Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3851

Appeal PA14-9-2

Ministry of Community Safety and Correctional Services

June 4, 2018

Summary: At issue in this appeal is a request for access to information pertaining to the appellant, including any wiretap records. The ministry granted partial access to responsive records, ultimately relying on section 49(a) (discretion to refuse requester's own information), in conjunction with sections 14(1)(c) (reveal investigative techniques) and 14(1)(l) (hamper control of crime) to deny access to a portion it withheld. It also took the position that the *Freedom of Information and Protection of Privacy Act* (the *Act*) does not apply to wiretap records because the *Criminal Code* provides a complete and comprehensive code for the obtaining of, and release of information or records regarding, authorizations to intercept private communications. The appellant appealed the ministry's access decisions and took issue with the adequacy of the ministry's search for responsive records as well as the ministry's determination that certain information was not responsive to the request. The appellant also requested a better copy of a recording of a 911 call that had been disclosed to her. In this order, the Adjudicator upholds the reasonableness of the ministry's search for responsive records, other than any wiretap records, and finds that the ministry met its obligations under the *Act* with respect to the appellant's access to a 911 call recording and identifying information that is responsive to the request. He also upholds the ministry's decision that certain information qualifies for exemption under section 49(a), in conjunction with section 14(1)(c) of the *Act*, but orders the ministry to disclose to the appellant the 911 call operator identification codes that are contained in the responsive records. Finally, the Adjudicator does not find any issue of paramountcy between the *Act* and the *Criminal Code* with respect to the request for access to any wiretap records and orders the ministry to issue an access decision regarding the appellant's request for access to any wiretap records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 1, 2(1), 14(1)(c), 14(1)(l), 14(3), 24, 21(5), 25(1), 30(2), 40(2),

47(2)(a), 48(3), 48(4) and 49(a); *Access to Information Act*, R.S.C. 1985, c.A-1, section 24(1); *Criminal Code*, R.S.C., 1985, c. C-46, sections 184(1), 187, 193(1), 193(2)(a), 193(3) and 196.

Orders Considered: MO-1786, MO-3070, Order P-344, PO-2092-F, PO-2490, PO-3013 and PO-3421.

Cases Considered: Multiple Access Ltd. v. Mc Cutcheon, (1982) 2 SCR 161; Bank of Montreal v. Hall, [1990] 1 SCR 121; M & D Farm Ltd. v. Manitoba Agricultural Credit Corp, [1999] 2 SCR 961; Michaud v. Quebec (Attorney General), [1996] 3 SCR 3; 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), [2001] 2 SCR 241; Law Society of British Columbia v. Mangat, [2001] 3 SCR 113; Canadian Western Bank v. Alberta, [2007] 2 SCR 3; Bank of Montreal v. Marcotte, 2014 SCC 55; Imperial Oil v. Jacques, [2014] 3 SCR 287, 2014 SCC 66; Canada (Procureur général) c. Charbonneau, 2012 QCCS 1701; Ontario (Attorney General) v. Pascoe, 2001 CanLII 32755 (ON SCDC); Rubin v. President of Canada Mortgage & Housing Corp., [1989] 1 FC 265 (FCA); Rubin v. Canada (Minister of Transport), [1998] 2 FC 430 (FCA); Chatterjee v. Ontario (Attorney General), 2009 SCC 19; British Columbia (Attorney General) v. Lafarge Canada Inc., 2007 SCC 23; Wakeling v. United States of America, 2014 SCC 72.

BACKGROUND:

[1] 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* or *FIPPA*) for access to the following information:

1. Copy of recorded voice authorization May - July 2013 for [specified address].

2. Organizational chart for Pembroke OPP [Ontario Provincial Police] detachment.

3. Copy of police report(s) relating to the requester for dates between July 11 and July 22/13.

4. Transcript of call made to OPP by [named individual] July 12, 2013.

5. Transcript of audio records for meeting between [named individual] and Pembroke OPP officers July 20, 2013.

[2] The request was subsequently clarified to be for access to the following information pertaining to the requester:

> …Ontario Provincial Police reports, officers' notes, statements, 911 calls, wiretap and surveillance records relating to incidents from July 11-22, 2013…
>
> …the name of an officer involved with an RCMP [Royal Canadian Mounted Police] investigation involving [the requester].

[3] The ministry identified records that it determined were responsive to the request

and granted partial access to them. The police relied on section 49(a) (discretion to refuse requester's own information), in conjunction with sections 14(1)(c) (reveal investigative techniques), 14(1)(l) (hamper control of crime) and 14(2)(a) (law enforcement report), as well as section 49(b) (personal privacy) to deny access to certain portions they withheld. The police also took the position that certain information in the records was not responsive to the request.

[4] The ministry's decision letter further stated that:

> With respect to your request for access to statements, records relating to surveillance and the name of an OPP officer involved with an RCMP investigation, please be advised that the information cannot be provided as the information does not exist. Experienced ministry staff familiar with the record holdings of the OPP conducted a search and no responsive records were located.
>
> With respect to the portion of your request seeking access to Wiretap information, please be advised that the ministry is unable to respond to this portion of your request at this time. Should you wish to pursue access to this information the ministry will require additional time to issue a formal decision.

[5] The ministry then provided the appellant with a supplementary decision letter responding to the request for wiretap records. The ministry took the position that:

> … [the *Act*] does not apply to the portion of your request relating to Wiretap records. The *Criminal Code* (Canada)[1] provides a complete and comprehensive code for the obtaining of, and release of information or records regarding, authorizations to intercept private communications. It is that federal legislation which governs issues regarding the sealing, retention or possible disclosure of such material. In particular, section 196 of the *Criminal Code* (Canada) prescribes a procedure whereby notification is given to a person who was the object of an interception pursuant to an authorization. To permit a requestor to seek disclosure of the same records and information through the [*Act*] would frustrate the federal legislative purpose of the scheme in the *Criminal Code*.
>
> In the circumstances, the Ontario Provincial Police is of the view that the *Freedom of Information and Protection of Privacy Act* does not apply to this portion of your request and on this basis is not in a position to process your request for this information or record under that legislation.

[6] The requester (now the appellant) appealed the ministry's decisions.

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[1] *Criminal Code*, R.S.C., 1985, c. C-46.

[7] During the course of mediation, the appellant advised the mediator that she sought access to all of the withheld records, including the portions the ministry indicated were non-responsive, and was of the view that additional responsive records should exist. The additional records the appellant asserted should exist included production orders and/or "information to obtain" documents related to wiretapping. Accordingly, the responsiveness of the records and the reasonableness of the ministry's search for responsive records became issues in the appeal. The appellant also explained that the digital copy of a 911 call made on a specified date was inaudible and requested an audible copy of the 911 call in MP3 format.

[8] Also during the course of mediation, an affected party provided their consent to the disclosure of any information relating to him that might be contained in the responsive records. As a result, the application of section 49(b) was considered to be no longer at issue in the appeal. The ministry then issued a further supplementary decision granting access to additional information contained within the records. The ministry also advised that it was relying on the other exemptions cited in its earlier decision letter to deny access to the portion it withheld. The ministry also provided a copy of the 911 call in MP3 format to the appellant. Finally, the ministry's letter indicated that it removed some information "such as printing information" because it was of the opinion that it was non-responsive to the request.

[9] The appellant also explained to the mediator that she was of the view that the ministry did not produce all of the responsive records relating to occurrence reports and police officers' notes for a specified time frame. Specifically, the appellant took the position that additional police officers' notes should exist because there are gaps in the page numbers of the notes that were disclosed to her. As well, the appellant advised the mediator that additional records should exist with respect to the name of an OPP officer involved with an RCMP investigation. The ministry advised the mediator that the police officers' notes for which there are gaps in the page numbers fall outside the scope of the request and provided copies of the non-responsive pages to the mediator. The appellant advised the mediator that she is pursuing access to these records. Accordingly, the scope of the request was added as an issue in the appeal.

[10] With respect to the request for "information to obtain" documents related to wiretapping, the ministry took the position that the *Criminal Code* prevails over the *Act* and raised the issue of paramountcy with respect to this portion of the request. The ministry also referred to a letter to the appellant from an OPP detachment that stated:

> One of the items you requested was "wiretap and audio/video surveillance." Pursuant to section 196 of the *Criminal Code*, if an individual's private communications has been the subject of an authorization to intercept that private communication, the individual is to be notified 90 days after the period for which the authorization was given or renewed, or such further extension of time as granted by the Superior

> Court of Justice. The Ontario Provincial Police is under an obligation to comply with the *Criminal Code*.
>
> We can confirm that the Ontario Provincial Police is complying with its obligations under this provision.

[11] Finally, the appellant advised the mediator that the 911 call in MP3 format was inaudible and asked for a transcript of the call.

[12] The ministry subsequently issued a further supplementary decision in which it granted partial access to additional responsive records. In the decision, the ministry advised that transcripts of the 911 call relating to a specific occurrence did not exist but that it was providing partial access to the event details of the call. In addition, the ministry disclosed the name of the OPP officer who communicated with an RCMP officer in 2013. The letter also advised that the information that the ministry viewed as non-responsive had been severed from the disclosed records.

[13] The appellant continued to pursue access to all of the withheld portions of the responsive records and was of the view that additional responsive records should exist for the period from July 11 to 19, 2013, as well as notebook entries pertaining to communication between the OPP officer and the RCMP officer in 2013.

[14] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[15] During the inquiry into the appeal, I sought and received representations from the ministry and the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[16] The ministry advised in its representations that it was no longer relying on section 14(2)(a) to withhold access to the responsive records. As a result, the application of section 14(2)(a) is no longer at issue in the appeal.

[17] In addition, the ministry stated that:

> The ministry has been asked in Issue F to provide submissions on whether the records contain personal information. We have not withheld the records on the basis that they do contain personal information. Therefore, we are not preparing representations in response to Issue F.

[18] Notwithstanding the submissions of the ministry, whether a record contains personal information, and whose personal information it is, determines which part of the *Act* applies. Accordingly, it is still necessary to conduct the analysis even though the ministry has decided not to provide representations on the issue.

[19] In her representations, the appellant advised that she was no longer seeking

access to the police ten codes or patrol zone codes. Accordingly, that information is also no longer at issue in the appeal.

[20] In this order, I uphold the reasonableness of the ministry's search for responsive records, other than any wiretap records, and find that the ministry met its obligations under the *Act* with respect to the appellant's access to the July 13, 2013 911 call recording and identifying information that is responsive to the request. I also uphold the ministry's decision that certain information qualifies for exemption under section 49(a), in conjunction with section 14(1)(c) of the *Act*, but order the ministry to disclose to the appellant any 911 call operator identification codes that are found in the responsive records. I do not find any issue of paramountcy between the *Act* and the *Criminal Code* with respect to the request for access to any wiretap records and order the ministry to issue an access decision regarding the appellant's request for access to any wiretap records.

