Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3868-I

Appeal PA-980338-1

Ministry of Community Safety and Correctional Services

July 27, 2018

Summary: Pursuant to the Ontario Divisional Court's decision in *Criminal Lawyers' Association v Ministry of Community Safety and Correctional Services*, 2016 ONSC 6948, the ministry's claim of section 14(2)(a) to exempt information relating to an Ontario Provincial Police investigation into the disappearance of an audio tape and the conduct of police officers and the Crown Attorney during a double murder trial was remitted back to this office. This order considers the ministry's application of section 14(2)(a) and the possible reconsideration of the application of sections 21 and 23 in Order PO-1779 with respect to the personal information of three affected parties.

The Commissioner declines to reconsider the application of section 21 and 23 in Order PO-1779. The Commissioner finds that portions of the record do not qualify for exemption under section 14(2)(a) and orders those portions to be disclosed to the appellant. With respect to the portions that do qualify for exemption under section 14(2)(a), the Commissioner finds that the ministry has failed to exercise its discretion regarding the application of the exemption, and orders the ministry to re-exercise its discretion.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 14(2)(a).

Orders and Investigation Reports Considered: Order PO-1779, PO-3231-I, PO-3322-I, PO-3402-F, and PO-1959.

Cases Considered: *Criminal Lawyers' Association v Ministry of Community Safety and Correctional Services*, 2016 ONSC 6948.

OVERVIEW:

Request and subsequent appeal

[1] This matter dates back to 1998 when the former Ministry of the Solicitor General and Correctional Services, now the Ministry of Community Safety and Correctional Services (the ministry), received three requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to an Ontario Provincial Police (OPP) investigation into the disappearance of an audio tape and the conduct of police officers and the Crown Attorney during a double murder trial. The murder charges were eventually stayed after the court found that there had been "many instances of abusive conduct by state officials…".[1]

[2] The ministry identified three records as being responsive to the requests. Record 1 is a 317-page report detailing the results of the OPP investigation. Pages 1 to 24 of record 1 contain the history, investigation and summary of the investigation into the missing audio tape; pages 25 to 46 consist of the "Disclosure Final Report," and pages 47-317 consist of notes relating to eleven identified individuals who were interviewed during the investigation. Record 2 is a letter, dated March 24, 1998 and record 3 is a memorandum, dated March 12, 1998.

[3] The ministry denied access to all three records in full pursuant to sections 14(1)(c) (reveal investigative techniques and procedures), (d) (confidential source of information), (e) (endanger life or safety), (g) (intelligence information) and (l) (facilitate commission of unlawful act), 14(2)(a) (law enforcement report), 19 (solicitor-client privilege), 20 (danger to safety or health) and 21(1) (personal privacy) of the *Act*.

[4] The requesters appealed the decision to this office and three appeal files were opened (PA-980338-1, PA-990137-1, and PA-990218-1). The appellants in PA-980338-1 and PA-990218-1 also raised the public interest override at section 23 and it was added as an issue.

[5] During the initial inquiry stage, the ministry provided representations on the application of sections 14(2)(a), 19 and 21 of the *Act*. Consequently, the other exemptions claimed in the ministry's decision letter were no longer at issue in the appeals. In addition, the appellant raised the constitutional validity and/or constitutional applicability of sections 10 (exemptions to right of access), 14, 19 and 23 of the *Act* under section 2(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*).[2]

[6] After conducting an inquiry, then Assistant Commissioner Tom Mitchinson issued

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[1] *R v Court,* (1997), 36 OR (3d) 263 (Gen Div) at 300; cited *in Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 at para 10.

[2] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11, at section 2(b).

Order PO-1779, in which he upheld the ministry's decision not to disclose the records. He found that all three records contained personal information. He also found that the public interest in disclosure clearly outweighed the purpose of the section 21 personal privacy exemption on the facts, and would have applied the section 23 public interest override with respect to the exemption, subject to some limited exceptions.[3] However, he ultimately upheld the ministry's decision because the other claimed exemptions (sections 14(2)(a) and 19) are not subject to the section 23 public interest override. He also concluded that the omission of sections 14 and 19 from the public interest override did not constitute a breach of the appellant's right to freedom of expression under section 2(b) of the *Charter*.

[7] The appellant in PA-980338-1 sought judicial review of Order PO-1779. The Divisional Court upheld the decision not to disclose the records. On appeal, the Ontario Court of Appeal concluded that the non-application of the public interest override to sections 14 and 19 violated section 2(b) of the *Charter*.

[8] In 2007, the appellant in PA-990218-1 abandoned the appeal and that appeal file was closed.

[9] The ministry then sought, and was granted, leave to appeal the decision of the Ontario Court of Appeal to the Supreme Court of Canada. The ministry's appeal focused on the constitutional validity of the section 23 public interest override. In a decision issued June 17, 2010,[4] the Supreme Court allowed the ministry's appeal and held that the former Assistant Commissioner's order confirming the constitutionality of section 23 of the *Act* should be restored; the records protected by section 19 of the *Act* should be exempt from disclosure (records 2 and 3); and the claim under section 14 should be returned to the Commissioner for reconsideration.

