Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3891

Appeal PA17-563

Ministry of Natural Resources and Forestry

October 17, 2018

Summary: The Ministry of Natural Resources and Forestry (the ministry) received a request for a document pictured in a photograph accompanying a specified newspaper article about an annual Haudenosaunee deer harvest, and any documents attached to it. The ministry located two maps on one page as responsive to the request. However, the ministry denied access to the record in its entirety on the basis of the discretionary law enforcement exemptions at sections 14(1)(e) (endanger life or safety) and 14(1)(l) (facilitate commission of an unlawful act), and the discretionary exemption at section 20 (danger to safety or health) of the *Act.* This order upholds the ministry's access decision.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 14(1)(e); *Provincial Parks and Conservation Reserves Act, 2006,* SO 2006, C 12 S. 5, S. 37.

Orders Considered: Orders PO-2603 and PO-2461.

OVERVIEW:

[1] Every year since 2013, a traditional deer harvest has been held at a provincial park ("the park") by the Haudenosaunee, who have a traditional treaty right to harvest in that area. According to the Ministry of Natural Resources and Forestry (the ministry), the deer in the park exceed the park's maximum capacity, so the harvest benefits the park's ecosystem. A single annual harvest normally comprises of three 2-day harvesting periods. The harvesters use archery equipment to harvest the deer for their personal or community use. The entire park is closed to the general public during this time, and

signs and barricades are put up at park access points to prevent access to the park. Before the harvest, the ministry mails notices to local residents and issues a news bulletin to inform the public and stakeholders about the harvest and the park's closure. Various law enforcement agencies [or certain ministry staff with "all the power and authority of a member of the Ontario Provincial Police (OPP)"[1] while on the grounds of the park] respond to public complaints and reports of trespassing, and ensure public safety as well as perimeter and entrance security during the harvest. Ministry staff are also on site to inform members of the general public that the park is closed.

[2] The ministry, the law enforcement agencies, and the harvesters themselves use two maps, which are the subject of this appeal, as navigational guides and for other purposes, which are confidential.

[3] The Toronto Star published an article about the deer harvest and protests of it, and included three photographs with the article. The largest photograph shows two harvesters looking at a document that consists of two maps on the same page. No details on either map can be seen in the newspaper photograph.

[4] Before making a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*), the requester contacted the ministry with questions about that Toronto Star article. She asked for the documents that the two harvesters were looking at in the largest photograph accompanying the article. The ministry provided her with a copy of the eight-page protocol of the harvest, and a clear colour copy of a version of one of the maps. That version highlights the boundaries of the park and harvest, and the park trails.

[5] The requester then made a request under the *Act* to the ministry for access to the colour copy of the documents pictured in the largest photograph accompanying the specified Toronto Star article and the reverse of each. She also sought access to any accompanying documents that may have been disengaged from what was pictured in the article.

[6] The ministry located two maps on one page in response to the request.

[7] The ministry decided to withhold the entire record under sections 14 (law enforcement) and 20 (danger to safety or health) of the *Act*, and issued an access decision accordingly.

[8] The requester, now the appellant, appealed the ministry's access decision to this office.

[9] During mediation, the ministry clarified that it is relying on sections 14(1)(e) (endanger life or safety), 14(1)(l) (facilitate the commission of an unlawful act), and 20 (danger to safety or health) of the *Act* to deny access to the record. Mediation was not successful and the appellant asked for this appeal to move to adjudication, where an

[1] *Provincial Parks and Conservation Reserves Act, 2006,* SO 2006, C 12 S. 5, S. 37.

adjudicator conducts an inquiry under the *Act*.

[10] At adjudication, I sought and received written representations from the parties on the issues set out in a Notice of Inquiry. I withheld portions of the ministry's representations due to confidentiality concerns, in keeping with the criteria for withholding representations found in this office's *Practice Direction 7*. After receiving the appellant's sur-reply representations, I determined that there was no need to share them with the ministry.

[11] The appellant disputes the safety of the harvest itself, but that is outside my legal authority to decide. This order can only address the issues listed below.

[12] This order upholds the ministry's decision to withhold the record. Since I have found that the section 14(1)(e) law enforcement exemption applies, there is no need to decide whether the exemptions at sections 14(1)(l) and 20 also apply.

RECORD:

[13] The record at issue consists of two maps on one page.