RECORDS REMAINING AT ISSUE:

[21] The records at issue in this appeal consist of the withheld portions of OPP records and police officers' hand-written notes as well as a withheld portion of a CD.

ISSUES:

A. Is there a question of federal paramountcy at issue in this appeal with respect to the request for "wiretap" records?

B. What is the scope of the request? What information is responsive to the request?

C. Did the ministry conduct a reasonable search for responsive records within their custody and control?

D. Does the appellant have any recourse regarding the quality of the recording of the July 13, 2013 911 call?

E. Does the discretionary exemption at section 49(a), in conjunction with sections 14(1)(c) and 14(1)(l), apply to the information at issue?

F. Did the institution exercise its discretion under section 49(a)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Is there a question of federal paramountcy at issue in this appeal with respect to the request for "wiretap" records?

[22] The ministry's position is that the constitutional doctrine of federal paramountcy excludes requests for wiretap records, and the contents of those intercepted communications, from the scope of *FIPPA*. It submits that the *Criminal Code* sets out a comprehensive code or complete scheme which deals with the issue of disclosure of the existence and contents of electronic surveillance records.

[23] Section 184(1) of the *Criminal Code,* which is found in Part VI of the *Criminal Code*, provides that everyone who wilfully intercepts a private communication by means of any electro-magnetic, acoustic, mechanical or other device commits an offence.

[24] Section 187 of the *Criminal Code* requires that applications and authorizations for wiretap records must be kept confidential.

[25] Section 193(1) of the *Criminal Code* creates an offence for the disclosure of the content or existence of an intercepted private communication, which would include records obtained by means of a wiretap. It reads:

> Where a private communication has been intercepted by means of an electromagnetic, acoustic, mechanical or other device without the consent, express or implied, of the originator thereof or of the person intended by the originator thereof to receive it, every one who, without the express consent of the originator thereof or of the person intended by the originator thereof to receive it, wilfully
>
> > (a) uses or discloses the private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof, or
> >
> > (b) discloses the existence thereof,
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

[26] Section 193(2)(a) of the *Criminal Code* states:

> Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or any part thereof or who discloses the existence of a private communication in the course of or for the purpose of giving evidence in any civil or criminal proceedings or in any other proceedings in which the person may be required to give evidence on oath.

[27] Section 193(3) of the *Criminal Code* states:

> Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or who discloses the existence of a private communication where that which is disclosed by him was, prior to the disclosure, lawfully disclosed in the course of or for the purpose of giving evidence in proceedings referred to in paragraph 2(a).

[28] In Order PO-2092-F former Assistant Commissioner Tom Mitchinson dealt with the impact of these sections of the *Criminal Code* on access requests under the *Act* in the context of a request for video surveillance records. He held in that order that there was no conflict between the *Act* and the *Criminal Code*. In making this finding he departed from his previous finding in Order P-344 decided before those sections were amended, where he found an operational conflict between the *Act* and the *Criminal Code* in responding to requests for access to wiretap application records in situations where a record does not exist, and that this was sufficient to invoke the doctrine of paramountcy.

[29] In Order PO-2092-F, former Assistant Commissioner Mitchinson wrote the following about the effect of the *Criminal Code* amendments and their impact on his determinations in Order P-344:

> By amendments passed in 1993 and 1997, the federal government added section 487.01 to Part XV of the *Criminal Code* to deal with warrants for video surveillance and other investigative methods not contemplated in Part VI. For the purposes of this discussion, it is important to note that section 193, among other provisions within Part VI, applies to video surveillance records by virtue of section 487.01(5), which states:
>
> > The definition "offence" in section 183 and sections 183.1, 184.2, 184.3 and 185 to 188.2, subsection 189(5), and sections 190, 193 and 194 to 196 apply, with such modifications as the circumstances require, to a warrant referred to in subsection (4) as though references in those provisions to interceptions of private communications were read as references to observations by peace officers by means of television cameras or similar electronic devices of activities in circumstances in which persons had reasonable expectations of privacy.
>
> Section 52(8) of the *Act* provides that, in conducting an inquiry under the *Act*, "[t]he Commissioner may summon and examine on oath any person who, in the Commissioner's opinion, may have information relating to the inquiry, and for that purpose the Commissioner may administer an oath." This suggests that the exception at section 193(2) of the *Criminal Code*

> would now apply to a person who discloses the existence or content of video surveillance records in the course of, or for the purpose of giving evidence in, an inquiry before the Commissioner.
>
> This interpretation was not possible when I issued Order P-344 because at that time, the exception provided by section 193(2) to the offence created by section 193(1) was only available "in the course of or for the purpose of giving evidence in any civil or criminal proceedings or in any other proceedings in which he may be required to give evidence on oath **where the private communication is admissible as evidence under section 189 or would be admissible under that section if it applied in respect of proceedings**" (my emphasis). Section 189(4), since repealed, stated that "[a] private communication that has been intercepted and that is admissible as evidence may be admitted in any criminal proceeding or in any civil proceeding **or other matter whatsoever respecting which Parliament has jurisdiction**, whether or not the criminal proceeding or other matter relates to the offence specified in the authorization pursuant to which the communication was intercepted" (my emphasis). Clearly, an inquiry before the Commissioner is not an "other matter respecting which Parliament has jurisdiction", and therefore information about an intercepted communication would not have been "admissible as evidence under section 189" at that time. [Emphasis in original]

[30] In the appeal that resulted in Order PO-2092-F, the Attorney General apparently conceded that section 193(2) would permit the disclosure of the existence and content of wiretap and video surveillance records to the IPC during an inquiry. In the appeal before me there is no such concession. That said, in Order PO-2092-F, Assistant Commissioner Mitchinson wrote:

> …, the appellant also submits that "[t]he *Criminal Code* now permits the disclosure of the existence and content of private communications in the course of a proceeding in which a person may be required to give evidence on oath, which would include proceedings before the Assistant Commissioner". She also submits that "after disclosure to the Assistant Commissioner in these proceedings", section 193(3) would apply to permit further disclosure pursuant to an order. I agree with these submissions. The amendments to section 193(2)(a) and the repeal of section 189(4) of the *Criminal Code* provide a clear indication of Parliament's intention to broaden this exception to the offence created by section 193(1). Parliament removed the test of admissibility and the requirement that the matter be one over which Parliament "has jurisdiction", with the result that the exception now permits the disclosure of information "in the course of" or "for the purpose of giving evidence in" a virtually unlimited range of tribunal proceedings, as long as the tribunal in question is able to

> require witnesses to give evidence under oath. As noted previously, the Commissioner is so empowered by section 52(8) of the *Act*.
>
> …
>
> Therefore, I am satisfied that section 193(2)(a) allows the Ministry to inform the Commissioner of the existence and contents of the Category 4 records "in the course of" proceedings before me, and also "for the purpose of giving evidence" during those proceedings. The Ministry has informed me of the existence of these records and has provided copies of them to me. In turn, I am also satisfied that, subject to the requirements of the *Act*, because this information has been provided to me in "proceedings referred to in paragraph (2)(a)", the exception at section 193(3) would permit me to disclose the existence of the records in this order, as I am doing, and would permit me to order the Ministry to disclose any records that have been provided to me, unless an exemption in the *Act* applies. Therefore, in my view, section 193, as amended since I issued Order P-344, is not a source of express contradiction or actual conflict in operation with the *Act*.
>
> As noted, the Ministry had also argued that the provisions at section 187 of the *Criminal Code*, requiring that the contents of the court's "sealed packet" containing the wiretap application materials be kept confidential, also create conflict with the *Act*. The Ministry did not elaborate on this argument, and the Attorney General did not refer to it. In any event, the Category 4 records that are the subject of this inquiry are the results of video surveillance, not "sealed packet" records.
>
> Although no other provisions of the *Criminal Code* were identified by the Ministry or the Attorney General as possible sources of conflict with the *Act*, I have reviewed the other provisions of Part VI of the *Criminal Code* that are made applicable to video surveillance under Part XV and I find that none creates such a conflict.
>
> Therefore, I find that there is no express contradiction or actual conflict in operation between the *Act* and the provisions of Parts VI and XV of the *Criminal Code*, including sections 187 and 193(1), in the circumstances of this appeal. In my view, this is sufficient to resolve the issue, since paramountcy can only apply in a case of express contradiction or actual conflict in operation.

[31] In Order PO-2092-F, the Attorney General also made submissions regarding the overall schemes of the legislation and the policy issues raised by the relationship between the *Act* and the *Criminal Code*. Former Assistant Commissioner Mitchinson explained:

The Attorney General cites *Michaud v. Quebec (Attorney General)*, 109 C.C.C. (3d) 289, 138 D.L.R. (4th) 423 (S.C.C.) to support its position that "[t]he Supreme Court of Canada has expressed concern for the risk of disclosure of the focus of the police investigation, the general modus operandi of police electronic surveillance, as well as the enormity of the work involved in producing the records as reasons for limiting disclosure of electronic surveillance records." The Attorney General notes that in *Michaud*, the target of electronic surveillance was seeking access to the sealed packet created in connection with the original wiretap application, and the information that was recorded. This was done by way of a motion under the former section 187(1)(a)(ii) of the *Criminal Code*, in the hopes of finding evidence on which to sue for damages as the result of an unlawful wiretap search. The Court recognized only limited or exceptional circumstances in which the target would be entitled to disclosure.

In a related argument, the Attorney General also submits that:

> [i]nterpreting the *Criminal Code* as the appellant suggests would mean that the target of a criminal investigation could apply to the Information and Privacy Commissioner for access to video surveillance records at any time. This could have profound effects on the conduct of criminal investigations, matters well beyond the expertise of the Information and Privacy Commissioner.
>
> The *Criminal Code* provides for a comprehensive treatment of the obtaining and releasing of video surveillance records. Consequently, the Information and Privacy Commissioner's authority under [the *Act*] does not extend to ordering the release of this information because to do otherwise would constitute a direct operational conflict.

[32] Former Assistant Commissioner Mitchinson did not agree with the Attorney General's position, writing that:

> In my view, a request for disclosure pursuant to the *Criminal Code* is not comparable to a request for access under the *Act*, which is a completely separate scheme with its own safeguards to protect law enforcement functions as well as personal privacy. I do not find *Michaud* persuasive in the context of the *Act*.
>
> The Attorney General's submissions overlook the fact that the *Act* contains exemptions to protect the very interests that are at the heart of the privacy scheme in Part VI of the *Criminal Code*. For example, there is a strong parallel between the grounds for exemption provided under the section 14 law enforcement exemption in the *Act* and the reasons for

withholding information requested by a surveillance target under section 187 of the Criminal Code.