Previous reconsideration decisions

[10] As a result of the Supreme Court's decision, PA-980338-1 and PA-990137-1 were remitted to this office for reconsideration of the ministry's exercise of discretion in denying access to the 317-page report, in its entirety, under the discretionary exemption at section 14 of the *Act.*

[11] Following a mediation stage, PA-980338-1 and PA-990137-1 were transferred to me for adjudication. I issued a Notice of Inquiry to the ministry in May 2011, soliciting representations from the ministry and directing the ministry to "issue a revised decision letter relating to the application of sections 14 and 21 of the *Act*."

[12] In December 2011, the ministry issued a revised decision granting partial access to the report. In the revised decision, the ministry indicated that it had sought the views

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[3] Order PO-1779 at 22-25.
[4] *Ontario (Public Safety and Security) v Criminal Lawyers' Association,* 2010 SCC 23.

of the Ministry of the Attorney General, the OPP, the Halton Regional Police Service, the Hamilton Police Service, and eleven individuals who were interviewed in the investigation. The ministry reported that it had received responses from nine of the eleven individuals, and of these, five consented to the release of their personal information subject to the severance of certain personal identifiers. The remaining four individuals objected to the disclosure of their personal information. The revised decision also included an explanation of the factors and circumstances taken into account by the ministry in reaching its decision.

[13] The appellant in PA-980338-1 continued to pursue access to the withheld portions of the report. I sent the appellant a Notice of Inquiry in August 2012, seeking representations from the appellant on whether the ministry had exercised its discretion under section 14, and whether that exercise of discretion ought to be upheld by the IPC. The appellant provided submissions asserting that the ministry improperly exercised its discretion, and requesting that the IPC review each portion of the report to confirm that each qualified as a "report" under section 14(2)(a). The appellant also maintained that the IPC did not have the jurisdiction to consider whether section 21 applied to the withheld portions of the report, as the applicability of sections 21 and 23 had been dispositively addressed in Order PO-1779 and were not part of the subject matter remitted to the IPC by the Supreme Court decision.

[14] I then invited the ministry to respond to the appellant's submissions. The ministry maintained that the issue of whether the report is a "report" within the meaning of section 14(2)(a) had already been decided by Order PO-1779, and was not a part of the reconsideration inquiry. The ministry also disputed the appellant's submission that the IPC did not have the jurisdiction to consider the application of the section 21 exemption, and argued that it had given appropriate weight to the personal privacy issues in its exercise of discretion pursuant to section 14.

[15] In Interim Order PO-3231-I, dated July 11, 2013, I found that in exercising its discretion to claim the exemption at section 14(2)(a), the ministry had taken into account irrelevant factors and had failed to take into account relevant considerations; as a result, its exercise of discretion was flawed. I ordered the ministry to re-exercise its discretion in accordance with my directions set out in that order.

[16] In addition, I concluded that the doctrine of *functus officio* barred me from reconsidering the applicability of the section 21 exemption and section 23 override. I also did not consider the question of whether the section 14(2)(a) exemption applied to the entirety of the report, as I determined that the doctrine of *functus officio* applied to that issue as well.

[17] In October 2013, the ministry issued a further revised decision re-exercising its discretion and disclosing 17 additional pages of the report or portions of it. The ministry continued to withhold in their entirety the portions of the report containing the personal information of the individuals who had not provided express consent for its disclosure.

The appellant continued to pursue access to the withheld portions.

[18] In Interim Order PO-3322-I, dated March 19, 2014, I considered the ministry's re-exercise of discretion as described in its further revised decision. In that order, I upheld the ministry's exercise of discretion in respect of some, but not all, of the information it continued to withhold from the appellant. Given this office's inability to substitute its own exercise of discretion for that of the ministry, I remitted the matter to the ministry for another re-exercise of discretion. In that order, I provided additional guidance to assist the ministry in its task.[5]

[19] On May 26, 2014, the ministry communicated the results of its further re-exercise of discretion in response to Order PO-3322-I, and in light of further consultation by the ministry with the five individuals whose personal information is contained in the report and remained at issue. The ministry advised that two of the five individuals consented to the disclosure of their personal information in the report, and that it would exercise its discretion to disclose information relating to those individuals, with severances of certain information.[6] The ministry indicated that it was "further exercising its discretion not to disclose" the personal information relating to the remaining three individuals who had not consented to the disclosure of their information.

[20] In Final Order PO-3402-F, dated September 25, 2014, I considered the ministry's third revised decision and found that its further re-exercise of discretion remained flawed. I found that the ministry continued to exercise its discretion in an improper manner, including by effectively delegating its discretion to third parties. However, in the circumstances, I found it would serve no useful purpose to return the matter to the ministry for another re-exercise of discretion. Accordingly, I closed the file.

[21] The appellant sought judicial review of my decisions. Specifically, the appellant pursued the following issues on judicial review:

- The Commissioner breached the rules of procedural fairness in the process leading to his conclusion that he was *functus officio* regarding the question of whether the section 14 exemption applied to all portions of the report.

- The Commissioner erred in law in concluding that he was *functus officio* to consider whether the section 14(2)(a) exemption applied to all portions of the report.

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[5] Order PO-3322-I at para 32.

[6] The following categories of information were redacted from the statements and summaries of statements of the two consenting individuals: personal information to which the public interest override was found not to apply in Order PO-1779, and "similar information"; information which may identify a police informant; and information regarding confidential law enforcement processes, techniques and equipment.

