to submit representations in response to the ministry's representations, which were shared in accordance with *Practice Direction Number 7*.

[12] The appellant submitted representations. In his representations, the appellant confirmed he does not take issue with the ministry's application of section 49(a), read with section 18(1)(d), to portions of Records 65 and 68. Accordingly, this information is not at issue in this appeal and I will not consider it further.

[13] The appeal was then transferred to me. In the discussion that follows, I uphold the ministry's decision, in part. I find that portions of the records are exempt from disclosure under sections 49(a), read with sections 14(1)(c) and 19, and 49(b). I uphold the ministry's search for responsive records as reasonable, with the exception of three records and order the ministry to conduct another search for these three records. I order the ministry to disclose the information I find to not be exempt from disclosure to the appellant.

RECORDS:

[14] There are 57 pages of records at issue in appeal PA14-245. The information at issue in PA14-245 consists of the withheld portions of letters, officers' notes, a document relating to the search of a residence, warrants and an investigative plan.

[15] There are an additional 56 pages of records at issue in appeal PA14-245-2. The information at issue in PA14-245-2 consists of officers' notes and other documents.

ISSUES:

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

B. Does the discretionary exemption at section 49(a), read with sections 14(1)(c), (h), (j), (l) and/or section 14(2)(a) apply to the records?

C. Does the discretionary exemption at section 49(a), read with section 19, apply to the records?

D. Does the discretionary exemption at section 49(b) apply to the information at issue?

E. Did the ministry exercise its discretion under sections 49(a) and (b)? If so, should this office uphold the exercise of discretion?

F. Did the ministry conduct a reasonable search for records?

DISCUSSION:

Issue A: Do the records contain *personal information* as defined in section 2(1) and, if so, to whom does it relate?

[16] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain *personal information* and, if so, to whom it relates. The term *personal information* is defined in section 2(1) as follows:

> "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,
>
> (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,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where 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,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where 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

[17] 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.[1] To qualify as personal information, it must be reasonable to

[1] Order 11.

expect an individual may be identified if the information is disclosed.[2]

[18] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be *about* the individual.[3] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[4]

[19] The ministry submits the records contain personal information relating to affected third parties named in the law enforcement investigation. The ministry submits that the personal information includes these affected parties' names as well as other "highly sensitive" information, such as their dates of birth and personal financial information. In addition, the ministry submits it withheld the educational and occupational backgrounds of an investigating OPP officer.

[20] The appellant submits he provided a signed consent form from his client for the disclosure of his personal information to the appellant. In addition, the appellant provided a signed consent form from an individual (the affected party) or the disclosure of their personal information to the appellant.

[21] I reviewed the records at issue and find that they contain personal information relating to the appellant and other identifiable individuals.

[22] Specifically, I find all the records contain the appellant's personal information, including

- his age, sex, marital or family status (paragraph (a)),
- information relating to his employment history and financial transactions involving him (paragraph (b)),
- various account numbers (paragraph (c)),
- his address and telephone number (paragraph (d)),
- views or opinions of other individuals relating to him (paragraph (g)) and
- his name where it appears with other personal information relating to him (paragraph (h)).

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[2] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[3] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[4] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

I note all of the records at issue relate to an investigation conducted by the OPP in relation to allegations against the appellant. As a result, I find that all of the records relate to the appellant in a personal capacity.

[23] In addition, I find some of the records contain personal information relating to the affected party. Specifically, I find that the records contain

- the affected party's age, sex, marital or family status (paragraph (a)),
- information relating to their employment history and financial transactions involving them (paragraph (b)),
- various account numbers (paragraph (c)),
- their address and telephone number (paragraph (d)),
- views or opinions of other individuals relating to the affected party (paragraph (g)) and
- the affected party's name where it appears with other personal information relating to them (paragraph (h)).

I note some of the personal information contained in the records relates to both the appellant and the affected party.

[24] As well, I find the records contain personal information relating to a number of other identifiable individuals such as patients of the appellant. The information contained in the records relating to these individuals include their dates of birth (paragraph (a)), their personal views or opinions (paragraph (e)) and their names where they appear with other personal information relating to them (paragraph (h)).

[25] Finally, I find the records contain some personal information relating to OPP officers, specifically information relating to their education or employment histories (paragraph (b)).

[26] I will now consider whether the records qualify for exemption under Part III of the *Act* because they contain the personal information of the appellant.

Issue B: Does the discretionary exemption at section 49(a), read with sections 14(1)(c), (h), (l) and/or section 14(2)(a) apply to the records?

[27] Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right. Section 49(a) reads as follows:

> A head may refuse to disclose to the individual to whom the information relates personal information,

> where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[5]

[28] Where it denies access under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether it should release the record to the requester because the record contains his or her personal information.

[29] In this case, the ministry relies on section 49(a) in conjunction with sections 14(1)(c), (h), (l) and 14(2)(a). These sections state as follows:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
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> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
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> (h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.
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> (2) A head may refuse to disclose a record,
>
> (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law

[30] The term *law enforcement* is used in several parts of section 14 and is defined in section 2(1). The definition includes policing, investigations or inspections that could lead to proceedings in a court or tribunal and proceedings in relation to those investigations or inspections.