As noted previously, a finding by me that paramountcy does not apply would not trigger an order for disclosure of the records to the appellant. Instead, any such order would require the Ministry to make an access decision under the *Act*. In making such an access decision, if the Ministry considers that disclosure could reasonably be expected to interfere with an ongoing law enforcement matter or investigation, it could claim the exemptions at sections 14(1)(a) or (b) of the *Act*. In addition, the remaining paragraphs within section 14(1) cover a wide variety of possible harms in the context of law enforcement. These could be claimed where disclosure could reasonably be expected to:

- reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
- disclose the identity of a confidential source of information in respect of a law enforcement matter;
- endanger the life or physical safety of a law enforcement officer or any other person;
- deprive a person of the right to a fair trial or impartial adjudication;
- interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons; or
- facilitate the commission of an unlawful act or hamper the control of crime.

In addition, if disclosure would be an unjustified invasion of personal privacy, the Ministry could claim either the mandatory exemption at section 21(1) of the *Act* or, if the record contains the requester's personal information, the discretionary exemption at section 49(b).

It is also noteworthy that, although the Ministry ultimately decided not to rely on sections 14(3) and 21(5) of the *Act* in this appeal, these sections would permit an institution to refuse to confirm or deny the existence of records that are subject to the law enforcement or personal privacy exemptions in response to other requests under the *Act*.

A review of these exemptions makes it clear that, in developing the access and privacy scheme in the *Act*, the legislature sought to protect the important interests of law enforcement bodies and the kinds of records

> they would be expected to have, including evidence seized or obtained during a criminal investigation. The Ontario Provincial Police has been subject to the *Act* since it first came into force, and all municipal police forces in Ontario are covered under the province's parallel municipal access legislation, the *Municipal Freedom of Information and Protection of Privacy Act*.

[33] As a result, Former Assistant Commissioner Mitchinson did not accept the Attorney General's argument in that appeal that the overall schemes of the *Act* and the *Criminal Code* conflict. He wrote:

> I have already found that there is no express contradiction between section 193 of the *Criminal Code* and the *Act*, nor is there an "actual conflict in operation" in the circumstances of this appeal, and that the application of the paramountcy doctrine is not established. I have also concluded that the overall schemes of these two statutes do not conflict. For these reasons, I find that the *Act* applies to the Category 4 records and I will order the Ministry to make an access decision.

[34] He also wrote:

> In closing, I would like to touch briefly on the two previous orders that applied the paramountcy doctrine. As I have already indicated, Order P-344 was decided before the amendments to section 193(2)(a), referred to above, were enacted by Parliament. In addition, as the appellant points out, Order P-344 is distinguishable because it dealt with a request for Ministry copies of records in the "sealed packet" referred to in section 187, rather than the results of surveillance which are dealt with in section 193. While the Court's copy of the sealed packet would be within the Court's custody and control and therefore not subject to the *Act* (see Order P-994), a request for copies of documents in the sealed packet in the custody or control of an institution under the *Act* could raise different issues than those addressed in this order. As far as Order P-625 is concerned, it did not analyze the effects of the changes to section 193(2)(a) of the *Criminal Code* that led me to the conclusion I have reached in this order.

[35] In the appeal before me, the ministry seeks to revisit the findings made by former Assistant Commissioner Mitchinson in Order PO-2092-F and the impact of that decision on the appellant's request for access to wiretap records.

The ministry's representations

[36] The ministry submits that there are two categories of records that may fall under the general category of "wiretap records" referred to in the Notice of Inquiry in the

appeal before me: (i) materials submitted to a judge in support of an application to intercept private communications (the "sealed packet"); and (ii) the intercept content itself[2]. It submits that based on the application of the paramountcy doctrine, the treatment of both types of records is governed by the *Criminal Code* and the *Act* does not apply.

[37] The ministry submits that:

> Courts applying the paramountcy doctrine will conduct two inquiries to determine if there is a conflict between valid but overlapping federal and provincial enactments. First, they will determine whether it is impossible to comply simultaneously with both laws[3] ….
>
> In addition to impossibility of dual compliance or express contradiction, the second inquiry under the paramountcy doctrine examines whether the operation of the provincial law will frustrate the purpose of the federal law. The second branch of the paramountcy test emerged with the Supreme Court's decision in *Bank of Montreal v. Hall* [4]. The Court in *Hall* held that an actual conflict in operation will also exist where Parliament's "legislative intent" stands to be "displaced" by the provincial legislation. Put another way, " ... dual compliance will be impossible when application of the provincial statute can fairly be said to frustrate Parliament's legislative purpose."[5]

[38] The ministry submits that the scheme set out in Part VI of the *Criminal Code* informs the interpretation of section 193, and demonstrates that, properly interpreted, section 193(2)(a) of the *Criminal Code* does not permit the circumventing of the comprehensive scheme set out in Part VI of the *Criminal Code*, and the jurisprudence stemming from *Michaud*, through an application to a provincial body that decides the issue of disclosure, without more.

[39] The ministry submits that it would frustrate Parliament's legislative intent with respect to Part VI of the *Criminal Code* to permit provincial privacy commissions to

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[2] The ministry explains that it uses the term "intercept content" to refer to private communications intercepted lawfully under Part VI of the *Criminal Code* without consent (to interception, use or disclosure), including transcripts, summaries and references in relation thereto.

[3] In support of this submission the ministry refers to *Multiple Access Ltd. v. Mc Cutcheon*, (1982) 2 SCR 161 at 191; *Bank of Montreal v. Hall*, [1990] 1 SCR 121 (*Hall*) at paragraph 53 and *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp*, [1999] 2 SCR 961 at paragraph 40.

[4] *Hall*, supra.

[5] In support of this submission and to track the development of the law in this regard, the ministry refers to *Hall*, supra at paragraphs 59 and 61; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 SCR 241; *Law Society of British Columbia v. Mangat*, [2001] 3 SCR 113*; Canadian Western Bank v. Alberta*, [2007] 2 SCR 3 at paragraph 73 and *Bank of Montreal v. Marcotte*, 2014 SCC 55 at paragraph 71.

make disclosure decisions concerning the interception of private communications and that in Order PO-2092-F, former Assistant Commissioner Mitchinson erroneously rejected the proposition that Part VI of the *Criminal Code* prevented him from ordering the release of intercept content.

[40] It submits:

> The [former] Assistant Commissioner's conclusion that there is no express contradiction or actual conflict in operation between *FIPPA* and Part VI of the *Criminal Code* was premised on his interpretation of the exceptions in sections 193(2)(a) and (3) of the *Criminal Code*. The [former] Assistant Commissioner reasoned that because section 52(8) of *FIPPA* provides that the Commissioner may summon and examine individuals under oath, an inquiry under *FIPPA* therefore qualifies as "any other proceeding" in which a person "'may be required to give evidence on oath". Thus, in the [former] Assistant Commissioner's view, section 193(2)(a) exempts from section 193(1) any person who discloses the existence or the content of intercept content in the course of giving evidence in an inquiry under *FIPPA*. Accordingly, the [former] Assistant Commissioner concluded that there was "no source of express contradiction or actual conflict in operation" between *FIPPA* and the Code.

[41] The ministry submits that this decision should be reconsidered, and ought not to be followed, because the Supreme Court of Canada's recent decision in *Imperial Oil v. Jacques* (*Jacques*)[6] dealing with the interpretation of section 193(2)(a) of the *Criminal Code*, supports the ministry's position that the IPC is not an "other proceeding'" for the purpose of section 193(2)(a) of the *Criminal Code* as it is not engaged in a truth-finding adjudicative function.

[42] In addition, the ministry submits that the text of section 193(2)(a) itself informs the type of bodies that Parliament contemplated as "other proceeding". It submits that:

> The reference to "other proceedings" must be interpreted *ejusdem generis* to be the same type of proceedings as civil and criminal proceedings (e.g., a disciplinary hearing). The type of bodies contemplated by Parliament as "other proceedings" in section 193(2)(a) are adjudicative bodies called upon to make determinations involving the relevance of the evidence to a material issue, as in criminal and civil proceedings, and disciplinary hearings. The Quebec Superior Court has also held that the exemption in section 193(2)(a) of the *Criminal Code* may apply to commissions of public inquiry: *Canada (Attorney General) v.*

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[6] *Imperial Oil v. Jacques,* [2014] 3 SCR 287, 2014 SCC 66 (*Jacques*).

> *Charbonneau*[7]. Disclosure in this context is to provide the court or disciplinary hearing or public inquiry with information that assists it to seek and to ascertain the truth.[8]

[43] The ministry submits that the decision in *Jacques* is consistent with the jurisprudence that limits the exemption in section 193(2)(a) to proceedings before an adjudicative body with the purpose of enabling it to seek and to ascertain the truth. It submits that these have been held to include criminal and civil proceedings, disciplinary hearings and commissions of public inquiry. The ministry submits that the IPC is not such a body, and the exception in section 193(2)(a) of the *Criminal Code* has never been used, and nor is it intended to be used, in a proceeding the sole purpose of which is to determine the issue of public disclosure. It reiterates that the IPC is not an "other proceeding" within the meaning of section 193(2)(a) because the IPC is not engaged in the type of "truth finding" adjudicative functions contemplated by Parliament for bodies under this provision, which must make determinations involving the legality of an interception, the relevance of the material to an issue in dispute, and weigh probative value against prejudicial impact.

[44] It submits that the purpose of an IPC proceeding is different:

> In this respect, the IPC's purpose is to determine the issue of public disclosure. The IPC does not concern itself with whether evidence is "relevant" to the making of a particular separate adjudicative decision, or in the context of any truth-seeking endeavour. The proceedings are concerned with the issue of disclosure in and of itself within the context of a particular *FIPPA* request, without more. In contrast, civil proceedings, disciplinary hearings and public commissions of inquiry (to which the exemption in section 193(2)(a) has been held to apply) are proceedings in which the relevance and importance of the evidence must be weighed against a distinct and separate issue in the context of these proceedings' search for truth. Proceedings before the IPC are not of that nature.[9]

[45] The ministry submits that outside a criminal proceeding, the *Criminal Code* does not expressly provide a non-accused person with a procedure for disclosure of the recordings of the intercepted communications. The ministry submits:

> … In *Michaud*, the Court held that a non-accused could only seek access to the intercept content upon a new motion to the court in a subsequent proceeding, following the grant of an order opening the sealed packet and

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[7] *Canada (Procureur général) c. Charbonneau*, 2012 QCCS 1701 (*Charbonneau*).
[8] The ministry refers to *Jacques*, supra at paragraph 71 and *Charbonneau*, supra at paragraph 7 in support of this submission.
[9] In support of this submission, the ministry refers to *Jacques*, supra at paragraphs 46, 52, 71 and 83 and *Charbonneau*, supra at paragraphs 44 and 45.