- The section 14(2)(a) exemption is inapplicable to at least some of the remaining withheld portions of the OPP report.

- The Commissioner erred in law when he decided to close the appeal files, despite his finding that the ministry had again improperly exercised its discretion.

[22] The ministry and this office took part in the judicial review application. The ministry maintained that the entirety of the report is subject to the section 14(2)(a) exemption and argued that it had properly exercised its discretion in choosing to withhold the portions of the report that remained at issue. The ministry did not request that the Divisional Court review my determination that I was *functus officio* with respect to the issues concerning the applicability of sections 21 and 23.

[23] In a judgment dated November 15, 2016,[7] the Divisional Court granted the application and remitted the matter back to this office to determine whether the remaining portions of the report at issue qualify as a "report" under section 14(2)(a), and to decide whether to return the matter to the ministry to exercise its discretion in accordance with my directions in Orders PO-3231-I, PO-3322-I, and PO-3402-F. Further, the Divisional Court declared that the ministry disregarded the proper interpretation and application of the *Act* with respect to its exercise of discretion.

The present inquiry

[24] I remain the adjudicator in this matter.

[25] In light of the Divisional Court's most recent decision, I began my current inquiry by sending a Notice of Inquiry to the ministry and the three individuals who objected to the disclosure of their personal information and whose personal information remains at issue (the affected parties). The Notice of Inquiry invited those parties to provide written representations on whether the portions of the report remaining at issue qualify as a "report" under section 14(2)(a). I also asked the ministry to provide representations on its exercise of discretion to withhold the remaining portions pursuant to section 14(2)(a).

[26] In addition, I asked the ministry and the affected parties to provide representations on whether this office has grounds to reconsider its findings in Order PO-1779 regarding the application of sections 21 and 23 to the affected parties' personal information. I also asked for submissions on the application of those sections for my consideration in the event that I find there are grounds for reconsideration.

[27] I received written representations from the ministry and one of the affected parties. I then invited the appellant to provide representations in response to the

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[7] *Criminal Lawyers' Association v Ministry of Community Safety and Correctional Services*, 2016 ONSC 6948.

ministry's submissions and a summary of the non-confidential arguments raised by the affected party. The appellant provided representations, which were shared with the ministry in accordance with *Practice Direction Number 7* and the IPC's *Code of Procedure*, for the purpose of obtaining reply representations. The ministry provided reply representations, which were shared with the appellant at the appellant's request.

[28] For the reasons that follow, I find that it is not necessary for me to determine whether there is a basis for reconsideration of the former Assistant Commissioner's findings in respect of sections 21 and 23 in Order PO-1779. I also find that certain portions of the record are not a "report" for the purpose of the *Act* and therefore do not qualify for the exemption at section 14(2)(a). I order the ministry to disclose those portions to the appellant. Finally, I find that the ministry has again failed to exercise its discretion regarding the portions of the record that do qualify for an exemption under section 14(2)(a). Accordingly, I order the ministry to re-exercise its discretion in accordance with the findings and directions set out in Orders PO-3231-I, PO-3322-I, and PO-3402-F.

RECORDS:

[29] Only portions of record 1 remain at issue. As noted above, record 1 is a 317-page document detailing the results of the OPP investigation. Pages 1 to 24 of the record contain the history, investigation and summary of the investigation into the missing audio tape; pages 25 to 46 consist of the "Disclosure Final Report," and pages 47-317 consist of notes relating to eleven identified individuals who were interviewed.

[30] The following pages remain at issue: 18-19, 23, 42-44, 120-160, 285-291, and 307-317.[8]

ISSUES:

A. Does the IPC have grounds to reconsider its decision in Order PO-1779 regarding the application of sections 21 and 23 with respect to the personal information of the remaining three affected parties?

B. Does the discretionary exemption at section 14(2)(a) apply to the record?

C. Did the institution exercise its discretion under section 14(2)(a)? If so, should this office uphold the exercise of discretion?

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[8] Throughout this order, the page numbers referenced correspond to the typed page numbers on the top of each page, and not the handwritten numbers at the bottom. For the sake of clarity, the handwritten number at the bottom of pages 1-46 is the same as the typed number at the top of those pages, while the handwritten number at the bottom of pages 47-317 is one higher than the typed number at the top.

DISCUSSION:

Issue A: Does the IPC have grounds to reconsider its decision in Order PO-1779 regarding the application of sections 21 and 23 with respect to the personal information of the remaining three affected parties?

[31] As noted above, the personal information of three remaining parties who did not consent to disclosure remains at issue.

[32] During previous stages of this inquiry, the three affected parties had not been formally invited to provide representations; instead, their position was conveyed through the ministry's submissions. In Order PO-3231-I, I found that I was *functus officio* with regard to the application of sections 21 and 23*,* but even if I had some basis for re-opening those issues, I would have no reason to depart from the finding in Order PO-1779. Similarly, in Order PO-3402-F, I found that "any harm occasioned by a failure to notify the interviewees during the original processing of these appeals was minimal, and has since been remedied by the ministry's notification efforts during the reconsideration process."

[33] However, out of an abundance of caution, I invited the affected parties, as well as the ministry and the appellant, to provide representations in the present inquiry. These parties were provided an opportunity to make representations on all of the issues considered in this order, including whether this office has grounds to reconsider the application of the personal privacy exemption at section 21 and the public interest override at section 23 with respect to their personal information.