ISSUES:

A. Does the discretionary exemption at section 14(1)(e) apply to the record?

B. Did the institution exercise its discretion under sections 14(1)(e)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Does the discretionary exemption at section 14(1)(e) apply to the record?

[14] The ministry submits, and I find, that the law enforcement exemption at section 14(1)(e) applies to the record because disclosure of the record could reasonably be expected to give rise to the harms contemplated in section 14(1)(e), as explained below.

[15] Section 14(1)(e) states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > endanger the life or physical safety of a law enforcement officer or any other person;

[16] A person's subjective fear, while relevant, may not be enough to justify the section 14(1)(e) exemption.[2] The term "person" is not necessarily limited to a particular identified individual, and may include the members of an identifiable group or organization.[3]

[17] 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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> > policing,
> >
> > 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
> >
> > the conduct of proceedings referred to in clause (b).

[18] The term "law enforcement" has covered situations beyond a police investigation into a possible violation of the *Criminal Code.*[4]

[19] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[5]

[20] It is not enough for an institution to take the position that the harms under section 14 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.[6] How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[7] The institution 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.

[21] The ministry argues in its shared representations, and I find, that the record should be exempt in the same way that records revealing the nature of security systems and vulnerabilities in courthouses are exempt, as disclosure would show the nature of the park's security systems at or around the time of the harvest, and their vulnerabilities.[8]

[22] The ministry's affidavit evidence showing why the record is exempt under section

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[2] Order PO-2003.
[3] Order PO-1817-R.
[4] Orders M-16, MO-1245, M-202 and PO-2085.
[5] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[6] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.
[7] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[8] Order PO-2603.

14(1)(e) can be broadly categorized as concerning the confidential features and uses of the record (which were not shared with the appellant), and the detailed history of anti-harvest incidents (which was shared with the appellant). I will address each of these aspects of the ministry's evidence in turn.

Confidential features and uses of the record

[23] In its confidential representations, the ministry persuasively explains how disclosure of the record could reasonably be expected to result in the harm contemplated by section 14(1)(e) due to specified confidential features and uses of the record, which distinguish it from the version of a map disclosed to the appellant.

[24] The ministry submits that those opposed to the harvest could use the record in specified ways that the ministry confidentially explains. I cannot describe these ways in more detail without revealing the contents of the record. In its shared representations, the ministry also argues, and I find, that opponents of the harvest could reasonably be expected to use the information on the maps to gain unauthorized access to the park during the harvest, which would put the safety of these individuals at risk. The ministry argues in its shared representations, and I find, that these individuals could be inadvertently injured by the archery equipment used in the harvest since the harvesters, ministry staff, and law enforcement agencies would not know of the presence of those unauthorized individuals. I understand and accept both the ministry's shared and confidential explanations, and find that they support a conclusion that disclosure of the record could reasonably be expected to result in the harms contemplated by the law enforcement exemption at section 14(1)(e).

[25] In addition, disclosure of the record can reasonably be expected to endanger the lives of individuals other than those opposed to the harvest. Use of the confidential features and uses of the record by harvest opponents can also reasonbly be expected to endanger the lives and/or safety of law enforcement individuals, ministry staff (whether in a law enforcement capacity or not), and/or the harvesters.

[26] The ministry also argues, and I find, that the record cannot be severed without disclosing the confidential features and uses described in the ministry's confidential representations.

A detailed history or anti-harvest incidents

[27] To make the case that the section 14(1)(e) exemption applies, the ministry also relies on a detailed history of incidents that have occurred before or during the harvest, perpetuated by protestors and/or others opposed to the deer harvest. The ministry provided this evidence in affidavit form, so I reject the appellant's argument that this is a "litany of events without evidence". I find that this history is convincing evidence that the harms contemplated by section 14(1)(e) could reasonably be anticipated if the record was disclosed. These incidents, which have occurred without harvest opponents' knowledge of the confidential features and uses of the record, include:

a. Tampering with park infrastructure (including the removing of and replacement of locks, and damage to lock mechanisms so that keys do not work to impede staff access). This occurs annually before the start of the harvest dates;

b. Damage to, or removal of, park signs highlighting harvest dates and that the Park would be closed during the harvest. This occurs annually before the start of the harvest dates;