[31] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[6] However, it is not sufficient 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.[7] The ministry must provide sufficiently detailed evidence to establish a risk of harm well beyond the merely possible or speculative although it does not need to prove that disclosure will, in

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[5] Order M-352.
[6] *Ontario (Attorney General) v. Fineberg* (1994), 19 OR (3d) 197 (Div. Ct.).
[7] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

fact, result in such harm. How much and what kind of evidence is required will depend on the type of issue and seriousness of the consequences.[8]

Section 14(1)(c) – reveal investigative techniques and procedures

[32] The ministry claims section 14(1)(c) applies to all or parts of Records 12-17, 20-25, 28-38, 43-45, 47-51, 69-70, 76-78, 82-83, 85-93, 96 and 99-104. The ministry states as follows:

> When the OPP conducts a law enforcement investigation of the type that is referenced in the records, its members employ techniques and procedures that we maintain are not generally known to the public (especially in the detail described in the records), and the OPP treat these techniques and procedures as highly confidential.

[33] Specifically, the ministry submits the information subject to its section 14(1)(c) claim in Records 12-38 relates to the search conducted pursuant to a warrant. The ministry submits Records 12-38 describe "in significant detail" how the OPP conducted the investigation, including the steps they took and the equipment they used to copy information and gather evidence.

[34] In addition, the ministry submits the information at issue in Records 43-51 contains investigative techniques or procedures relating to handwriting and statistical analysis. Furthermore, the ministry submits that the Investigative Plan, which comprises Records 39-55, contains a "broad overview of the procedures used during a law enforcement investigation of the type involving the [appellant], and the process for assessing which procedures would be used."

[35] The ministry states the records were created a number of years ago, but they "substantively reflect how these types of law enforcement investigations may still be conducted." Therefore, the ministry is concerned that disclosing the information subject to its section 14(1)(c) claim would allow "would-be criminals [to] use this information to their advantage, which would impair law enforcement by undermining the continued effectiveness of these techniques and procedures."

[36] In addition, the ministry submits the notes subject to its section 14(1)(c) claim in Records 69-104 may be referred to at a later stage to determine whether there is sufficient evidence to proceed with charges. The ministry submits the techniques or procedures described in Records 69-104 relate to the search conducted pursuant to a warrant involving computers located in a residence. The ministry submits these pages describe in "significant detail" how the OPP officer conducted the investigation, including the steps taken, and the nature of the evidence gathered and removed from the residence. The ministry also submits the records contain information about how the OPP achieved the results they did and would reveal "behind the scenes activities of the

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[8] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-54.

OPP investigation." The ministry opposes the release of the information subject to its section 14(1)(c) claim because it submits this disclosure could interfere with future investigations of this kind.

[37] The ministry refers to Order PO-3338, in which the adjudicator upheld the ministry's claim of section 14(1)(c) for OPP investigative techniques during an investigation.

[38] The appellant submits the ministry failed to provide sufficient evidence to establish a reasonable expectation of harm. The appellant submits the public generally knows the manner in which law enforcement executes search warrants. The appellant specifically refers to *R. v. Menuck*[9], in which the Supreme Court of Canada held as follows:

> … I find it difficult to accept that the publication of information regarding the techniques employed by police will seriously compromise the efficacy of this type of operation. Criminals who are able to extrapolate from a newspaper story about one suspect that their own criminal involvement might well be a police operation are likely able to suspect police involvement based on their common sense perceptions or on similar situations depicted in popular films and books.

The appellant submits law enforcement agencies routinely publicize the execution of search warrants in the media. Further, the appellant submits it is difficult to see how the release of the information at issue concerning the execution of this particular warrant could enable suspects to hinder investigators executing warrants in other cases.

[39] In order to meet the *investigative technique or procedure* test, the ministry must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. Normally, the exemption will not apply where the technique or procedure is generally known to the public.[10]

[40] The techniques or procedures must be *investigative* and the exemption will not apply to *enforcement* techniques or procedures.[11]

[41] Based on my review of the information subject to the ministry's section 14(1)(c) claim, I find the majority of it is not exempt under that exemption. The majority of the information withheld under section 14(1)(c) relates to the OPP's search of the appellant's residence and identifies the items seized. Generally, the information subject to the ministry's section 14(1)(c) claim describes the search the OPP officers conducted in their investigation. I agree the manner in which the OPP conducts a search of a residence may be an investigative technique or procedure. However, the ministry did

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[9] [2001] 3 SCR 442.
[10] Orders P-170, P-1487, MO-2347-I and PO-2751.
[11] Orders PO-2034 and PO-1340.

not provide sufficient evidence to demonstrate that the public would not generally know how OPP officers conduct searches of a residence. The ministry's representations do not identify any specific investigative technique or procedure, let alone explain how any investigative technique or procedure would be revealed if the withheld information is disclosed. Moreover, the ministry did not provide evidence to demonstrate that the risk of revelation is well beyond the merely possible or speculative as required for the application of the exemption.[12] As indicated by the Supreme Court of Canada in *R. v. Menuck*, above, an individual is probably able to assume how the OPP conducts a search of a residence using their "common sense perceptions or on similar situations depicted in popular films and books."[13]

[42] Furthermore, I find a number of the portions subject to the ministry's section 14(1) claim simply describe the appellant's residence and/or the items located. Section 14(1)(c) applies to investigative techniques or procedures; a description of an item found does not constitute either. Therefore, I find that the exemption does not apply to the portions of the records that describe the appellant's residence and/or items located.

[43] However, I accept the ministry's claim of section 14(1)(c) over portions of the records describing a particular investigative technique or procedure used during the search. For example, Record 13 contains a description of a number of procedures and programs used in its search. Similarly, Records 47 to 49 contain a detailed description of the process through which the OPP planned to proceed with their investigation into the appellant's activities. Based on my review of the information, I find these techniques or procedures are not generally known to the public and, if disclosed, could reasonably be expected to hinder or compromise their effective utilization. Therefore, I uphold the ministry's claim of section 14(1)(c) to certain portions of the records that identify specific techniques or programs the OPP used in conducting its search. Accordingly, these portions of the records are exempt under section 49(a), subject to my finding on the ministry's exercise of discretion.