[34] Paragraph 18 of the IPC's *Code of Procedure* (the *Code*) sets out the grounds upon which this office may reconsider an order. Paragraphs 18.01 and 18.02 of the *Code* state as follows:

> 18.01 The IPC may reconsider an order or other decision where it is established that there is:
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> (a) a fundamental defect in the adjudication process;
>
> (b) some other jurisdictional defect in the decision; or
>
> (c) a clerical error, accidental error or omission or other similar error in the decision.

Representations

[35] The ministry maintains that Order PO-1779 must be reconsidered regarding the application of section 23 with respect to the personal information of the affected parties.

[36] In support of this position, the ministry submits that former Assistant Commissioner Mitchinson did not notify the affected parties during his inquiry, despite the fact that he found that the public interest override in section 23 overrode the mandatory personal privacy exemption in section 21. The ministry maintains that the former Assistant Commissioner would have been unable to properly engage in the required "balancing exercise" between the public interest in disclosure and the privacy interests of the affected parties, as the individuals whose privacy rights were at issue were not notified nor provided an opportunity to be heard. The ministry states that this failure to ensure procedural fairness amounts to a fundamental defect in the adjudication process.

[37] The ministry submits that an opportunity to be heard is one of the procedural fairness considerations that extends to all tribunals, even if it is not prescribed by statute or procedural rules. The ministry notes that since Order PO-1779 was issued, courts have affirmed the duty to notify affected parties when their privacy rights are engaged.[9]

[38] The ministry advises that it recognized and sought to protect the interests of the affected parties by consulting with them about the potential disclosure of their personal information in 2011 and again in 2014. The ministry states that it has "followed the wishes" of the affected parties in opposing the disclosure of their personal information where express consent has not been given. However, the ministry maintains that these steps alone do not afford procedural fairness.

[39] The ministry also acknowledges the statement in paragraph 33 of Interim Order PO-3231-I that "all responses that the ministry received from persons or institutions that were notified by it" were reviewed by this office. However, the ministry submits that this review did not confer proper notice to the affected parties. The ministry also maintains that no reasoning was provided to support my conclusion that "even if I were permitted to re-open issues related to section 21 and section 23, I would have no reason to depart from the Assistant Commissioner's finding that the public interest override applied to all but the few sections of the record identified in Order PO-1779."

[40] The ministry notes that at the time that Order PO-1779 was issued, the application of section 23 proved to be moot, because the record was exempt from disclosure in its entirety pursuant to the section 14(2)(a) exemption. However, the ministry maintains that the issue ceased to be moot once the IPC ordered the ministry to re-exercise its discretion under section 14(2)(a) without considering the protections afforded to affected parties under section 21.

[41] Only one affected party provided representations in the present inquiry. These representations do not address this office's grounds to reconsider Order PO-1779.

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[9] *Merck Frosst Canada Ltd v Canada (Health),* 2012 SCC 3 at para 72; *Ministry of Community Safety and Correctional Services v Information and Privacy Commissioner*, 2014 ONSC 3295.

Rather, they focus on the affected party's reasons for opposing the release of their information contained in the report. Specifically, the affected party maintains that they were told their participation in the investigation was as a witness, but that they had been deliberately misled by the investigating officers. The affected party states that had they been aware of their status, they might have sought legal advice or declined to give an interview, but these opportunities were denied. The affected party maintains that they were denied access to legal advice as a direct result of the misrepresentation and that it would be contrary to their *Charter* rights for their personal information in the report to be disclosed without their consent.

[42] In its representations, the appellant submits that the IPC does not have jurisdiction to reconsider the section 23 determination made in Order PO-1779. The appellant also maintains that there is no jurisdiction for the IPC to consider the applicability of section 21 in the present inquiry.

[43] In support of this position, the appellant states that an administrative body is *functus officio* if it does not have "further authority or legal competence because the duties and functions of the original commission have been fully accomplished."[10] In this case, the appellant submits that the IPC's jurisdiction to undertake the present inquiry rests entirely on the Divisional Court's order remitting the matter back to the IPC. The appellant states that but for the Divisional Court's order, the IPC was entirely *functus officio* with respect to this matter following the issuance of Order PO-3402-F.

[44] The appellant states that the Divisional Court's order clearly remits two issues back to the IPC for reconsideration: the applicability of the section 14(2)(a) exemption and the propriety of the ministry's exercise of discretion. The appellant maintains that it is the duty of this tribunal to follow the directions of the reviewing court.[11]

[45] The appellant submits that the reconsideration grounds set out in section 18 of the IPC's *Code of Procedure* are inapplicable in this case. The appellant submits that the grounds in the *Code of Procedure* reflect the common law circumstances in which a tribunal may reconsider a prior determination, and are not applicable where a tribunal's jurisdiction results solely from a remission order on judicial review.