> a demonstration that the wiretap search was illegal in its authorization or execution. The Court was concerned with protecting the state's interest in limiting the disclosure of the intercept content, which would risk disclosing the focus of the police investigation in a particular case as well as general methods of police electronic surveillance. Persons could learn of the extent of a police surveillance operation and patterns of enforcement by making frequent requests for disclosure. Criminal organizations could then adjust or change their operations to avoid detection. Accordingly, to guard against this, the Court found that non-accused persons only have a "limited" interest in disclosure because "the target will generally not need access to the tapes to challenge the legality of the surveillance and to establish the liability of the Crown"[10].

[46] The ministry submits that this inquiry is still driven by the presumptively confidential nature of Part VI of the *Criminal Code*, and the careful balancing of privacy and law enforcement interest is conducted by a judge in a manner consistent with the object and purpose of Part VI of the *Criminal Code*:

> … Together, the provisions in Part VI of the *Criminal Code* and the jurisprudence stemming from *Michaud* provide a comprehensive set of procedures for accessing the sealed packet and intercept content by both accused and non-accused persons. To the extent that the disclosure of such material is sought in the context of civil proceedings. the Supreme Court's recent decision in *Imperial Oil v. Jacques* ("*Jacques*") confirms that it will be disclosed only in the most necessary circumstances to assist with the truth-seeking function of those proceedings, and that any such disclosure must be informed by the object and purpose of Part VI of the *Criminal Code*.

[47] The ministry submits:

> The limited and restrictive federal disclosure scheme under the *Criminal Code* and the jurisprudence regarding disclosure within Part VI of the *Criminal Code* stands in marked contrast to the broad approach to access in provincial freedom of information legislation. Subject to limited and specific exemptions, *FIPPA* provides a right of access to any record of information in the custody or under the control of a government institution (sections 1, 10(1)). Where an access request has been made under *FIPPA*, the head of the government institution to which the request is made, must, within 30 days after the request is received, give written

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[10] In support of this submission, the ministry refers to *Michaud v. Quebec (Attorney General)*, [1996] 3 SCR 3 (*Michaud*) at paragraphs 52 and 62 to 68.

> notice to the requester as to whether or not access to the record or part thereof will be given (section 26).

[48] The ministry refers to the purpose of the *Act* set out in section 1 in support of its position that there is a "presumption that accessibility is the rule under the provincial legislation" and that judicial decisions have emphasized disclosure and access.

[49] Section 1 of the *Act* reads:

> The purposes of this Act are,
>
> > (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
> >
> > > (i) information should be available to the public,
> > >
> > > (ii) necessary exemptions from the right of access should be limited and specific, and
> > >
> > > (iii) decisions on the disclosure of government information should be reviewed independently of government; and
> >
> > (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[50] The ministry submits that in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, Lang J. (as she then was) reviewed section 1 of the *Act* holding that "[t]he presumption is then in favour of disclosure to promote the goals of government transparency and accountability and to permit public debate".[11]

[51] The ministry submits that in nearly identical language to *FIPPA*, the federal *Access to Information Act*[12] also specifies that exceptions to access must be "limited and specific" and that the Federal Court of Appeal has found under similar legislation that, "[t]he general rule [under the Federal Act] is disclosure, the exception is exemption".[13] It also refers to *Rubin v. Canada (Minister of Transport)* where the Federal Court of Appeal held that:

> ... all exemptions to access must be limited and specific. This means that where there are two interpretations open to the Court, it must, given Parliament's stated intention, choose the one that infringes on the public's right to access the least. It is only in this way that the purpose of the Act

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[11] *Ontario (Attorney General) v. Pascoe*, 2001 CanLII 32755 (ON SCDC) at paragraphs 11 and 12.
[12] *Access to Information Act*, R.S.C. 1985, c.A-1.
[13] *Rubin v. President of Canada Mortgage & Housing Corp.*, [1989] 1 FC 265 (FCA) at page 276.

> can be achieved. It follows that an interpretation of an exemption that allows the government to withhold information from public scrutiny weakens the stated purpose of the Act.[14]

[52] The ministry submits that based on this approach, there is an actual conflict in purposes between Part VI of the *Criminal Code* and *FIPPA*, explaining that:

> … The manifest legislative purpose behind Part VI of the *Criminal Code* is to have a scheme of tightly controlled access to electronic and video surveillance records presided over by a court of competent jurisdiction. Confidentiality is the rule in such proceedings under the *Criminal Code* and accessibility is the exception. In contrast, the rule under *FIPPA* and several similar access to information statutes in Canada is the opposite: accessibility is the rule and confidentiality is the exception.

[53] The ministry further submits that there is an express contradiction in the operation of the *Criminal Code* and *FIPPA* with specific regard to seeking access to (i) the "Information to Obtain" (the sealed packet); and (ii) intercept content.

[54] The ministry submits that in *Michaud,* the Supreme Court of Canada held that under section 187 both an accused and a non-accused target could apply for access to the sealed packet. The disclosure regime is mandatory for an accused person, consistent with an accused's right to make full answer and defence, but the Court found that Parliament "specifically chose to preserve a discretionary regime of disclosure" for applications by non-accused targets.[15]

[55] The ministry submits that the high threshold set by the Supreme Court of Canada for a judge to exercise his or her discretion to grant access to the sealed packet for a non-accused target on the presentation of "some evidence that law enforcement officials engaged in fraud or wilful non-disclosure in obtaining the authorization" is commensurate with the strong presumption of confidentiality that informs Part VI of the *Criminal Code*.[16]

[56] The ministry submits:

> The comprehensive scheme set out in the *Criminal Code* and by the Court in *Michaud* precludes the IPC from considering the issue of disclosure of the sealed packet. Since the IPC is neither a provincial court judge, a judge of a superior court of criminal jurisdiction, nor a judge as defined under section 552 of the *Criminal Code*, the IPC has no authority to unseal the packet or disclose its contents, which is what the requester seeks in

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[14] *Rubin v. Canada (Minister of Transport)*, [1998] 2 FC 430 (FCA) at paragraph 23.
[15] In support of this submission, the ministry refers to *Michaud*, supra at paragraph 25.
[16] In support of this submission, the ministry refers to *Michaud*, supra at paragraphs 3 and 25.

> this appeal. Further, the test for disclosure under *FIPPA* does not require evidence of fraud or wilful non-disclosure, nor is it premised on the dominant consideration of preserving confidentiality.
>
> The Court in *Michaud* did not address section 193 of the *Criminal Code*, which, as described above, makes it an offence to disclose intercept content or the existence thereof without the express consent of the originator or recipient of the intercepted communication. It is submitted that even on a prima facie demonstration of unlawfulness, disclosure of the sealed packet (which would in turn disclose the existence of intercepts obtained further to the related authorization) could only be made if permitted by section 193.

[57] The ministry submits that the statements by Justice Moldaver in the majority and Justice Karatsanis in dissent in *Wakeling v. United States of America*[17] (*Wakeling*) that refer to seeking disclosure regarding intercept content through access to information legislation[18], cannot be held to stand for the proposition that access to information legislation is a means by which intercept content can be disclosed. The ministry explains:

> It is submitted that the Court's references to seeking access to intercept content through access to information legislation are *per incuriam* and cannot be held to stand for the proposition that access to information legislation is a means by which intercept content can be disclosed. Since this issue was not before the Court, there is no consideration of whether or not the doctrine of federal paramountcy would make provincial access to information legislation inoperative to requests for intercept content. Finally, the Court makes no mention of the provisions in the federal *Access to Information Act*, R.S.C. 1985, c. A-1, which specifically prohibit disclosure by a head of a government of "information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II which includes sections 187 and 193 of the Criminal Code".
>
> However, *Wakeling* raises additional issues that must be considered in the context of *FIPPA* requests for intercept content. A request for intercept content could give rise to a *Charter*[19] section 8[20] challenge to *FIPPA* where there may be disclosure of the private communications of a person who

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[17] *Wakeling v. United States of America*, 2014 SCC 72.
[18] *Wakeling*, supra at paragraph 70 per Moldaver J, *Wakeling*, supra at paragraph 139 per Karakatsanis J (dissent).
[19] *Canadian Charter of Rights and Freedoms*, Enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.) (*Charter*).
[20] Section 8 of the *Charter* reads: Everyone has the right to be secure against unreasonable search or seizure.

> has not consented to such disclosure, in light of the Court's finding in *Wakeling* that there is a *Charter* protected residual privacy interest in the intercept content, on the part of persons whose private communications have been intercepted.[21]

[58] The ministry adds:

> The comprehensive scheme set out in Part VI of the *Criminal Code* informs the interpretation of any request for the disclosure of the sealed packet or intercept content, and demonstrates that it would frustrate Parliament's intent to permit provincial privacy commissions to make disclosure determinations under provincial freedom of information legislation. Further, to interpret section 193(2)(a) of the *Criminal Code* to include the IPC would be contrary to Parliament's purpose to limiting disclosure of such materials only in the most necessary of circumstances, and the Supreme Court's restriction of disclosure of such materials outside the criminal context only in circumstances where such disclosure is subject to strict conditions and aids an adjudicative body with the purpose of enabling it to seek and to ascertain the truth.

[59] The ministry submits that another example of how permitting *FIPPA* applications would frustrate the federal scheme arises under section 196 of the *Criminal Code* is that this provision requires the Attorney General to give notice to the target of an electronic surveillance that they were such a target. It explains that the notice is to be given 90 days after the period for the authorization was given or renewed and that the section expressly permits requests for an extension of time or a renewal of the authorization. This could occur, it states, in cases in which the target is subject to an on-going investigation.

[60] The ministry submits:

> Here, too, Parliament has not seen fit to provide a mechanism whereby a third-party or interested person can receive notice from the Crown or the Court that someone else was a target of surveillance. A person that receives notice under section 196 may be able to disclose that fact to a third party, provided they give express consent within the meaning of section 193(1).
>
> While it does not explicitly say so, it is clear from the legislative scheme in Part VI that section 196 takes precedence over section 193(2)(a). For example, were a wiretap target to launch a civil law suit and seek discovery of any wiretap application material or the transcripts thereof, a

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[21] In support of this submission, the ministry refers to *Wakeling*, supra at paragraphs 40, 67 and 90.

> Superior Court of Justice would not order disclosure if the 90-day period (or an extension thereof) were still running under section 196.
>
> Law enforcement officials may decide to seek an extension of the 90-day period for disclosure of a wiretap authorization or a wiretap under section 184.4. Notification can be delayed for up to three years. A person who suspects he or she is the target of such a wiretap (or, indeed, a third party that suspects someone else is such a target) could apply under *FIPPA* to the ministry, or a police force, and ask them to disclose the transcript or recording even though the disclosure period has been extended.
>
> If this were within the 90 days set out in section 196, or during an extension period, the ministry or police force would be precluded from disclosing its existence by operation of federal law. However, a response to a request under *FIPPA* could provide valuable information to a criminal or criminal organization. As Chief Justice Lamer stated in *Michaud* (at para. 52), this could permit "criminal organizations to adjust their activities accordingly". In such a situation, the ministry is put in an impossible position; it can neither reveal the existence, or non-existence of the wiretap transcript or recording. Similarly, in a situation in which there never was an electronic surveillance, a response to a *FIPPA* request for wiretap information could also disclose valuable information to a criminal or criminal organization.