c. Painting over top of the harvest and park boundary markers that are painted by ministry staff (this occurs annually). Annually, prior to the harvest, ministry staff spray paint park trees to identify the harvest boundary (which is at least 150 metres inside the park boundary). Ministry staff use another colour to mark the southern boundary of the Park (adjacent to private properties). These markers are provided to the harvesters to ensure that harvesting occurs only within the harvest area and so that harvesters do not inadvertently trespass onto adjacent private property. When these markers are painted over, this leads to confusion among harvesters and ministry staff as to where the harvesting and Park boundaries are located;

d. Placement of objects on park trails to impede travel and potentially injure staff and harvesters. Objects have included fallen trees and tree limbs (this occurs annually before start of the harvest dates);

e. Unauthorized installation of at least one game camera to record video and pictures of ministry staff and Haudenosaunee harvesters within the harvest area (occurred in 2016 immediately prior to harvest start);

f. Littering of the park with synthetic predator urine soaked dryer sheets and activated smoke alarms in an effort to scare deer out of the harvest area and park (occurred in 2016 the evening before the harvest start);

g. Protesters have engaged in yelling (including expletives), hitting vehicles with hands and/or signage and have attempted to dislodge or damage harvester equipment stored in vehicles while the harvesters exit from the park (this occurs annually during the harvest dates).

h. Placement of metal spikes and nails in the trail that provides access to the harvest area. The intent was to damage staff and harvester vehicles and could have resulted in vehicle accident(s) and injury due to the topography of the area, consisting of steep slopes and watercourse immediately adjacent to the trail (this occurred in 2017 immediately prior to harvest start); and

i. Physical confrontations initiated by protesters towards ministry staff. These include examples of passive resistance such as when protestors have blocked ministry staff from leaving the park on foot or in vehicles. In one instance, protesters blocked ministry staff from leaving the maintenance compound during a harvest and would not move until [a specified law enforcement agency] arrived

> to facilitate the staff exit. Additionally, one incident resulted in a charge being laid against a protester for assault against a ministry staff member (this occurred in 2017 during the harvest).

[28] In its shared representations, the ministry argues, and I find, that the history of anti-harvest incidents is a reasonable basis for believing that if the confidential features and uses of the record were disclosed, they would be used by opponents of the harvest. Confrontations would then increase between protesters and ministry staff and/or the harvesters, which could reasonably be expected to result in harm to any of these individuals. The ministry indicates that despite the detailed history of incidents provided and ongoing protests, there have been no injuries to harvesters, ministry staff, or members of the public to date. The ministry credits this to the presence of, and duties performed by, the various law enforcement agencies and ministry staff maintaining safety and security. I accept this, and find that disclosure of the record could reasonably be expected to undermine the ability of law enforcement personnel to secure the park's perimeter and maintain public safety.

[29] The appellant argues that some of the incidents listed by the ministry are "frivolous" in nature, but I disagree. As mentioned, evidence in the context of law enforcement exemptions should generally be approached with particular sensitivity, recognizing the difficulty of predicting future events in a law enforcement context.[9] I do not find a reason to depart from this approach in this case. I find that these incidents justify a belief that the harms contemplated by section 14(1)(e) could reasonably be expected to occur as a result of the disclosure of the record at issue.

[30] The appellant also attempted to diminish the weight of this history by stating that the events are not attributed to named individuals. However, I am unpersuaded that names are required to be disclosed to give this detailed evidence significant weight.

[31] The appellant also submits that the ministry's detailed list does not include another alleged incident (this one by ministry staff against a "demonstrator"), but even if that is the case, that would support the ministry's position, not the appellant's. A plain reading of the ministry's affidavit shows that it is not an exhaustive history of anti-harvest incidents because the word "includes" precedes the list. Even if the incident alleged by the appellant occurred, I would consider that as additional evidence of the intense nature of the confrontations between law enforcement and persons opposed to the harvest. This supports, rather than detracts from, the ministry's position that the lives and physical safety of law enforcement officers and other individuals [the interests covered by section 14(1)(e)] are real interests in this case, deserving special sensitivity when considering the disclosure of the record.

[32] I also disagree with the appellant's contention that the ministry is claiming the exemption because it has "ascribed the risk" of disclosing the record to her and is "discriminating against [her] without any proof that [she] is the culprit in these

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[9] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

activities". The ministry did not directly or indirectly identify any individual in its shared or confidential representations, and referred to the number of protesters as being between 6 and 30 people. Having reviewed both the shared and confidential representations of the ministry, I find that the reasons for withholding this record would apply regardless of the identity of the requester.