[46] In the alternative, the appellant submits that none of the grounds for reconsideration are present in this case, and it would be inappropriate to re-open the section 23 determination made by former Assistant Commissioner Tom Mitchinson in Order PO-1779. The appellant notes that the applicability of the section 23 override was not part of the subject matter remitted back to the IPC following the Supreme Court's decision. The appellant also notes that the ministry sought to re-open the section 23 determination on the basis of a procedural defect following the Supreme Court's

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[10] *Black's Law Dictionary*, Bryan A Garner 9th ed, (St Paul: Thomson Reuters, 2009) at 742.
[11] *Régie des rentes du Québec v Canada Bread Co*, [2013] 2 SCR 125 at paras 46 and 66; *Corlac Inc et al v Weatherford Canada Ltd et al*, 2012 FCA 261 at para 18.

remission of the matter, and that I rejected this submission in Order PO-3231-I after finding that I was *functus officio* with respect to the applicability of the section 21 exemption and the section 23 override.

[47] The appellant submits that it was open to the ministry and the affected parties to challenge my refusal to reconsider the section 23 issue during the most recent judicial review before the Divisional Court, and yet that did not occur. Moreover, the appellant submits that the ministry declined to provide specific notice to the affected parties of the judicial review application, even after the IPC's counsel requested that this occur. On this basis, the appellant maintains that it is inappropriate for the ministry to now seek to justify a reconsideration on the grounds that the affected parties have not been provided with an opportunity to participate in the IPC's process.

[48] Finally, the appellant states that there is no doubt that the affected parties have been aware of its efforts to obtain disclosure of the record since at least the beginning of the reconsideration process following the Supreme Court's remission order. The appellant states that the affected parties have had multiple opportunities to make submissions, and that this case is not a situation of jurisdictional defect or accidental error.

Analysis

[49] As I discuss below, the affected parties have been formally invited to provide representations to this office, and the only affected party to provide representations has simply reiterated concerns already considered by this office. Accordingly, I find that it is not necessary to determine whether I have jurisdiction to reconsider the application of sections 21 and 23 to the personal information of the remaining three affected parties, nor is it necessary to determine whether there are grounds for a reconsideration. To the extent that there may have been a procedural defect in Order PO-1779 resulting from the former Assistant Commissioner conducting an inquiry without notifying the affected parties, I am satisfied that it has been remedied by notification during the present inquiry.

[50] There remains three affected parties who have not provided consent to the disclosure of their personal information in the record. All three parties were notified during this inquiry and invited to provide written representations for my consideration. I received representations from one affected party, advising that he continued to object to the disclosure of his personal information.

[51] I have reviewed the affected party's representations and note that they reiterate concerns expressed by the affected party in correspondence that had already been provided to this office by the ministry during earlier stages of this appeal process. The submissions received from the affected party during this inquiry did not raise any novel issues or bring any new arguments to the discussion.

[52] Accordingly, I am satisfied that any concern the ministry had regarding a procedural defect is moot, as the affected parties were notified and given an opportunity to be heard. Given that notification and receipt of representations has not altered the discussion in any material way, I find that there is no need to determine whether there is a basis for reconsideration of the section 21 and section 23 findings in Order PO-1779.

Issue B: Does the discretionary exemption at section 14(2)(a) apply to the record?

[53] The record at issue has been partially withheld by the ministry pursuant to the discretionary exemption at section 14(2)(a) of the *Act*, which states:

> (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[.]

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

> "law enforcement" means,
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> > (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)

[55] In past orders of this office, the term "law enforcement" has been found to cover the following situations:

- a municipality's investigation into a possible violation of a municipal by-law that could lead to court proceedings.[12]
- a police investigation into a possible violation of the *Criminal Code*.[13]
- a children's aid society investigation under the *Child and Family Services Act* which could lead to court proceedings.[14]

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[12] Orders M-16 and MO-1245.
[13] Orders M-202 and PO-2085.

- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997*.[15]

[56] In order for a record to qualify for exemption under section 14(2)(a) of the *Act*, the institution must satisfy each part of the following three-part test:

1. the record must be a report; and

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

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.[16]

[57] The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact.[17]

[58] The title of a document does not determine whether it is a report, although it may be relevant to the issue.[18]

Representations

[59] The ministry declined to provide representations addressing the issue of whether or not the record is a "report" within the meaning of section 14(2)(a) on the basis that "it would not be helpful to do so at this point." The ministry maintains that repeated findings that it has not exercised its discretion distracts from what it considers to be the main issue: whether procedural fairness has been conferred upon the affected parties, and whether the protection of their privacy rights has been properly taken into consideration.

[60] The appellant maintains that the section 14(2)(a) exemption is inapplicable to at least some of the withheld portions of the record. The appellant states that this, along with the exercise of discretion, are the only issues that the Divisional Court remitted back to the IPC for reconsideration. The appellant submits that it is the ministry's burden to prove that "the record or the part falls within one of the specified exemptions," section 14(2)(a) in this case, and that the ministry may exercise its discretion to withhold a record or part thereof only if an exemption properly applies. The appellant submits that the ministry's failure to do so in the present inquiry is significant, especially in light of the Divisional Court's express direction that the

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[14] Order MO-1416.
[15] Order MO-1337-I.
[16] Orders 200 and P-324.
[17] Orders P-200, MO-1238 and MO-1337-I.
[18] Order MO-1337-I.

applicability of section 14(2)(a) be considered. The appellant states that the ministry's failure to discharge its burden of proof is tantamount to a concession that the exemption is inapplicable.