[61] The ministry also submits that an examination of other federal statutes further supports its position that Parliament's purpose in enacting Part VI of the *Criminal Code* would be frustrated if provincial freedom of information statutes were used to provide access to wiretap recordings or material:

> In this regard, Parliament's intention vis-a-vis the interpretation of section 193 of the *Criminal Code* and its interaction with access to information legislation is made clear in section 24 of the federal *Access to Information Act*, R.S.C. 1985, c.A-1 which provides:
>
> > 24. (1) The head of a government institution shall refuse to disclose any record requested under this Act that contains information the disclosure of which is restricted by or to any provision set out in Schedule II.
>
> Among the provisions set out in Schedule II are sections 187 and 193 of the *Criminal Code*.

[62] The ministry submits that as Parliament has effectively precluded the disclosure of surveillance records under the federal *Access to Information Act*, it would defy logic

to interpret sections 193(2)(a) and 193(3) as allowing provincial access to information legislation to regulate access to these records. Furthermore, to the extent that there is any doubt about parliamentary intent respecting the all-inclusive nature of Part VI of the Criminal Code, in particular the sealing and secrecy provisions, it submits that section 24 of the *Access to Information Act* resolves that issue and Part VI of the *Criminal Code* cannot be overtaken by access to information legislation.

[63] Finally, the ministry submits:

> This case involves alleged wiretapped conversations purportedly carried out by the OPP. Had this case arisen in British Columbia or Manitoba, the police force that could have carried out the wiretap would have been the Royal Canadian Mounted Police. A request for information allegedly held by that body would be made under the federal *Access to Information Act*, and, it is submitted, would be denied under section 24. The result should not be different in Ontario merely because this province has its own provincial police force. The object and purpose of Part VI of the *Criminal Code* is the same across Canada.

The appellant's representations

[64] The appellant submits that Order PO-2092-F demonstrates that the doctrine of paramountcy is no longer viewed as a defensible argument for challenging the IPC's authority.

[65] The appellant submits that the Supreme Court of Canada's decision in *Chatterjee v. Ontario (Attorney General)* (*Chatterjee*)[22] stands for the proposition that a provincial statute is not invalidated on the basis of any incidental intrusions into the field of criminal law.

[66] The appellant further submits that in *Chatterjee*, the Supreme Court of Canada was able to identify numerous examples where provincial legislative jurisdiction overlapped with federal criminal law and procedure. She submits that in many of these cases the provincial legislation and not the federal law prevailed, leading the Court to write:

> … Resort to a federalist concept of proliferating jurisdictional enclaves (or "interjurisdictional immunities") was recently discouraged by this Court's decisions in *Canadian Western Bank* (2007)[23] and *Lafarge Canada Inc.* (2007)[24] and should not now be given a new lease on life. A court should

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[22] 2009 SCC 19.
[23] *Canadian Western Bank v. Alberta*, [2007] 2 SCR 3.
[24] *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23

> favour, where possible, the ordinary operation of statutes enacted by both levels of government.[25]

[67] The appellant further submits that in *Jacques*, the Supreme Court of Canada identified several cases where the exception provided for in section 193(2)(a) was applied to contexts other than that of giving evidence at a trial, including for the purpose of disciplinary hearings and child protection cases.[26] She submits that the Supreme Court in *Jacques* identified that section 193(1) neither created a workable disclosure mechanism nor presumed a right of access. As such, the appellant submits that the Court reasoned that the procedure for seeking access to the wiretap recordings must therefore derive from another source.[27]

[68] With respect to the ministry's position that the proceeding before the IPC is not an "other proceeding" within the meaning of section 193(2)(a), the appellant refers to *Charbonneau*[28] where she says the Quebec Superior Court rejected the RCMP's submission that the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry was not an "other proceeding" for the purposes of section 193(2)(a), finding that it applies to any other proceedings in which a person may be required to give evidence under oath and a commission of inquiry constitutes another proceeding for the purposes of the exception.[29]

[69] The appellant also refers to Order PO-2490, where Senior Adjudicator David Goodis[30] discussed the relationship between access under the *Act* and the discovery process under the Ontario Rules of Civil Procedure, finding that they operate in tandem.

[70] The appellant further submits that:

> The ministry, in its representations, overlooks the fact that in *Michaud*, the Court found legislative support for compelling disclosure of wiretap records "elsewhere", specifically under section 8 of the [*Charter*] once civil proceedings had been commenced.

[71] With respect to the ministry's concern that Part VI of the *Criminal Code* would be frustrated if provincial freedom of information statutes were used to provide access to wiretap recordings or material, the appellant submits:

> In my view, the closest the ministry comes to explaining the putative source of conflict between the *Act* and the federal statute is in paragraph

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[25] In support of this submission, the appellant refers to *Chatterjee*, supra at paragraph 2, which she paraphrases as above.
[26] In support of this submission, the appellant refers to *Jacques*, supra at paragraph 71.
[27] In support of this submission, the appellant refers to *Jacques*, supra at paragraphs 9 and 71.
[28] 2012 QCCS 1701.
[29] In support of this submission, the appellant refers to *Charbonneau* at paragraphs 34 and 36.
[30] Now Assistant Commissioner.

> 69 [of its representations] where it imagines a hypothetical situation where a person suspecting he or she is the target of a wiretap applies to the ministry (or police force) under *FIPPA* for access to the transcript or recording "even though the disclosure period has been extended." The example, in my opinion, does not adequately demonstrate how the *Act* frustrates the federal scheme. The ministry does not provide an actual example of this conflict occurring from case law.

[72] The appellant further submits that, any real or imagined conflict between section 196 of *the Criminal Code* and the *Act*, does not apply to the present circumstances as the ministry has not claimed the section 14(3) exemption.

[73] Sections 14(1) to (3) of the *Act* read:

> 14(1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> (f) deprive a person of the right to a fair trial or impartial adjudication;
>
> (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
>
> (h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;
>
> (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; or
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.
>
> (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;
>
> (b) that is a law enforcement record where the disclosure would constitute an offence under an Act of Parliament;
>
> (c) that is a law enforcement record where the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability; or
>
> (d) that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority.
>
> (3) A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) apply.

[74] Furthermore, the appellant submits that the ministry already confirmed the existence of wiretap records in the following portion of its decision letter:

> With respect to the portion of your request seeking access to Wiretap information, please be advised that the ministry is unable to respond to this portion of your request at this time. Should you wish to pursue access to this information the ministry will require additional time to issue a formal decision.

[75] With respect to the ministry stating that appellant has not been charged with any offense and has not "received notice of any intercept, as would be required by section 196 of the Criminal Code if 'my' private communications had been intercepted", the appellant states:

> The ministry is being coy. The ministry might have said the following while still being truthful:

> A. The person has not been charged with any offence because a person does not have to be charged with an offence under section 184.4 to become the target of intercept; or
>
> B. The person has not received notice of any intercept, as would be required by section 196 of the *Criminal Code* because the section 196 requirement does not apply to section 184.4 [if her private communications had been intercepted].

The ministry's reply representations

[76] The ministry submits in reply that *Chatterjee* is distinguishable and the passages cited by the appellant are not relevant to this appeal:

> The analysis and reasoning used to determine whether or not a provincial law is invalid or *ultra vires* the provincial legislature (i.e. the legislature is without constitutional jurisdiction to enact the impugned law) is different from the analysis and reasoning used to determine whether or not a provincial law is inoperative due to federal paramountcy. Federal paramountcy applies where validly enacted provincial legislation is inoperative because (i) there is an operational conflict with validly enacted federal legislation; or (ii) it frustrates the purpose of federal legislation.

[77] The ministry adds that it has not raised any issue regarding the validity of the *Act* and takes no issue with the suggestion that *FIPPA* requests can operate concurrently with the civil litigation process.

[78] With respect to the appellant's submissions regarding Order PO-2092-F, the ministry reiterates its position that Order PO-2092-F should not be followed because it predates the *Jacques* decision, which supports the ministry's position that the IPC is not an "other proceeding" for the purpose of section 193(2)(a) of the *Criminal Code*. In addition, the ministry submits that former Assistant Commissioner Mitchinson did not consider the second branch of the paramountcy doctrine, which examines whether or not provincial legislation frustrates the purpose of federal legislation.

[79] With respect to section 196 of the *Criminal Code*, the ministry states that its position is that to permit access under *FIPPA* to the sealed packet or intercept content of wiretap records while the 90-day period is still running or where an extension to the notification period has been obtained by law enforcement officials would frustrate the federal purpose of the *Criminal Code* notification procedure. This is because, it asserts, it would provide notification to the person in the absence of authorization to do so under the *Criminal Code*.

The appellant's sur-reply representations

[80] In her sur-reply representations, amongst other things, the appellant sets out

her belief that her private communications were unlawfully intercepted in violation of her section 8 *Charter* rights.

Analysis and Findings

[81] Former Assistant Commissioner Mitchinson's findings in PO-2029-F address many of the ministry's arguments in this case and refer to expressly to *Michaud*, and refers to some of the jurisprudence cited by the ministry in its representations. The trend in the jurisprudence as reflected in *Charbonneau* is to recognize that provincial and federal legislation can effectively operate concurrently.

[82] I am not persuaded that the ruling in *Jacques* changes the landscape to the degree suggested by the ministry. This is because as recognized by the Court at paragraph 43 of that decision, sections 193(2) and 193(3) of the *Criminal Code*, do not create a disclosure mechanism or a procedure for seeking access, which has to derive from another source. The court explained that:

> By excluding certain well-defined situations from the scope of the prohibition provided for in s. 193(1), these exemptions give a person the right to disclose recordings that otherwise could not be disclosed. But even though s. 193(2) and s. 193(3) allow for such a disclosure, they do not create an actual disclosure mechanism, let alone a right of access. The procedure for seeking access to the recordings must therefore derive from another source. Since this case involves civil proceedings brought under s. 36 of the *Competition Act* and art. 1457 C.C.Q., that procedure is the one provided for in art. 402 C.C.P.

[83] In addition, in my view, contrary to the position asserted by the ministry, in *Wakeling* the Supreme Court of Canada actually recognized the role of access to information legislation when it discussed how access to information statutes, specifically the Ontario legislation, can operate in tandem with the *Criminal Code*.

[84] At paragraph 70 of the majority decision, Justice Moldaver wrote:

> As noted, the existing notice requirements contained in Part VI of the *Criminal Code* ensure that all individuals who have been wiretapped are provided with notice of this fact. Once notified, individuals may wish to know whether their intercepted communications have been disclosed to a foreign authority. An individual may make a request pursuant to the applicable access to information statute in an effort to obtain this information. Justice Karakatsanis correctly notes that such efforts may not always be successful, depending on the details of the applicable access to information regime and the individual's circumstances. I express no view on whether a guaranteed right of access to this information would be advisable - only that it is not constitutionally required.