Section 14(1)(h) – record confiscated by a peace officer

[44] The ministry applied section 14(1)(h) to withhold parts or all of Records 3, 10, 12-17, 22-26, 28-38, 59-64, 69-70, 76-78, 82-83, 85-93, 96 and 99-104. I note I will not consider whether section 14(1)(h) applies to those portions I found to be exempt under section 14(1)(c).

[45] The purpose of section 14(1)(h) is to exempt records confiscated or *seized* by search warrant.[14] Section 14(1)(h) applies where the record at issue is itself a record that was confiscated from a person by a peace officer or where the disclosure of the record could reasonably be expected to reveal another record that was confiscated from

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[12] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-54.
[13] *R. v. Menuck*, *supra* note 10 at para. 43.
[14] Order PO-2095.

a person by a peace officer.[15]

[46] Section 14(1)(h) applies to a *record*. The term *record* is defined in section 2(1) as follows:

> "record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,
>
> > (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and
> >
> > (b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution

[47] The ministry submits that the records were confiscated by OPP officers who qualify as *peace officers* under section 14(1)(h). The ministry states that the records describe the records the OPP officers seized from the appellant's residence. Specifically, the ministry submits that the records refer to a computer system, related equipment and financial information. The ministry states the OPP conducted their search under the authority of a search warrant issued pursuant to the *Criminal Code*.

[48] In his representations, the appellant submits that the absurd result principle should apply to the records withheld under section 49(a), read with section 14(1)(h). The appellant submits the information subject to the ministry's claim constitutes information originally in his possession and/or control and which was seized by the OPP. Therefore, the appellant submits he supplied this information to the OPP.

[49] The records at issue in this appeal consist of OPP officers' notes and various reports. None of the records appear to be the actual records or copies of the records seized by the OPP officers from the appellant's residence. In other words, none of the information at issue is a record confiscated or seized by the OPP. Therefore, I must decide whether disclosure of the information at issue in the records could reasonably be expected to reveal another record confiscated from a person by a peace officer.

[50] I agree with the ministry that the items referred to in the portions of the records subject to the ministry's section 14(1)(h) claim were confiscated by an OPP officer in accordance with the *Criminal Code*.

[51] However, not all of the items referred to in the records are *records* as that term

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[15] Order M-610.

is defined in section 2(1) of the *Act* or could reasonably be expected to reveal another record that was confiscated from a person by a peace officer. For example, the OPP officers seized various amounts of cash from the appellant's residence and this is itemized on Records 87-88. These items are not *records* within the meaning of section 2(1) and, therefore, section 14(1)(h) does not apply to exempt from disclosure. Furthermore, I note that the ministry disclosed similar information contained in Records 98 and 99 to the appellant.

[52] With regard to the remainder of the information at issue, I find that the information subject to the ministry's section 14(1)(h) claim describes the type of material seized by the OPP in a general way. In Order PO-2474, the adjudicator considered whether section 14(1)(h) applied to records that the ministry claimed would reveal "detailed information regarding the materials possessed by the appellant which were confiscated by the police." The adjudicator reviewed the records before him and found section 14(1)(h) did not apply to the information because it described the type of material seized by the police in a "general way."[16] Upon review of the records before me, I find the information describes the records seized in a general way and does not contain specific details regarding the contents of the items. Furthermore, I find the ministry did not provide me with sufficient evidence to demonstrate that the disclosure of the information subject to its section 14(1)(h) claim would, if disclosed, reveal another record confiscated by the OPP. Therefore, I find section 14(1)(h) of the *Act* does not apply to the information at issue.

Section 14(1)(l) – commission of an unlawful act

[53] The ministry takes the position that portions of the records are exempt from disclosure under section 14(1)(l) of the *Act*. Specifically, the ministry submits it applied section 14(1)(l) to the following information:

- Law enforcement codes: the ministry states it applied section 14(1)(l) to portions of Records 26, 28, 72 and 74 because they contain police ten codes, which are widely used as part of OPP internal operations. The ministry refers to Order PO-2409 which found that police codes qualify for exemption under section 14(1)(l).

- Information that would "jeopardize health care fraud investigations". The ministry submits it withheld the records because the disclosure of the investigative techniques and procedures would facilitate the commission of unlawful acts by making such acts easier to evade. The ministry submits the techniques and procedures that the OPP uses to investigate health care fraud are not widely known and publicizing them will allow would-be offenders to commit similar crimes. The ministry raises concerns regarding the integrity of the public health care system.

- Information that would "jeopardize investigative record-keeping." The ministry is concerned the disclosure of this type of information will discourage the

[16] Order PO-2474, page 10.

> meticulous record-keeping required to conduct fraud investigations, thereby hampering the control of crime. The ministry submits that if law enforcement officers knew the records they prepared during an investigation would be subject to disclosure, they might be less willing to create them.

[54] The appellant advises he does not take issue with the ministry's application of section 14(1)(l) to the ten codes. Accordingly, I will remove the ten codes from the scope of the appeal and the ministry is not required to disclose them to the appellant.