[61] The appellant submits that numerous IPC decisions have established that in order to qualify as a "report" within the meaning of section 14(2)(a), each portion of the record must consist of "a formal statement or account of the results of the collation and consideration of information." Moreover, the appellant maintains that mere observations or recordings of fact typically do not constitute a "report".[19]

[62] The appellant maintains that the ministry has never properly analyzed whether each and every part of the 317-page record qualifies as a "report" within the meaning of section 14(2)(a).

[63] The appellant takes the position that the exemption is inapplicable to at least some of the withheld portions of the record, though its ability to make precise submissions is limited by its lack of knowledge of the full contents of the record. Specifically, the appellant states that of the 317 pages in the record, 271 pages consist of summaries and transcripts of the interviews conducted by the OPP with 11 individual witnesses. Fifty-nine of those 271 pages were withheld by the ministry on the basis that they contain the personal information of the three affected parties who did not consent to disclosure.[20] The appellant submits that based on the pages already disclosed, it can make an educated guess as to the structure and content of the remaining 59 pages. Based on disclosures to date, the appellant submits that the withheld pages likely contain transcripts of interviews with the affected parties, as well as point form synopses of each.

[64] With respect to the other 46 of the 317 pages of the record, the ministry continues to withhold six of them on the basis that they contain the summaries of statements of the three remaining affected parties.[21] Again, the appellant submits that the corresponding pages that were disclosed with respect to the other individuals allow for educated guesses as to the contents of these six pages. The appellant states that the six pages are likely to contain narrative summaries of the information obtained during interviews of the three affected parties.

[65] Based on its review of prior disclosures, the appellant maintains that the only portion of the record that truly qualifies as a "report" within the meaning of section 14(2)(a) is page 24, which contains a statement of the OPP investigators' analysis and conclusions based on the information collected in its investigation. The appellant notes that page 24 was partially disclosed in the ministry's first revised decision.

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[19] Orders PO-3791-I, PO-3655-I, MO-1238, PO-3003, and MO-1341.
[20] Pages 120-160, 285-291, and 307-317.
[21] Pages 18-19, 23, and 42-44.

[66] The appellant maintains that none of the transcripts of interviews, nor the associated summaries and synopses of the interviews qualify as "reports" within the meaning of section 14(2)(a). Rather, the appellant submits that these are "investigative records that reflect and/or summarize facts, rather than providing an evaluative consideration of the information gathered in the investigation." The appellant states that this office has consistently held that witness statements, whether in writing, audio or video form, do not constitute a "report" for the purpose of section 14(2)(a),[22] nor do the associated summaries.[23] Accordingly, the appellant submits that none of the withheld pages that remain at issue qualify as "reports" within the meaning of the exemption, and therefore the exemption is not applicable to the remaining pages at issue.

[67] When I invited the ministry to respond to the appellant's submissions, I specifically requested that it respond to the appellant's position on the application of the section 14(2)(a) exemption and its exercise of discretion. Instead, the ministry responded to the appellant's submissions on the affected parties' privacy rights, as summarized above, and did not provide any additional submissions on this point.

Analysis

[68] Upon review of the parties' submissions and the record at issue, I find that pages 1 – 46 constitute a report as described in section 14(2)(a) of the *Act*, while pages 47-317 do not constitute a report for the purposes of the exemption.

[69] In order for a record to qualify for exemption under section 14(2)(a), the institution must establish that the record is a report that was prepared in the course of law enforcement, inspections or investigations, and that was prepared by an agency tasked with enforcing and regulating compliance with the law.[24] While the second and third parts of the three-part test are not contested, the question remains whether the record constitutes a "report".

[70] The word "report" is not defined in the *Act*; however, past orders of this office have defined the term as meaning, "a formal statement or account of the results of the collation and consideration of information".[25] As a general rule, records that convey recordings of fact more so than formal, evaluative accounts of investigations, will not typically meet the definition of "report" under the *Act*.[26]

[71] In determining whether several records within a Special Investigation Unit (SIU) investigation file constitute a "report", the approach followed by this office is to look at

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[22] Orders PO-3273, PO-1959, PO-3003, and PO-2821.
[23] Orders PO-3169, PO-2054-I, PO-2821, PO-2286-I, PO-1845, MO-1341, and PO-1819.
[24] Orders 200 and P-324.
[25] Orders P-200, MO-1238 and MO-1337-I.
[26] Orders M-1109, MO-2065 and PO-1845.

the records individually to determine whether or not they qualify for exemption under section 14(2)(a) of the *Act*.[27] This is consistent with the following commentary from the Divisional Court regarding the interplay between the exemption at section 14(2)(a) and severability under section 10 of the *Act*, in the context of this appeal:

> Section 10 of *FIPPA* provides instruction to institutions when a request for information is received by a member of the public. Specifically, s. 10(1)(a) states that "every person has a right of access to a record or part of a record in the custody or under the control of an institution unless, (a) the record or the part of the record falls within one of the exemptions under section 12 to 22" (emphasis added). The obligation of severance set out in s. 10(2) applies to "a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22".
>
> In our view, it is clear that section 10 required the Ministry to first consider whether each and every part of the 318-page OPP Report qualified as a "report" within the meaning of s. 14(2)(a). For every part of the Report that does not qualify as a "report", the content cannot be withheld, subject to other considerations such as non-disclosure orders or release of personal information, which are not at issue in this proceeding.
>
> Similarly, the Ministry was required to consider whether or not those parts of the Report that qualify under s. 14(2)(a) should be released by way of severance because s. 10(2) expressly applies to "a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22".[28]