[85] In dissent, Justice Karakatsanis did not take issue with the statement that resort to access to information legislation was available, only that she felt it was not enough to achieve accountability, explaining at paragraph 139 of the decision that:

> Justice Moldaver's suggestion that individuals subject to disclosure of wiretapped information might find out through an access to information request is far from adequate in achieving accountability, particularly since the various privacy laws governing law enforcement across Canada generally include an exception for records relating to law enforcement matters: see, for example, *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, s. 8(1)[31]. Without any requirement that law enforcement agencies maintain records, even a successful applicant may find there is little or no record to obtain.

[86] I do not agree that these comments are *per incuriam*, as suggested by the ministry. In my view, these comments represent a clear recognition that there is no issue of paramountcy and both the processes can operate together. In my view, it is also a recognition that, as found by former Assistant Commissioner Mitchinson in Order PO-2092-F, proceedings under *FIPPA* qualify as "other proceedings" under section 193(2)(a) of the *Criminal Code*.

[87] In my view, these comments apply equally to the appellant's request for access to all records in the custody and control of the ministry that are responsive to the appellant's request. In this regard, I am dealing with the application of *FIPPA*, not the federal *Access to Information Act*, which has different statutory provisions. In addition, as noted by former Assistant Commissioner Mitchinson in Order PO-2092-F, the appellant does not have a right of access to the Court's copy of any sealed packet, which would be within the Court's custody and control and therefore not subject to the *Act*. However, other responsive records within the custody and control of the ministry would be subject to the *Act*.[32] I also note that in *Michaud*, which focussed on the sealed packet, there was an acknowledgement by the Supreme Court of Canada that the decision did not address all possible scenarios.

[88] At paragraph 118 of the decision of the dissent in *Michaud*, the following comments are found:

> We would also like to note that this appeal does not raise the issue of the rights of individuals involved in conversations with the target or of third parties who are neither accused persons nor targets whose

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[31] This is the municipal equivalent of section 14(1) of *FIPPA*.

[32] See in this regard Orders M-927, MO-2131, MO-2556, MO-2953-R, MO-3070 and MO-3238 as well as the decisions of the Ontario Divisional Court in *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457 and *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 952.

> communications have been intercepted but who have not been notified under s. 196 of the *Criminal Code*. Nothing we have said should be interpreted as addressing this issue.

[89] The majority agreed. Writing at paragraph 56 of the decision that:

> This appeal is only concerned with the right of a surveillance target who seeks access to the sealed packet under s. 187(1)(a)(ii) following the termination of the surveillance and in the absence of any pending criminal proceeding. As my colleagues point out, at para. 118, this appeal does not address the right of a non-targeted interested third party who seeks to examine the contents of the packet.

[90] Finally, as set out in PO-2092-F there are sufficient safeguards within *FIPPA* to ensure that the purposes and interests of the *Act* and the *Criminal Code* are balanced. For example, sections 14(3)[33] and 21(5)[34] of the *Act* would permit an institution to refuse to confirm or deny the existence of records that are subject to the law enforcement or personal privacy exemptions in response to other requests under the *Act*. In other words, a request for access does not mean automatic disclosure. I find no basis for a determination that there is an express contradiction or actual conflict in operation between the two statutes or that *FIPPA* frustrates the purpose of the federal legislation.

[91] I will therefore order the ministry to make an access decision concerning the matter in accordance with sections 26, 28 and 29 of the *Act*, and to send a copy of the decision to the appellant by **July 10, 2018**. As I have ordered the ministry to make an access decision, it is not necessary to consider the appellant's *Charter* arguments.

[92] I will now address the balance of the issues in the appeal.

Issue B: What is the scope of the request? What information is responsive to the request?

[93] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;

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[33] Set out in the body of this decision above.

[34] Section 21(5) provides that a head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[94] 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.[35]

[95] To be considered responsive to the request, records must "reasonably relate" to the request.[36]

The ministry's representations

[96] The ministry submits that based on its reading of the Notice of Inquiry, the appellant believes that the ministry did not produce all responsive records relating to the occurrence reports and officers' notes because there are "gaps in the page numbers of the notes that were disclosed to her".

[97] The ministry states that it disclosed all the responsive records to the appellant and explains that there is a reasonable explanation for there to be "gaps" in the page numbering of officers' notes:

> Officers' notes are recorded in time sequential order. During the course of a shift, an officer may be involved in a number of different incidents. Only those page numbers containing information related to the incident involving the appellant are responsive. Unrelated incidents referenced in the notes are not responsive, and have therefore been withheld.

[98] In addition, the ministry states that it viewed the following information as non-responsive to the request:

a. Administrative information, such as printing date information (i.e., information about when the records were printed);

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[35] Orders P-134 and P-880.
[36] Orders P-880 and PO-2661.

b. Parts of the Officers' notes containing standard information entered at the beginning and end of the shift, such as the description of weather conditions; and,

c. Parts of pages of Officers' notes describing unrelated incidents.

[99] It submits that in Order PO-3421, Adjudicator Daphne Loukidelis noted that past orders have upheld these types of information as being non-responsive. The ministry submits that this reasoning should be applied to the same or similar records the IPC has deemed non-responsive for the purpose of this appeal.

The appellant's representations

[100] The appellant submits that the ministry should not be relied upon to properly determine the responsiveness of the information in the records, "due to the numerous discrepancies in police reporting and selective disclosure of witness statements". These discrepancies include the recording of her age, that her husband (not herself) answered a call from the police on a specified date, that police statements describing the call are missing from page 1 of the records and that notes for a CAD operator pertaining to the call are also missing. In addition, she states that on page 3 of the records another CAD operator's notes are missing.

[101] She submits that discrepancies in her reported age suggest that an identified officer "supplanted her notes with the notes of [the first CAD operator]".

[102] In her representations, the appellant advised that she was no longer seeking access to the police ten codes or patrol zone codes, however she appears to seek access to some withheld administrative information. She submits that:

> Past IPC orders have established that administrative information relating to the date, time and by whom the report was printed is not reasonably responsive to a request [Orders PO-2315 and PO-2409]. To be considered responsive to the request, records must "reasonably relate" to the request [Order P-88].
>
> I submit that the inconsistent reporting of witness statements and the unexplained discrepancies in my reported age and my actual age merit an exception to this rule.

[103] She also expresses her concerns about what she perceives as "biased reporting" and that the:

> ….. unexplained discrepancies and inconsistencies in police reporting raise concerns around transparency and procedural fairness. Without transparency, one cannot properly decide whether my "complaint" was treated fairly during the police investigation. Without knowing how the

> investigation of facts was conducted, it is impossible to know whether the ministry's records are relevant or responsive.

[104] Finally, she submits that the content of page 17 is largely redacted and because she says the purpose of the meeting that day was to discuss certain allegations she made, she would have expected that a statement from her husband would have to have been set out in that record.

The ministry's reply submissions

[105] In reply, the ministry provides the following explanation with respect to the alleged age discrepancy:

> The appellant alleges that there is a discrepancy between the age of the appellant and her age as reported in the Occurrence Summary. The reason for this discrepancy is that the computer data base in which the Occurrence Summary is contained is updated automatically and would have been current, as of the date the Occurrence Summary was printed. Therefore, while the appellant may have been age [specified age] at the date of the incident which resulted in the creation of the Occurrence Summary, the computer data base reflects the fact that she had turned [specified age] by the time the Occurrence Summary was printed in response to the appellant's request.

[106] Regarding the appellant's concerns about the accuracy of what was recorded, the ministry submits:

> Section 47 [of the *Act*] allows the appellant to request a correction of personal information, but it does not require the ministry to make the correction. If the ministry does not make the correction, the appellant can "require that a statement of disagreement be attached to the information reflecting any correction that was requested but not made". This is the recourse available to the appellant if she is not satisfied with the personal information about her in the custody or control of the ministry.

Analysis and findings

[107] At Paragraphs 17 to 19 of Order PO-3421, Adjudicator Daphne Loukidelis wrote:

> Past orders of this office have upheld the severance of "administrative information," such as printing date information, as non-responsive because the information does not reasonably relate to the subject matter of the request or, alternately, the appellant's "interest."[37] In this appeal, I

[37] For example, Orders MO-2877-I, PO-3228 and PO-3273.

> accept the ministry's position that some of the information withheld as non-responsive fits within this category.
>
> I note that there are also parts of the officers' notes withheld as non-responsive that consist of details about weather and road conditions, which are entered as standard information at the beginning of a shift. I agree with the ministry that this type of information is also unrelated to the appellant's request.
>
> Finally, I accept the ministry's submissions respecting information in the officers' notes that relates to other investigations or police matters. Based on my review of these officers' notes, I am satisfied that these larger portions of the records have also been properly withheld because they do not relate to the incident involving the appellant.

[108] I agree with Adjudicator Loukidelis' analysis, and find that the printing date information is not responsive to the request. I have also carefully reviewed all the other portions of the records that the ministry claimed as non-responsive and agree that those portions are indeed not responsive to the request because they relate to other matters not involving the appellant.

[109] Section 47(2)(a) of the *Act* provides that a person who is given access under section 47(1) of the *Act* to personal information is entitled to a right of correction, in certain circumstances. Section 47(2)(a) reads as follows:

> Every individual who is given access under subsection (1) to personal information is entitled to,
>
> > request correction of the personal information if the individual believes there is an error or omission therein;

[110] For section 47(2)(a) to apply, the information must be personal information and must be "inexact, incomplete or ambiguous". This section will not apply if the information consists of an opinion.[38]

[111] Section 47(2)(a) gives the institution discretion to accept or reject a correction request.[39] Even if the information is "inexact, incomplete or ambiguous", this office may uphold the institution's exercise of discretion if it is reasonable in the circumstances.[40]

[112] As suggested by the ministry, the appellant was always at liberty to file a correction request to the ministry, for their consideration. I will not address the request

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[38] Orders P-186 and PO-2079.
[39] Order PO-2079.
[40] Order PO-2258.

in the abstract.

Issue C: Did the ministry conduct a reasonable search for responsive records within their custody and control?

[113] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.[41] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[114] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[42] To be responsive, a record must be "reasonably related" to the request.[43] 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.[44] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[45]

[115] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[46]

The ministry's representations

[116] In support of its position that a reasonable search was conducted, the ministry provided an affidavit from the Acting Detachment Commander of the Upper Ottawa Valley detachment of the OPP (Acting Detachment Commander). The ministry states that this is the detachment where responsive records reside, and where the search for records was conducted.