[55] However, the appellant submits the ministry failed to provide sufficient evidence to demonstrate that the disclosure could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. The appellant submits information about investigative techniques that is already in the public domain or can be inferred easily cannot be reasonably expected to result in the harms contemplated by section 14(1)(l), if disclosed. Finally, the appellant submits there is no basis for the ministry's suggestion that disclosure of the records will discourage the meticulous record keeping required to conduct fraud investigations. The appellant submits the ministry's assertion directly contradicts law enforcement officers' duties to "prepare accurate, detailed and comprehensive notes as soon as practicable after an investigation."[17]

[56] I agree with the appellant. In order to satisfy its section 14(1)(l) claim, the ministry must provide sufficiently detailed evidence to establish a risk of harm that is well beyond the merely possible or speculative.[18] I find the ministry did not provide me with sufficient evidence to establish a risk of harm beyond the merely possible or speculative. The ministry asserts that the disclosure of the records could reasonably be expected to jeopardize the health care fraud investigations and investigative record keeping. However, the ministry does not refer to specific portions of the records nor does it provide additional explanation as to how the disclosure of that information could reasonably be expected to result in these harms. Furthermore, upon review of the information remaining at issue, I am not satisfied the disclosure of this information, which relates to the search of the appellant's residence, could reasonably be expected to jeopardize health care fraud investigations as a whole. In any case, the ministry did not provide me with evidence to demonstrate that there is a reasonable expectation this harm could result from the disclosure of the information at issue.

[57] In addition, I find the ministry's assertion that the disclosure of these records could reasonably be expected to result in poor record keeping is not tenable. As the appellant states above, law enforcement officers have a duty to prepare accurate, detailed and comprehensive notes. Furthermore, in Order PO-3662, the adjudicator found "the keeping of written records is an integral part of policing". The adjudicator did not accept that the disclosure of officers' notes would somehow facilitate the commission of an unlawful act or hamper the control of crime. Accordingly, I find it is

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[17] *Wood v. Schaeffer* [2013] SCJ No. 71 (SCC) at para. 67.

[18] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-54.

unlikely that the disclosure of the information subject to the ministry's section 14(1)(l) claim would discourage OPP officers from preparing accurate, detailed and comprehensive notes and reports during their investigations. In any case, the ministry did not provide me with sufficient evidence to support this claim.

[58] Therefore, I find section 49(a), read with 14(1)(l), does not apply to the information subject to the ministry's claim.

Section 14(2)(a) – law enforcement report

[59] In its representations, the ministry states it applied the exemption in section 14(2)(a) to withhold parts or all of Records 43-45 and 47-51. The ministry states these pages form part of an Investigative Plan prepared by the OPP and the Workplace Safety and Insurance Board.

[60] However, from a review of the records, it appears the ministry also claimed section 14(2)(a) to withhold Records 13 to 16, in full.

[61] For a record to qualify for exemption under section 14(2)(a), the ministry must satisfy each part of the following three part test:

1. The record must be a report; and

2. The report must have been prepared in the course of law enforcement, inspections or investigations; and

3. The report must have been prepared by an agency that has the function of enforcing and regulating compliance with a law.[19]

[62] The word *report* means "a formal statement or account of the results of the collation and consideration of information." Generally, results would not include mere observations or recordings of fact.[20] In addition, the title of a document is not determinative of whether it is a report, although it may be relevant to the issue.[21]

[63] The ministry submits the Investigative Plan contains analysis and conclusions with respect to a law enforcement investigation, which was about to commence. The ministry submits this analysis includes a consideration of the law, the reasons why the investigation was occurring, the objectives of the investigation, the various steps OPP officers would take during an investigation and the resources the OPP would use. In addition, the ministry submits the Investigative Plan is a formal statement because it contains an index, chapter headings, a glossary and signatures at its conclusion. For these reasons, the ministry submits the Investigative Plan is distinguishable from other routine police reports not generally considered to be *reports* within the meaning of section 14(2)(a).

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[19] Orders P-200 and P-324.
[20] Orders P-200, MO-1238 and MO-1337-I.
[21] Orders MO-1238 and MO-1337-I.

[64] The appellant submits section 14(2)(a) does not apply to Records 13-16 as these records form part of a routine report summarizing facts and observations. In addition, the appellant submits the Investigative Plan does not qualify for exemption under section 14(2)(a). The appellant submits the Investigative Plan is not an evaluative summary of an investigation, as required by Order PO-2751. In addition, the appellant submits the investigative phase was in contemplation at the time. As such, the appellant submits the Investigative Plan was not prepared *in the course of an investigation*.

[65] I reviewed the information at issue and find that section 14(2)(a) of the *Act* does not apply to Records 13-16, 43-45 or 47-51. First, I agree with the appellant that Records 13 to 16 contain summary information and descriptions. As such, I find Records 13 to 16 are not a part of "a formal statement or account of the results of the collation and consideration of information." Accordingly, and in the absence of any representations from the ministry on the application of section 14(2)(a) to Records 13 to 16, I find the exemption does not apply to them.

[66] With regard to the Investigative Plan, I find section 14(2)(a) does not apply to exempt the portions identified by the ministry from disclosure. Order P-1238 considered whether an investigative plan constitutes a law enforcement report and found as follows:

> Record 3 is an Investigation Plan prepared by the Officer. It contains a summary of the parties' positions and identifies the relevant issues. It also records the facts or information relevant to each issue and includes possible sources of evidence. In my view, this record does not contain any formal accounting of the results of the collation and consideration of this information (Order 200). Accordingly, I find that it does not qualify as a "report" within the meaning of section 14(2)(a). Record 3 is, therefore, not exempt under this section.

I adopt this analysis for the purposes of this appeal. The information subject to the ministry's section 14(2)(a) claim in Records 43 to 45 consists of background information relating to the allegations against the appellant. Based on my review, these pages do not contain any analysis or collation of information.

[67] With regard to the information that remains at issue in Records 47 to 51, I find that it does not amount to a formal statement or account of the results of the collation and consideration of information. I agree with the ministry that Records 47 to 51 contain a consideration of the law, the reasons why the investigation was occurring, the objectives of the investigation, the various steps that OPP officers would take during an investigation and the resources the OPP would use. However, in my view, these elements do not contain any formal accounting of the results of the collation and consideration of information. The information at issue in Records 47 to 51 relates to the objectives and plan for the investigation and provide no conclusions or analysis regarding outcomes after the gathering and collation of information. Therefore, I find that section 14(2)(a) does not apply to the records.