[72] Having reviewed the record, I am satisfied that the first 46 pages contain facts, analysis, and evaluative elements that demonstrate an exercise of judgment carried out by the OPP investigative team. These pages constitute a formal account of the results of the collation and consideration of information, including the interviews of the affected parties, and therefore qualify as a "report". For the sake of completeness, I am satisfied that the second and third parts of the test for the exemption at section 14(2)(a) have been made out with regard to the first 46 pages, as these pages were prepared in the course of a law enforcement investigation conducted by the OPP in relation to the *Criminal Code*, and that the OPP has the function of enforcing and regulating compliance with the *Criminal Code*. Therefore, I am satisfied that all three parts of the test under section 14(2)(a) have been met with respect to the first 46 pages of the record, and those pages qualify for exemption pursuant to that section subject to my findings on the ministry's exercise of discretion.

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[27] Orders PO-2524 and PO-3169.
[28] *Criminal Lawyers' Association v Ministry of Community Safety and Correctional Services*, 2016 ONSC 6948 at paras 72-74.

[73] With regard to the remaining pages at issue, I note that the index on page two sets out the chapters in pages 1-46, but does not reference the interviews that appear in pages 47-317. These appear to be appended to the end of the first 46 pages as evidence upon which the analysis in the report is based. Of pages 47-317, only pages 120-160, 285-291, and 307-317 remain at issue. Each grouping of pages consists of a summary and transcript of the interview conducted by the OPP with one of the three remaining affected parties.

[74] Past orders have found that appendices or attachments to a report, such as interview notes, will not necessarily form part of the report. For example, in Order PO-1959, Assistant Commissioner Sherry Liang found that certain information forming part of a SIU investigation file did not qualify as a report for the purposes of section 14(2)(a). While the SIU Director's decision qualified as a report, "in that it consists of a formal statement of the results of the collation and consideration of information," Assistant Commissioner Liang found that other records such as incident reports, supplementary reports and police officers' notes did not meet the definition of a "report", "in that they consist of observations and recordings of fact rather than formal, evaluative accounts."[29] While the record at issue in this appeal can be differentiated from the SIU investigation file at issue in Order PO-1959, I am satisfied that a similar approach should be applied in the present appeal.

[75] Based on my review of pages 47-317, I find that these pages consist entirely of transcripts and synopses of interviews conducted by the OPP with 11 individual witnesses, three of whose interview transcripts and synopses remain at issue. Consistent with this office's past findings regarding witness statements and their associated summaries,[30] I find that these pages of the record constitute mere recordings of fact. These pages do not include or describe any conclusions or analysis following the collection of the information contained therein. Accordingly, I am satisfied that pages 47-317 do not meet the definition of a "report" as required for the exemption in section 14(2)(a) to apply.

[76] As the section 14(2)(a) exemption is not available with respect to pages 47-317, the interview transcripts and summaries remaining at issue should be partially disclosed to the appellant. The affected parties' home addresses, dates of birth, and personal telephone numbers, as well as the location of the interview, should be redacted prior to disclosure in accordance with the former Assistant Commissioner's finding in Order PO-1779 that the individuals' personal privacy interest with respect to that information are not overridden by the public interest in its disclosure.[31]

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[29] Order PO-1959 at pages 6-7. This analysis has been applied in subsequent IPC decisions, including Orders PO-2524, PO-2414, PO-3169 and PO-3212.
[30] Orders PO-3273, PO-1959, PO-3003, PO-2821, PO-2054-I, PO-2286-I, PO-1845, MO-1341, and PO-1819.
[31] Order PO-1779 at page 25.

Issue C: Did the institution exercise its discretion under section 14(2)(a)? If so, should this office uphold the exercise of discretion?

[77] The section 14(2)(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.

[78] 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; or it fails to take into account relevant considerations.

[79] In such a case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[32] According to section 54(2) of the *Act*, however, this office may not substitute its own discretion for that of the institution.

Representations

[80] The ministry did not provide representations on its exercise of discretion initially or when invited to do so at the reply representations stage.

[81] The appellant notes that the Divisional Court has held that the ministry's three prior exercises of discretion with respect to the section 14(2)(a) exemption were improper and unreasonable, and failed to follow the lawful direction of the IPC. The appellant quotes the following from the Divisional Court judgment:

> The ministry disregarded the prior interpretation and application of the right of access provisions and law enforcement provisions of the *Act*, as determined by the Orders of the Commissioner, with respect to the exercise of its discretion to claim the s. 14(2)(a) exemption in respect of the disputed pages of the OPP report.[33]

[82] The appellant maintains that in a society governed by the rule of law, declarations such as this are issued by courts in the expectation that they will command the attention of the government, and will be followed. The appellant suggests that the ministry's refusal to follow the order of the Divisional Court ought to be "denounced in the strongest of terms."