[33] In addition, I reject the argument that the depiction of the harvester in the newspaper with the record itself undermines the confidential nature of the record. It is impossible to discern any level of detail from looking at the Toronto Star photograph. The appellant also argues that because the record was made available to the Toronto Star reporter, it should be made available to her too, and that the difference in treatment is discrimination against the appellant due to her opposition to the harvest. However, I accord greater weight to the affidavit evidence of the ministry as leader of media relations[10] that it is not aware that any photographs of the record were taken. This suggests, at a minimum, that the ministry did not allow any photographs of the record to be taken close enough to reproduce the confidential features of the record.

[34] Finally, I do not accept the appellant's submission that because this record is distributed to the Haudenosaunee harvesters, it should be disclosed to her under the *Act*. There are many reasons for my rejection of this argument.

[35] The appellant claims that the record "could and most likely do[es] end up in any hands". However, there is no evidence before me that this record has been distributed beyond the harvesters.

[36] The appellant also indicates that a harvester was "offering" the record to the Toronto Star photographer to show that harvesters share this record with non-harvesters/law enforcement personnel. I do not agree. The harvest protocol disclosed to the appellant clearly indicates that ministry staff lead media relations (including media interviews), so I reject the premise that the harvester photographed at a distance with the record "offered" this record on terms that were not controlled or contrary to the interests of the life or safety of any individual.

[37] I also find the ministry's evidence sufficiently demonstrates that these arguments are without merit. The ministry provided affidavit evidence that to the best of the ministry's knowledge, harvesters who participate in the Haudenosaunee harvest at the park understand that the record is provided for their use during the harvest and should not be distributed. I find that, especially given the history of anti-harvest incidents that has occurred without access to confidential features and uses of the record, it is reasonable to believe that the harvesters have a strong individual and community self-interest in not distributing the record.

[38] I also find that it would be contrary to the spirit and purpose of the *Act* to provide access to this record beyond the harvesters, ministry staff, and law enforcement agencies who require it for the uses (both shared and confidential) that

[10] Page 3 of the harvest protocol disclosed to the appellant.

they have for it. For these reasons, the fact that the Haudenosaunee harvesters have possession of the record does mean that the record cannot be exempt by the law enforcement exemption at section 14(1)(e).

[39] Therefore, I find that the law enforcement exemption at section 14(1)(e) applies to the record on the basis of the evidence before me about the confidential features and uses of the record, and the history of anti-harvest incidents, subject to my review of the ministry's discretion. As I have found that section 14(1)(e) applies to the record, I do not have to consider the possible application of sections 14(1)(l) and 20 to it.

Issue B: Did the institution exercise its discretion under section 14(1)(e)? If so, should this office uphold the exercise of discretion?

[40] On the basis of the following, I find that the ministry properly exercised its discretion under the exemption at section 14(1)(e) of the *Act*.

[41] The appellant argues that if the ministry provided access to the full record, it would be showing good faith towards her and it would promote, or be consistent with, transparency and even public safety. I disagree. The *Act* stipulates that access can (and sometimes must) be limited by certain exemptions, including the one claimed in this case. Therefore, the appellant's argument on this point is without merit.

[42] The section 14(1)(e) 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.

[43] 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.

[44] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[11] This office may not, however, substitute its own discretion for that of the institution.[12]

[45] Here, the ministry provided the appellant with information about the harvest, and a version of a map used in the harvest, but withheld information based on several considerations. The ministry considered and balanced the circumstances of the request, the purposes of the *Act*, and the nature of the exemption. These were proper and relevant considerations, and I am satisfied that they were made in good faith and not in

[11] Order MO-1573.
[12] Section 43(2).

bad faith. There is no evidence before me that the ministry took into consideration any irrelevant factors.

[46] I specifically reject the appellant's submission that the information was withheld because of her identity. The evidence shows otherwise: the ministry did not identify any individual as being a specific threat to law enforcement or public health and safety, and in fact referred to protesters ranging from 6 to 30 people. As discussed, I am also satisfied by the ministry's representations that the reasons for withholding the record would remain regardless of the identity of the requester, as disclosure under the *Act* is effectively disclosure to the world.[13].

[47] For these reasons, I uphold the exercise of discretion by the ministry.

ORDER:

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

Original signed by
Marian Sami
Adjudicator

October 17, 2018

[13] Order PO-2461.