Conclusion

[68] I find section 49(a), read with section 14(1)(c), applies to certain portions of the records at issue, subject to my review of the ministry's exercise of discretion. I find section 49(a), read with sections 14(1)(h), (l) and 14(2)(a), does not apply to the records.

Issue C: Does the discretionary exemption at section 49(a), read with section 19, apply to the records?

[69] The ministry claims section 19 applies to the information severed from Records 81 and 82 and are thereby exempt under section 49(a). Section 19 of the *Act* states as follows:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
>
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
>
> (c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege. The ministry must establish that one or the other (or both) branches apply.

[70] The ministry claims portions of Records 81 and 82 are subject to solicitor-client communication privilege. The ministry submits it withheld portions of Records 81 and 82 because they contain confidential advice provided by legal counsel at the Ministry of the Attorney General to an OPP investigator about an investigation. The ministry submits the notes clearly indicate that they contain the legal counsel's advice. The ministry submits the legal advice is separate and distinct from the other parts of the officer's notes.

[71] The ministry also submits the legal advice consists of direct communications between the OPP investigator and legal counsel. Further, the ministry submits that the records have not been disclosed and so, the privileged has not been waived.

[72] The appellant acknowledges solicitor-client privilege covers solicitor-client communications of a confidential nature relating to the seeking, forming or giving of legal advice. The appellant also acknowledges solicitor-client privilege applies to government lawyers, including legal counsel at the Ministry of the Attorney General.

[73] In order for me to find the information identified by the ministry in Records 81

and 82 is subject to the common law solicitor-client privilege exemption, I must be satisfied that the records contain written communication of a confidential nature between a client and a legal advisor that is directly related to seeking, formulating or giving legal advice.[22] Upon review of Records 81 and 82, I find the information subject to the ministry's section 19 claim is exempt from disclosure. The portions withheld under section 19 consist of notes created by an OPP investigator containing legal advice provided by legal counsel at the Ministry of the Attorney General. Therefore, I find these portions are exempt from disclosure under section 49(a), read with section 19, of the *Act*.

[74] I note the appellant raises the issue of whether certain information can be severed from Records 81 and 82 even though the severed portions are exempt under section 19. On my review of these records, I find the information exempt under section 49(a), read with section 19, is not severable.

[75] Therefore, I uphold the ministry's decision to withhold portions of Records 81 and 82 under section 49(a), read with section 19, subject to my review of the ministry's exercise of discretion below.

Issue D: Does the discretionary exemption at section 49(b) apply to the information at issue?

[76] As previously stated, section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right. The ministry claims the application of the exemption in section 49(b) to the information that remains at issue.

[77] Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an unjustified invasion of another individual's personal privacy, the ministry may refuse to disclose that information to the requester. Since the section 49(b) exemption is discretionary, the ministry may decide to disclose the information to the requester. Section 49(b) states

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where the disclosure would constitute an unjustified invasion of another individual's personal privacy.

Section 21(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy. Based on my review of the circumstances of this appeal, I find that section 21(1)(a) is relevant to this appeal and will consider it below.

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[22] *Decôteaux v. Mierzwinski* (1982), 141 DLR (3d) 590 (SCC).

Section 21(1)(a) – consent

[78] Section 21(1)(a) states

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access.

For section 21(1)(a) to apply, the consenting party must provide a written consent to the disclosure of his or her personal information in the context of an access request. In Order PO-1723, the adjudicator found that section 21(1)(a) requires that consent be provided under the *Act*. In other words, the consenting party must provide a written consent to the disclosure of his or her personal information in the context of an access request.

[79] During the inquiry, the appellant provided this office with a signed consent form from the affected party. As discussed above, I found the records contain personal information relating to the affected party. I reviewed the affected party's consent. I find it clearly authorizes the release of any of their personal information that may appear in records responsive to the appellant's original request. Therefore, I find the affected party's consent is valid for the purposes of section 21(1)(a). Given the valid consent, I order the ministry to disclose the personal information relating to the affected party to the appellant.

[80] I find support for this decision in Order MO-2461, in which the adjudicator received the consents of two individuals whose personal information was contained in the records during the inquiry. The adjudicator reviewed the consents and found they were valid for the purposes of section 14(1)(a), the municipal equivalent to section 21(1)(a). In light of this development, the adjudicator ordered the institution to disclose the records that contain these individuals' personal information.

[81] Therefore, I order the ministry to disclose the personal information relating to the affected party who provided their consent to the appellant. I will now consider whether the remainder of the personal information at issue is exempt from disclosure under section 49(b).

[82] I reviewed paragraphs (b) to (e) of section 21(1) and find that none apply. In addition, I find paragraphs (a) to (d) of section 21(4) do not apply. Therefore, I will consider whether the factors in section 21(2) and the presumptions in section 21(3) are relevant to my determination.

Section 21(3) – presumptions

[83] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section

49(b).

[84] The ministry submits the presumptions in sections 21(3)(b) and (d) apply to the personal information at issue. These state,

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
> >
> > (d) relates to employment or educational history.

[85] The ministry submits the presumption in section 21(3)(b) applies to the majority of the personal information that remains at issue. The ministry submits the records were created pursuant to a law enforcement investigation and they are clearly identifiable as such. The ministry submits the records are associated with charges laid under the *Criminal Code*. While the charges were ultimately dropped, the ministry states the appellant pleaded guilty to a charge under the provincial *Health Insurance Act*.