[83] The appellant submits that there is no evidence that the ministry has exercised

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[32] Order MO-1573.
[33] *Criminal Lawyers' Association v Ministry of Community Safety and Correction Services*, 2016 ONSC 6984 at para 97(e).

its discretion anew following the decision of the Divisional Court. To the contrary, the ministry has declined to provide representations on this issue during this inquiry, on the basis that repeated findings that it has not exercised its discretion distracts from what it maintains is the key issue. Accordingly, the appellant states that there is no new exercise of discretion to be reviewed by the IPC.

Analysis

[84] In its 2016 decision referring this matter back to the IPC, the Divisional Court stated:

> We also find that the Ministry exercised its s. 14(2)(a) discretion on the basis of an improper consideration with respect to the withheld portions of the Report that remain at issue and that this exercise of discretion was unreasonable in light of the IPC's clear directions.
>
> We find that the Ministry failed to follow the direction of the IPC regarding the proper exercise of its discretion. It was improper for the Ministry to use the lack of consent of the interviewees as the basis for refusing to release the withheld portions of the Report. Had the three witnesses consented to the release of the information, the Ministry would have had no valid concerns regarding the release of the pages that remain at issue from the Report. We agree with the IPC's position in this regard.
>
> Notwithstanding this finding, we do not have jurisdiction to remit the matter back to the Ministry for reconsideration. That authority belongs to the Commissioner. Therefore, if any of the withheld portions of the Report that remain at issue do qualify for an exemption under s. 14(2)(a), this issue is also remitted back to the IPC to decide whether to return the matter to the Ministry for reconsideration and to instruct the Ministry to exercise its discretion in accordance with the findings and directions of the Commissioner as set out in Orders PO-3231-I, PO-3322-I, and PO-3402-F.[34]

[85] As mentioned above, the section 14(2)(a) exemption is discretionary and permits the ministry to disclose the information on pages 18-19, 23, and 42-44, despite the fact that it qualifies for the exemption. The ministry must exercise its discretion.

[86] In the present inquiry, the ministry expressly declined to provide submissions addressing its exercise of discretion. Given the Divisional Court's declaration that the ministry disregarded the proper direction of this office with respect to its exercise of discretion, the ministry's ongoing failure to re-exercise its discretion is particularly

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[34] *Criminal Lawyers' Association v Ministry of Community Safety and Correctional Services*, 2016 ONSC 6948, at paras 86-87.

troubling. Not only has the ministry repeatedly disregarded several orders of this office, but it has most recently ignored the Divisional Court's declaration, which was intended to "assist in the resolution of the dispute." In the absence of fresh submissions on its exercise of discretion, I find that the ministry continues to delegate its discretion to the affected parties and withhold the information "in accordance with [the interviewees'] wishes."[35] As I have previously determined and as has been affirmed by the Divisional Court, I find that this constitutes yet another failure on behalf of the ministry to properly exercise its discretion as required under the *Act*.[36]

[87] Accordingly, this matter must be sent back to the ministry to re-exercise its discretion based on proper considerations.

[88] In addition to the considerations and directions that I have set out at length in past orders,[37] it is important to highlight that the findings of this order effectively remove any barriers preventing disclosure of the majority of the record to the appellant. Once pages 120-160, 285-291, and 307-317 are disclosed, only pages 18-19, 23, and 42-44 will remain withheld under section 14(2)(a). These pages contain a few discreet paragraphs summarizing the interviews conducted with the three affected parties, the transcripts and synopses of which will be disclosed. While these pages do contain snippets of information that will qualify for exemption for the reasons outlined in paragraph 25 of Order PO-1779, very little of the information in pages 18-19, 23, and 42-44 will be unknown to the appellant once pages 120-160, 285-291, and 307-317 are disclosed. This is another consideration that must be taken into account by the ministry when exercising its discretion regarding the application of section 14(2)(a) to the summaries withheld in pages 18-19, 23, and 42-44.

ORDER:

1. I order the ministry to disclose pages 120-160, 285-291, and 307-317 to the appellant, with minor redactions in accordance with the finding at page 25 of Order PO-1779 that the affected parties' personal privacy interest with respect to certain information is not overridden by the public interest in its disclosure.

2. I do not uphold the redactions made by the ministry to pages 18-19, 23 and 42-44 on the basis that it has failed to exercise its discretion regarding the application of the discretionary law enforcement exemption at section 14(2)(a). I order the ministry to re-exercise its discretion in accordance with the findings and directions set out in this order as well as those set out in Orders PO-3231-I, PO-3322-I, and PO-3402-F. The ministry is to advise the appellant of the result of this further exercise of discretion in writing. If the ministry continues to

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[35] Ministry submissions to this office dated July 20, 2011.
[36] See Order PO-3322 at paras 29-31.
[37] Specifically, Orders PO-3231-I, PO-3322-I, and PO-3402-F.

withhold pages 18-19, 23, and/or 42-44, I order it to provide the appellant with an explanation of how it is exercising its discretion for each part of the report that is being withheld. The ministry is required to send the results of its further re-exercise of discretion and its explanation to the appellant, with a copy to this office, by no later than **August 27, 2018**. If the appellant wishes to respond to the ministry's further re-exercise of discretion and/or its explanation for exercising its discretion to withhold information, the appellant must do so within **21 days** of the date of the ministry's further decision.

3. I remain seized of this matter pending the resolution of the issue outlined in provision 2.

Original Signed by: July 27, 2018

Brian Beamish
Commissioner