[117] In his affidavit, the Acting Detachment Commander states that he and a named Sergeant oversaw a search by staff of any responsive records in the custody and control of the OPP that were responsive to the appellant's request. He submits that the "Niche Records Management System, which is the primary data and document storage system of the OPP and of the former Pembroke Police Service, which was amalgamated in

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[41] Orders P-85, P-221 and PO-1954-I.
[42] Orders P-624 and PO-2559.
[43] Order PO-2554.
[44] Orders M-909, PO-2469 and PO-2592.
[45] Order MO-2185.
[46] Order MO-2246.

2013, was searched" for responsive records and that the search was "diligent and thorough".

The appellant's representations

[118] The appellant submits that although the ministry's representations address two categories of records that fall under the general category of "wiretap records", they fail to consider a third category of wiretap records:

> … these being the copies made of the original material submitted in support of an intercept application and conceivably in the custody and control of the "institution."

[119] The appellant relies on Order MO-3070 and submits that the ministry has been "largely silent on the possibility that copies of the 'information' documents exist in its custody".

[120] The appellant submits that while the Niche Records Management System is identified as the primary data and document storage system of the OPP and the former Pembroke Police Service, she notes that information describing the capabilities and limitations of this system for identifying and retrieving responsive records has not been provided.

[121] She also submits that a description of the identified Sergeant's qualifications and the qualifications of those who conducted the search are missing. She submits that:

> Without having this information, it is impossible to know the standard on which [named Sergeant] based his opinion that the search was "diligent and thorough."

[122] She further submits that the ministry failed to consider whether the amalgamation had any impact on the availability of police records.

[123] She submits:

> … For example, [the Acting Detachment Commander] does not discuss whether the Pembroke police records were archived into a separate database or whether they were joined with the OPP records. Further, he does not discuss the possibility that records that once existed prior to amalgamation might no longer exist. Nor does he provide detailed information on the OPP's record maintenance polices and practices (i.e., retention schedules). As such it is impossible to determine whether the OPP staff made a reasonable effort to identify and locate responsive records.

[124] She also submits that because the ministry did not seek her assistance in

defining the scope of the request, there is no way of knowing how the scope of the request was defined. She states:

> … As such, it is impossible to determine whether OPP staff responded literally to my request, by, for example, limiting the search to only police reports for dates between July 11 and July 22, 2013 or whether they made a reasonable effort to find records extending beyond these dates.

[125] In addition, the appellant submits that in his affidavit, the Acting Detachment Commander does not refer to the fact that another individual was Commander of the OPP detachment at the time of her request. As well, she submits that the Acting Detachment Commander does not explain why he and not the Commander oversaw the search for responsive records, nor is there any indication that the Acting Detachment Commander consulted with the Commander. The appellant points out the Commander signed the decision letter wherein he explained that:

> … pursuant to section 196 of the *Criminal Code*, if an individual's private communications has been the subject of an authorization to intercept....the individual is to be notified 90 days after the period for which the authorization was given or renewed, or such further extension of time as granted by the Superior Court of Justice. The Ontario Provincial Police is under an obligation to comply with the *Criminal Code*...We can confirm that the Ontario Provincial Police is complying with its obligations under this provision.

[126] She submits that there is no mention of this letter in the Acting Detachment Commander's affidavit.

[127] She also states that the Acting Detachment Commander has not provided detailed information on the steps taken to locate records pertaining to a named detective constable. She submits:

> The ministry claims it was unable to locate any records even though it is evident from an RCMP disclosure that responsive records for Det/Cst. [named individual] do exist. The RCMP disclosure suggests that Det/Cst [named individual] is on secondment to the RCMP.

[128] The appellant submits that under section 25(1) of the *Act*, the ministry had an obligation to forward the request to the RCMP and she presumes that her "request for [the named Detective Constable's] police records, notes, etc. was not forwarded to the appropriate institution".

[129] Finally, she points to an email referenced in disclosure she received from the RCMP pursuant to an access to information request. She states that the email from the named Detective Constable referenced in the disclosure reads:

> Good morning [name], I notified Det/Cst [named individual] of the OPP yesterday at 1630 h, of the RCMP involvement with [the appellant].

[130] She submits that this demonstrates that the ministry is withholding responsive information.

The ministry's reply

[131] In reply, the ministry provides the qualifications of the Sergeant who assisted in the search and confirms that pre-amalgamation records that were created by the Pembroke police service were searched in response to the appellant's request.

[132] Regarding other matters raised by the appellant, the ministry submits:

> The appellant writes that the ministry did not seek her assistance in defining the scope of her request. We submit the appellant is incorrect in making this statement. In fact, the ministry did clarify the scope of her request with the appellant, and this is stated on the top part of page 2 of the Notice of Inquiry.
>
> The appellant writes that [the Acting Detachment Commander] does not explain why he and not [the Commander] oversaw the search for the records. This is because [the Acting Detachment Commander] is now Detachment Commander, and occupies the position previously occupied by [the Commander]. [The Commander] is on a secondment to another position.
>
> The appellant suggests that the responsive records should contain witness statements with respect to two CAD operators and an OPP constable. In response, the responsive records do not contain these witness statements. The CAD operators and the OPP constable are not witnesses, and therefore would not have provided witness statements.

[133] Finally, the ministry submits that the IPC's decision in MO-3070 is irrelevant to the present appeal:

> Whether or not the sealed packet and intercept content subject to this appeal, if they exist, are in the custody or under the control of a court or the ministry, the ministry's position is that federal paramountcy excludes requests for such records from the scope of *FIPPA* because the *Criminal Code* sets out a comprehensive scheme that deals with the issue of disclosure of the existence and content of electronic surveillance records.

Analysis and finding

[134] My determination regarding access to any wiretap records is set out above and it

is premature to address the reasonableness of the search for those records in this order.

[135] With respect to other records, as set out above, the *Act* does not require the institution to prove with absolute certainty that further records do not exist. In order to satisfy its obligations under the *Act*, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records within its custody and control. I find that, based on the searches it conducted, and the explanations provided, the ministry has made a reasonable effort to locate records responsive to the request. In that regard, I find that the statement in the email referred to by the appellant does not establish that the ministry did not conduct a reasonable search for responsive records.

[136] Accordingly, I find that the ministry has conducted a reasonable search for records, other than the wiretap records which have been addressed above, that are responsive to the appellant's request at issue in this appeal.

Issue D: Does the appellant have any recourse regarding the quality of the recording of the July 13, 2013 911 call?

[137] Section 48(3) of the *Act* dictates the manner of access to records containing personal information. Section 48(3) states:

> Subject to the regulations, where an individual is to be given access to personal information requested under subsection (1), the head shall,
>
> (a) permit the individual to examine the personal information; or
>
> (b) provide the individual with a copy thereof.

[138] This section indicates that there are two ways in which access to a record may be given: by allowing inspection of the record and by providing a copy of the record. This section implies that the choice is primarily that of the successful requester.

[139] Section 48(4) of the *Act* provides that:

> Where access to personal information is to be given, the head shall ensure that the personal information is provided to the individual in a comprehensible form and in a manner which indicates the general terms and conditions under which the personal information is stored and used.

[140] Section 30(2) of the *Act* specifically addresses access to original records. Section 30(2) states:

> Where a person requests the opportunity to examine a record or a part thereof and it is reasonably practicable to give the person that

> opportunity, the head shall allow the person to examine the record or part thereof in accordance with the regulations.

[141] This section indicates an institution may decline to accept the requester's choice to examine the records if it would not be reasonably practicable to comply with it. Some examples of why it might not be reasonably practicable to comply are:

- if a record is very large;
- if the reproduction of a record may be unduly burdensome on the institution; or
- if only part of the record is subject to disclosure and it is not feasible to allow inspection without disclosing the protected parts of the record as well.

[142] A requester may wish to combine both methods of access, narrowing the scope of the material to be copies by first inspecting the record. An institution must also accommodate this approach unless it is not reasonably practicable to do so.

[143] Section 30(2) is a mandatory provision, subject only to the requirement of reasonable practicability. In other words, unless an institution has determined that it is not reasonably practicable to give the requester the opportunity to examine an original record, the head must do so, upon request.[47]

The ministry's representations

[144] The ministry states that it does not believe that it can produce a better copy of the July 13, 2013 911 call recording, submitting that:

> … A staff member at the 911 Communications Centre has advised that the copy of the 911 recording is an exact duplicate of the original recording. In conclusion it is our position that there is no better copy than the one we have already provided.

[145] The ministry further states that it is not reasonable practicable to permit the appellant to listen to the original recording, submitting that:

> The original recording is located at the 911 Communications Centre. It is an operational environment that is not open to the general public. We do not ordinarily remove records from the Centre, because they are original law enforcement records and we do not want their integrity compromised.

The appellant's representations

[146] The appellant states that to date, "the ministry has not offered to explain how or

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[47] Order PO-1679.

why the 911 recordings came to be so badly corrupted or why the recordings are continually interrupted by electronic time signals."

[147] Referencing section 40(2)[48] of the *Act*, she submits that:

> Given the importance of the 911 recording as material evidence, the ministry should be required to explain the poor quality of its digital copies. Further, it should make every effort to procure a clean and audible copy of the original.
>
> The ministry should not be allowed to stand behind its flimsy excuse that this is the best they can do. I submit that the 911 recordings are important and relevant as these contain an oral representation of my concerns. Without this record, I have no measure for defending the reliability of my statements or basis for challenging the credibility of police statements.

The ministry's reply representations

[148] The ministry submits that the quality of the 911 call recording is based on factors beyond the control of the ministry, such as whether the call was placed from a landline (which is usually clearer) or a cell phone; whether there is background noise, which would interfere with the quality of the sound; and, whether the caller spoke clearly.

Analysis and finding

[149] Section 30 of the *Act* does not oblige an institution to provide an opportunity to review records produced by an institution in response to a request in whatever manner or form requested.[49]

[150] There are two 911 call recordings at issue. The first is clearly comprehensible with only the numerical code used to identify the 911 operator being withheld. This severance is discussed below. The beginning of the July 13, 2013 911 call is difficult to hear and the call recording contains time marking beeps. However, I accept the ministry's explanation for the quality of the call and accept the ministry's evidence that this recording is an exact duplicate of the original recording. Furthermore, as outlined above, under section 30(2) of the *Act*, the ministry is entitled to decline to accept a request to examine the original record if it would not be reasonably practicable to comply with it. In this appeal, I accept the evidence of the ministry regarding the security of its 911 Communications Centre, including the reasons provided for not facilitating access to the original of the record as requested by the appellant.

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[48] Section 40(2) reads: The head of an institution shall take reasonable steps to ensure that personal information on the records of the institution is not used unless it is accurate and up to date.
[49] Order MO-2910.

Accordingly, since I accept that it is not reasonably practicable for the ministry to permit the appellant to review the original of the July 13, 2013 911 call in this context, I find that, subject to my finding below with respect to the withheld numerical code used to identify the 911 operator in the first 911 call recording, the ministry has met its obligations under the *Act* with respect to the appellant's access to the 911 call recordings disclosed to her.