[86] Based on my review of the records, specifically the OPP officers' notes, the Investigative Plan and various law enforcement report, I find the personal information in these records was compiled and is identifiable as part of an investigation into a possible violation of law. I find disclosure of this information is presumed to be an unjustified invasion of the personal privacy of individuals other than the appellant. Accordingly, I find that the presumption in section 21(3)(b) is relevant to my determination of the application of section 49(b).

[87] In relation to section 21(3)(d), the ministry states portions of Records 10 and 63 contain references to the employment history of OPP officers and disclosure of this information would presume to be an unjustified invasion of their personal privacy. I agree. I find disclosure of the information relating to the employment history of the OPP officers is presumed to be an unjustified invasion of their personal privacy. As such, section 21(3)(d) is relevant to my determination of the application of section 49(b).

[88] Therefore, I find that sections 21(3)(b) and (d) are relevant to my determination of the application of section 49(b).

Section 21(2) – factors

[89] Section 21(2) of the *Act* lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy under section 49(b).[23] The ministry claims the application of the factor

[23] Order P-239.

relating to non-disclosure in section 21(2)(f) which states

> A head, in determining whether a disclosure of personal information constitute an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> the personal information is highly sensitive;

[90] The ministry submits a number of third parties whose personal information is contained in the records were not notified of the request and the records. The ministry refers to Order P-1618, in which the IPC found the personal information of individuals who are complainants, witnesses or suspects as part of their contact with the OPP is highly sensitive for the purpose of section 21(2)(f).

[91] The appellant submits the fact the ministry did not notify certain third parties is not dispositive of the matter. Also, the appellant submits that the ministry failed to provide record-by-record evidence that section 21(2)(f) is relevant.

[92] To be considered *highly sensitive*, there must be a reasonable expectation of significant personal distress if the information is disclosed.[24]

[93] The ministry claimed the application of the exemption in section 49(b) in conjunction with the factor in section 21(2)(f) to all the personal information that remains at issue in this appeal. These records relate to the OPP's search and seizure of records relating to the OPP's investigation into the appellant and his business. The records contain a number of patient's names and dates of births as well as the personal information relating to other individuals. Based on my review of the records, I find it is reasonable to expect that disclosure of the information would cause significant personal distress to those individuals whose personal information is at issue.

[94] Therefore, I find the factor in section 21(2)(f) is relevant with respect to the personal information at issue. In addition, I reviewed the remainder of the factors in section 21(2), including those in favour of disclosure, and find that none apply. Consequently, having considered and found that the presumptions in section 21(3)(b) and (d) apply as well as the factor in section 21(2)(f), I find the information qualifies for exemption under section 49(b) of the *Act*.

Absurd Result

[95] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 49(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption.[25] The IPC has found the absurd result principle applies where the requester was present when the information was provided to the institution[26] or the information is

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[24] Orders PO-2518, PO-2617, MO-2262 and MO-2344.
[25] Orders M-444 and MO-1323.
[26] Orders M-444 and P-1414.

clearly within the requester's knowledge.[27]

[96] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[28]

[97] The ministry did not address the absurd result principle in its representations.

[98] The appellant submits the absurd result principle applies to the following information:

- Information in the possession and control of the appellant that was seized by the OPP (and thus supplied to the OPP by the appellant); and
- Any information already contained in the selected *Access to Information Act* disclosed received by the appellant.

[99] I reviewed the information I find to be exempt from disclosure under section 49(b) and find the absurd result does not apply. While some of the information may be known to the appellant, the disclosure of the personal information of other individuals would be inconsistent with the personal privacy exemption in section 49(b). In particular, I find this applies to certain statements made by identifiable individuals as well as the names and birthdates of other identifiable individuals. Therefore, I find the absurd result principle does not apply to the personal information that I find exempt under section 49(b).

[100] The appellant requested that I consider whether the public interest override in section 23 of the *Act* applies to the information that is exempt under section 49(b). In his representations, the appellant submits there is a public interest in knowing whether, and how, its law enforcement institutions comply with their legal obligations concerning searches and information sharing. However, I reviewed all of the materials the appellant provided the IPC during the inquiry, including his confidential representations, and find section 23 does not apply to override the section 49(b) exemption. Generally, 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.[29] Based on my review of the personal information I found to be exempt under section 49(b), I find its disclosure would not inform or enlighten the public about the activities of their government or its agencies. Furthermore, given the nature of the records, which relate entirely to the OPP's investigation of the appellant, I find the interest in the records is essentially private in nature.[30] Therefore, I find the public interest override in section 23 has no application in this case.

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[27] Orders MO-1196, PO-1679 and MO-1755.
[28] Orders M-757, MO-1323 and MO-1378.
[29] Orders P-984 and PO-2556.
[30] Orders P-12, P-347 and P-1439.

[101] Accordingly, I find that the personal information that remains at issue is exempt from disclosure under section 49(b), subject to my review of the ministry's exercise of discretion below. However, I will order the ministry to disclose the personal information relating to the affected party to which section 21(1)(a) applies.

Issue E: Did the ministry exercise its discretion under sections 49(a) and (b)? If so, should this office uphold the exercise of discretion?

[102] After deciding that records or portions thereof fall within the scope of a discretionary exemption, an institution is obliged to consider whether it would be appropriate to release the records, regardless of the fact that they qualify for exemption. Sections 49(a) and (b) are discretionary exemptions, which means that the ministry could choose to disclose the information, despite the fact that it may be withheld under the *Act*.

[103] In applying sections 49(a) and (b), the ministry was required to exercise its discretion. On appeal, the Commissioner may determine whether the ministry failed to do so. In addition, the Commissioner may find that the ministry erred in exercising its discretion where it did so in bad faith or for an improper purpose; where it took into account irrelevant considerations; or where it failed to take into account relevant considerations. In either case, I may send the matter back to the ministry for an exercise of discretion based on proper considerations.[31] According to section 54(2) of the *Act*, however, I may not substitute my own discretion for that of the ministry.

[104] As I uphold the ministry's decision to apply sections 49(a) and (b), in part, I must review its exercise of discretion under those exemptions.

[105] The ministry submits it exercised its discretion appropriately. The ministry submits that disclosing the information at issue can be expected to harm law enforcement operations, by revealing confidential law enforcement techniques and procedures and internal law enforcement codes. In addition, the ministry submits it operated in accordance with its usual practice. Finally, the ministry submits it disclosed many of the records to the appellant.

[106] The appellant submits the ministry failed to take into account relevant considerations, including that individuals have a right to access their own personal information and that the appellant is seeking, in large part, his own personal information, in relation to occurrences over seven years. In addition, the appellant submits there is a public interest in knowing whether, and how, its law enforcement institutions comply with their legal obligations concerning searches and information sharing.

[107] Based on the parties' representations and my review of the information that remains at issue, I am satisfied the ministry considered relevant factors in exercising its discretion and did not take into account irrelevant considerations. On review of the

[31] Order MO-1573.

records, I find the appellant will have obtained access to a significant amount of his personal information through the ministry's access decision and this order. I reviewed the information at issue and it consists primarily of other individual's personal information, solicitor-client privileged information and information exempt from disclosure under section 14(1)(c). I find the ministry considered the appellant's right to his own personal information and balanced that against the importance of other individual's personal privacy, law enforcement and solicitor-client privilege. Finally, I find the ministry made the effort to maximize the amount of disclosure while also considering the nature and type of personal information contained in the records.

[108] Although the appellant raised the public interest in the context of the ministry's exercise of discretion, I find it is not a relevant consideration in this case. As stated above, it appears the appellant's interest in obtaining access to the records is primarily of a private nature.

[109] Therefore, in the circumstances before me, I am satisfied the ministry appropriately exercised its discretion under sections 49(a) and (b) to the portions of the records that I found to be exempt from disclosure.

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

[110] Where a requester claims additional responsive records exist beyond those identified by the institution, the issue to be decided is whether the institution conducted a reasonable search for records as required by section 24.[32] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the ministry's search. If I am not satisfied, I may order further searches.

[111] The *Act* does not require the ministry to prove with absolute certainty that further records do not exist. However, the ministry must provide sufficient evidence to show that it made a reasonable effort to identify and locate responsive records.[33] To be responsive, a record must be *reasonably related* to the request.[34]

[112] 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.[35] I will order a further search if the ministry does not provide sufficient evidence to demonstrate that it made a reasonable effort to identify and locate all of the responsive records within its custody or control.[36]

[113] Although the requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester must still provide a reasonable

[32] Orders P-85, P-221 and PO-1954-I.
[33] Orders P-624 and PO-2559.
[34] Order PO-2554.
[35] Orders M-909, PO-2469 and PO-2592.
[36] Order MO-2185.

basis for concluding that such records exist.[37]

[114] The ministry submits it conducted a reasonable search for records responsive to the appellant's request. The ministry states it contacted the appellant for clarification of his request twice. The ministry states the appellant amended his request significantly and, after the clarification process, the ministry and the appellant confirmed the scope of his request. The ministry submits it determined if records responsive to the request existed, they would be stored in the Major Case Management (MCM) file created for the relevant investigation. The ministry states the OPP, along with other Ontario law enforcement agencies, use MCM for major investigations, such as the one that is the subject of the request. The ministry submits that all relevant records related to the investigation are stored in the MCM file, in both paper and electronic form.

[115] The ministry submits the OPP advised that all responsive records should be located in the MCM. In any case, the OPP Investigation and Support Bureau also searched the RMS system (the police records database) and emailed OPP officers involved in the investigation to determine if they had any additional records. The ministry states the OPP did not identify any additional records beyond those retrieved from the MCM file.

[116] In his representations, the appellant identifies three records that he submits ought to exist. The appellant described these records as follows:

1. The "briefing package" detailing the search of the appellant's residence referred to in page 11 of the records.

2. The "summary of activity" prepared by the OPP officer for the purposes of briefing other OPP officers referred to in page 15 of the records.

3. The "report in relation to this investigation" prepared on February 22, 2007 referred to in page 15 of the records.

The ministry did not address the existence or non-existence of these specifically identified records in its representations. I reviewed the records at issue. I find there is a reasonable basis to believe that these three reports ought to exist. In the absence of any representations from the ministry addressing these reports, I find the ministry did not conduct a reasonable search for these records. Therefore, I will order it to conduct another search for these specific reports identified in the records.

[117] The appellant makes a number of additional submissions in relation to the ministry's search. I reviewed all of the appellant's submissions on search and find they do not establish a reasonable basis to believe additional responsive records ought to exist.

[118] First, the appellant submits the ministry failed to disclose a number of records

[37] Order MO-2246.

that he believes are relevant to his original request, including records relating to the "provision of information by the OPP to the CRA." The appellant identifies various references in the records that indicate the CRA was aware of certain information or relate to a referral made by the OPP to the CRA. In addition, the appellant submits the ministry ought to disclose "any working agreements or frameworks setting out the terms of information sharing-between the OPP and the CRA."

[119] The ministry states the OPP and the CRA routinely work together on law enforcement investigations and "do not, as a matter of course, enter into agreements or written understandings with respect to the sharing of information." Further, the ministry states there is no legal obligation for the OPP and the CRA to enter such agreements. Therefore, the ministry submits it is reasonable to assume no responsive agreement exists because the OPP and CRA did not establish one.