Issue E: Does the discretionary exemption at section 49(a) in conjunction with sections 14(1)(c) and 14(1)(l) apply to the information at issue?

[151] 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.

[152] Section 49(a) reads:

> 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, 15.1, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[153] 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.[50]

[154] 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,

[50] Order M-352.

> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (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;

[155] 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.[51] To qualify as personal information, the information must be about the individual in a personal capacity and it must be reasonable to expect that an individual may be identified if the information is disclosed.[52]

[156] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[157] 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.[53] 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

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[51] Order 11.
[52] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[53] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

nature about the individual.[54]

[158] In my view, all of the records at issue (other than any wiretap records which are addressed above) that the ministry identified as responsive to the request, contain the personal information of the appellant as defined at section 2(1) of the *Act*. Accordingly, section 49(a) governs the issue of whether the withheld information qualifies for exemption because it falls within the scope of sections 14(1)(c) and 14(1)(l) of the *Act*.

[159] Sections 14(1)(c) and 14(1)(l) read:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
> >
> > (l) facilitate the commission of an unlawful act or hamper the control of crime.

[160] The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

> "law enforcement" means,
>
> > (a) policing,
> >
> > (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
> >
> > (c) the conduct of proceedings referred to in clause (b)

[161] The term "law enforcement" has covered a police investigation into a possible violation of the *Criminal Code*.[55]

[162] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[56]

[163] 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

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[54] Orders P-1409, R-980015, PO-2225 and MO-2344.
[55] Orders M-202 and PO-2085.
[56] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

because of the existence of a continuing law enforcement matter.[57] 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 consequences. [58]

[164] In order to meet the "investigative technique or procedure" test under section 14(1)(c), the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public.[59]

The ministry's representations

[165] The ministry submits that the OPP is a police service, and the records at issue are operational records created during OPP law enforcement activities. The ministry submits that it has applied the exemptions primarily to protect the integrity of law enforcement investigations, specifically related to domestic violence, and in accordance with established practices, which have been accepted in past orders.

[166] The ministry submits that section 14(1)(c) applies to portions of pages 9 and 17 of the records because they contain or describe a checklist of risk factors that is completed when OPP officers are conducting an investigation regarding suspected domestic assault.

[167] They add that the information falls within section 14(1)(c) for the following reasons:

a. The checklist is an investigative technique or procedure;

b. The checklist is detailed, and we submit that the details contained in it are not generally known by the general public; and,

c. The checklist has been put in place to protect potential victims of domestic assault. The ministry is concerned that disclosing this information would harm the integrity of the investigative process for domestic assaults, and additionally, could allow alleged offenders to circumvent the purpose of the checklist, which is to identify potential domestic assault.

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[57] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.
[58] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[59] Orders P-170, P-1487, MO-2347-I and PO-2751.

[168] The ministry submits that Order MO-1786 upheld the application of section 14(1)(c) to investigative techniques and procedures that police follow when attending a victim's residence to investigate an allegation of domestic assault. The ministry submits that the reasoning used in Order MO-1786 ought to be applied to the withheld information at issue.

[169] The ministry states that it has also applied section 14(1)(l) to the same records claimed under section 14(1)(c), being a checklist and a related record used when OPP officers conducted an investigation regarding suspected domestic assault. The ministry submits that were this checklist and the related record to be disclosed, it could be expected to harm efforts by the police to assess and identify domestic assault, which could hamper the control of it.

[170] Finally, the ministry claims that section 14(1)(l) also applies to numerical codes used to identify 911 operators because disclosing them would reveal coded information used for internal law enforcement communications, which "would be used for nefarious purposes to circumvent or thwart law enforcement operations". The ministry submits that the reasoning in Order PO-3421, which found that "police codes" qualify for exemption, should be applied in this appeal.

The appellant's representations

[171] The appellant submits that the ministry's representations do not make it sufficiently obvious that checklists are not widely known or anything other than an efficient means of documentation. The appellant submits that the ministry has failed to provide sufficiently "detailed and convincing evidence to establish that the checklist in question is more than just a standard procedure that is widely known and widely used."

[172] With respect to the harms alleged to arise from disclosing the checklist, the appellant submits:

> The ministry is concerned that disclosing the checklist would harm the integrity of the investigative process for domestic assaults and might allow alleged offenders to "circumvent the purpose of the checklist, which is to identify potential domestic assault." The ministry imagines a future harm although it has not demonstrated this harm using a concrete example.

[173] With respect to the harms alleged to arise from disclosing the numerical codes used to identify 911 operators, the appellant submits the ministry has failed to provide detailed and convincing evidence to establish how revealing employee identification numbers could reasonably be expected to facilitate commission of an unlawful act.

[174] The appellant submits that it is not sufficient for the ministry "to take the position that the expected harms are plainly obvious and therefore need no explanation" and the ministry must demonstrate how disclosure of identification codes

could reasonably be expected to facilitate commission of an unlawful act in the sense contemplated by section 14(1)(l) of the *Act*.[60]

[175] The appellant further argues that the identification codes should be disclosed because:

> … ID codes are one of the few means whereby the public can identify those person(s) who are granted authority to view and form opinions around individuals' personal and highly sensitive information. Indeed, by withholding this information the ministry is infringing upon the public's interest in ensuring accountability.

[176] She adds that the operator notes on pages 24 to 27 of the records are relevant and responsive to her request "in that they represent another source of opinion and thus are vital for establishing the reliability of my statements and my credibility as a witness" and that "due to the importance of the operator notes the ministry should make every effort to supply these records."

Analysis and finding

Checklist of risk factors and responses

[177] I have considered the findings in Order PO-3013, where Adjudicator Frank DeVries was addressing a checklist of risk factors used to assess the threat posed by domestic violence and the pages of an officer's notes with responses to the questions contained in the checklist. In finding that section 49(a), in conjunction with section 14(1)(c), applied to that information, he wrote that:

> … the disclosure of the checklist of risk factors used to assess the threat posed by domestic violence could reasonably be expected to reveal investigative techniques and procedures currently in use or likely to be used in law enforcement. (see Order MO-1786). As a result, I find that this information qualifies for exemption under section 49(a) in conjunction with 14(1)(c), …

[178] I also note that in Order MO-1786, Adjudicator Bernard Morrow found that this exemption applied to information about investigative techniques and procedures that the police are to follow when attending at a victim's residence to investigate an allegation of domestic assault. In that order, the adjudicator found that this information is clearly "investigative" in nature and the techniques and procedures described are not generally known to the public.

[179] I adopt these findings in Orders PO-3013 and MO-1786 and on my review of the

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[60] The appellant refers to Orders PO-2844 and PO-3228 in support of this submission.

representations and the information for which section 14(1)(c) is claimed, I find that the disclosure of the checklist of risk factors and responses could reasonably be expected to reveal investigative techniques and procedures currently in use or likely to be used in law enforcement. As a result, I find that this information qualifies for exemption under section 49(a) in conjunction with 14(1)(c), subject to my review of the ministry's exercise of discretion, below.

[180] As I have found that section 14(1)(c) applies to this information it is not necessary to determine whether this information is also subject to exemption under section 14(1)(l) of the *Act*.

Numerical codes used to identify 911 operators

[181] In the section of Order PO-3421 dealing with Police Codes, Adjudicator Daphne Loukidelis wrote:

> To begin, I agree with the ministry's submission that past orders of this office have found police codes to be exempt under section 49(a), together with the law enforcement exemption in section 14(1)(l) of the *Act.* In this category of information are "10-codes," which are codes that represent common phrases, particularly in radio transmissions and other communications between individuals employed in law enforcement. There are also patrol zone codes which identify the particular areas of a community being patrolled. In this appeal, I also accept that disclosure of such information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.[61] Consequently, I find that this information qualifies for exemption under section 49(a), in conjunction with section 14(1)(l).

[182] Tellingly, she did not list numerical codes used to identify 911 operators in the category of information that she found to fall under the police code exemption.

[183] The ministry's representations on the harms under this exemption are not sufficiently persuasive. Although the ministry was not required to prove that disclosure will result in harm, it was obligated to demonstrate a risk of harm that is well beyond the merely possible or speculative. The simple assertions provided by the ministry are not sufficient. Accordingly, I find that the ministry has failed to provide sufficient evidence to establish that disclosing this information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. Accordingly, I find that section 14(1)(l) does not apply to the numerical codes used to identify 911 operators that are found in the records.

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[61] Adjudicator Loukidelis Orders M-757, PO-2571, PO-2970 and MO-3083.

EXERCISE OF DISCRETION

Issue F: Did the institution exercise its discretion under section 49(a)? If so, should this office uphold the exercise of discretion?

General principles

[184] The section 49(a) exemption is discretionary, and permits 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.

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

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[186] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[62] This office may not, however, substitute its own discretion for that of the institution.[63]

The ministry's representations

[187] The ministry submits it has exercised its discretion properly in not releasing the information that is the subject of this appeal, which it exercised based on the following considerations:

a. The ministry has relied upon a body of existing IPC orders, which have consistently upheld withholding police codes on law enforcement grounds; and,

b. The ministry has relied upon public policy considerations, which are that disclosing internal police codes and investigative procedures pose a threat to law enforcement operations, and the protection of public safety.

The appellant's representations

[188] In her representations, as discussed above, the appellant alleges that there are discrepancies in the records, that witness statements are missing and that they contain unfounded allegations, attacks on her credibility and biased representations impugning

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[62] Order MO-1573.
[63] Section 54(2) of the *Act*.

her character that overshadow the discussion in police reports.

[189] She states that evidence was erased that might support her credibility as a witness and there was corruption of audio records which might reveal that "the true purpose for my call to 911 was to have on official record a statement of my concern around issues of phone tampering".

[190] For the above reasons, the appellant submits that that the ministry did not properly exercise its discretion.

Analysis and finding

[191] I find that there is insufficient evidence before me to establish that the ministry exercised its discretion in bad faith, or for an improper purpose, or took into account irrelevant considerations. Based on my review of all the materials before me, I also find that there is no evidence that the ministry was withholding the information for a collateral or improper purpose. Nor am I satisfied that it was biased or that it fettered its discretion in any way. In all the circumstances, I uphold the ministry's exercise of discretion with respect to the information that I have not ordered to be disclosed to the appellant.

ORDER:

1. I order the ministry to disclose to the appellant the numerical codes used to identify the 911 telephone call operators that are found in the responsive records by sending them to her by **July 10, 2018**.

2. I order the ministry to make an access decision concerning the appellant's request for wiretap records in accordance with sections 26, 28 and 29 of the *Act,* and to send a copy of the decision to the appellant by **July 10, 2018.**

3. I further order the ministry to provide me with a copy of the pages of the records as disclosed to the appellant in accordance with paragraph 1 as well as the access decision referred to in paragraph 2 when they are sent to the appellant.

Original Signed by: June 4, 2018

Steven Faughnan
Adjudicator