[120] In any case, the ministry conducted a search and located an unsigned agreement from 2005. This unsigned agreement describes the *Terms of a Working Agreement* between the CRA and the OPP in relation to a Joint Forces Operation. The ministry submits this unsigned agreement is not responsive to the appellant's request because it does not relate to the investigation involving the appellant. However, the ministry disclosed the record to the appellant. The ministry submits it conducted a reasonable search and there are no further agreements, whether they are Memoranda of Understanding, Letters of Understanding, Working Agreements or agreements specific to the investigation that is the subject to the request.

[121] I uphold the ministry's search in relation with this aspect of the appellant's request. The ministry provided me with a sufficient and reasonable explanation regarding the relationship between the OPP and the CRA. I am satisfied that the ministry conducted a reasonable search for records relating to "any working agreements or frameworks" between the OPP and the CRA. Further, I am not satisfied the appellant demonstrated there is a reasonable basis for his belief that additional responsive records relating to the "provision of information by the OPP to the CRA" exist.

[122] The appellant also takes issue with the ministry's decision to search "only" its MCM system, the RMS system and the email accounts of certain OPP officers. The appellant submits the ministry did not provide any evidence to demonstrate the MCM file was the only place that could reasonably be expected to hold the responsive records. However, based on my review of the ministry's submissions, I am satisfied it searched the relevant locations for responsive records. The ministry confirmed the OPP and other Ontario law enforcement agencies use the MCM system in conducting major investigations. The ministry asserted that all relevant records relating to the investigation are stored in the MCM file. In any case, the ministry conducted a search of the MCM file, the RMS system and contacted a number of OPP officers for additional responsive records. I reviewed the appellant's representations and find they do not demonstrate there is a reasonable basis for his belief that additional responsive records exist elsewhere.

[123] The appellant also submits the ministry did not disclose any email

communications between members of the CRA and the OPP. The appellant further details his concerns with respect to the ministry's search for emails generally. The ministry submits email communications not part of the MCM file no longer exist due to the age of the records. The ministry states the OPP keeps most of its non-investigative records, such as emails, for two years, plus the current year. I accept the ministry's explanation in this case and find it conducted a reasonable search for responsive email records by reviewing the MCM file and contacting the relevant OPP officers for any additional responsive records.

[124] The appellant identified a number of other records he believes the ministry should have disclosed to him, such as records relating to applications pursuant to section 490(15) of the *Criminal Code* and all materials relating to meetings and telephone conversations between any member of the CRA and any member of the OPP. While the appellant submits the ministry should have disclosed these records, he did not provide sufficient evidence to demonstrate there is a reasonable basis for his belief that these records ought to exist.

[125] Finally, the appellant raises a number of issues with regard to the ministry's obligation to disclose certain records, such as court documents, to him. I will not address the appellant's concerns relating to these issues because they do not relate to the reasonableness of the ministry's search.

[126] I reiterate the principle outlined above that the *Act* does not require the ministry to prove with *absolute certainty* that further records do not exist. The IPC previously established that an institution is not required to go to extraordinary lengths to search for records responsive to a request.[38] Rather, the ministry's obligation under the *Act* is to demonstrate it made a reasonable effort to identify and locate responsive records. In the circumstances of this appeal, I accept the ministry conducted reasonable search, with the exception of the three specific records the appellant identified in its representations.

[127] Therefore, I uphold the ministry's search for responsive records as reasonable, with the exception of the records identified by the appellant. I will order the ministry to conduct another search for the three records identified by the appellant.

ORDER:

1. I uphold the ministry's application of section 49(a), read with section 14(1)(c), in part. I find that the ministry is not entitled to withhold portions of the records from disclosure under section 49(a), read with sections 14(1)(h) and (l) and 14(2)(a).

2. I uphold the ministry's application of section 49(a), read with section 19, to withhold portions of the records.

[38] See Order MO-2758.

3. I uphold the ministry's application of section 49(b) to withhold portions of the records. However, I order the ministry to disclose the personal information relating to the affected party to the appellant.

4. I order the ministry to disclose the information that is not exempt from disclosure under the exemptions claimed to the appellant by **January 3, 2018**. For the sake of clarity, I enclose a highlighted copy of the records to the ministry. The ministry is *not* to disclose the information that I highlighted in green. I order the ministry to disclose the remainder of the records to the appellant.

5. I order the ministry to conduct further searches for the following records:

    a. The "briefing package" detailing the search of the appellant's residence referred to in page 11 of the records.

    b. The "summary of activity" prepared by the OPP officer for the purposes of briefing other OPP officers referred to in page 15 of the records.

    c. The "report in relation to this investigation" prepared on February 22, 2007 referred to in page 15 of the records.

    In conducting the search, I order the ministry to provide me with an affidavit sworn by the individual who conducts the search(es) **within 30 days of the date of this Interim Order**. At a minimum, the affidavit should contain the following information:

    - the qualifications and responsibilities of the employee(s) swearing the affidavit;

    - a statement describing the employee's knowledge and understanding of the subject matter of the request;

    - the date(s) the person conducted the search and the names and positions of any individuals who were consulted;

    - the type of files searched, the nature and location of the search, and the steps taken in conducting the search; the results of the search;

    - and if as a result of the further searches it appears that responsive records existed but no longer exist, details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

6. I order the ministry to issue an access decision to the appellant if it locates additional records as a result of the search ordered in Order Provision 5, treating the date of this order as the date of the request and without recourse to a time extension under section 20 of the *Act*.

Original signed by: November 29, 2017

Justine Wai
Adjudicator