Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-3925-I

Appeals PA16-387 and PA16-389

Ministry of the Attorney General

January 31, 2019

Summary: The appellant, a media requester, made requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to an SIU investigation into the high-profile shooting death of an individual by a police officer. One request was for the names of the officers involved in the shooting, while the other was for a copy of the SIU Director's Report. The appellant asserted that there is a public interest in the disclosure of this information. The ministry denied access to the witness list and the SIU report, citing the application of the exemptions at sections 14(2)(a) (law enforcement report) and 21(1) (personal privacy) of the *Act*, and noting that the public interest override at section 23 of the *Act* does not apply to information exempt under section 14(2)(a).

The appellant appealed the ministry's decisions. During the adjudication of the appeals, some parties asked the adjudicator to recuse herself on the basis that a reasonable apprehension of bias exists, in light of certain comments the Commissioner had made to the media. Also during adjudication, certain other proceedings took place: a coroner's inquest was held into the death of the individual in question, and the Honourable Justice Tulloch released a report containing recommendations on matters related to police oversight and the transparency thereof.

In this order, the adjudicator finds that no reasonable apprehension of bias exists in respect of her adjudication of the appeals. She finds that the question of access to the subject officer's name as it appears in the witness list is moot, because that officer was publicly identified as the shooter in the coroner's inquest. She finds that neither section 14(2)(a) nor section 21 applies to the names of the witness officers and orders their names as they appear in the witness list to be disclosed to the appellant. The adjudicator upholds the ministry's application of section 14(2)(a) to the SIU report, but orders the ministry to re-exercise its discretion under section 14(2)(a).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, sections 2(1) definition of "personal information", 4(1), 8(1), 14(2)(a), 21(1), 50, 52(1), 56(1), and 57(5).

Orders and Investigation Reports Considered: Orders PO-3617, PO-3868-I, PO-1959, PO-3169, PO-2225, P-1295, PO-2879-R, M-271, PO-3322-I, and PO-3402-F.

Cases Considered: *Committee for Justice and Liberty et al. v National Energy Board et al.*, [1978] 1 SCR 369, 1976 CanLII 2 (SCC); *Ontario Medical Association v Ontario (Information and Privacy Commissioner)*, 2017 ONSC 4090 (Div. Ct.), appeal dismissed 2018 ONCA 673; *Alberta Teachers' Association v Alberta (Information and Privacy Commissioner)*, 2011 ABQB 19; *Borowski v The Attorney General of Canada*, (1989), 57 DLR (4th) 231 (SCC).

BACKGROUND:

[1] These appeals arise out of the shooting death of an individual by a police officer in 2015. After the shooting, the Special Investigations Unit (the SIU) invoked its mandate and investigated the circumstances of the shooting. Following that investigation, the Director of the SIU released his report in which he concluded that there were no reasonable grounds to believe that the officer exceeded the ambit of justifiable force in the circumstances. As a result, no charges were laid.

[2] Much media and public attention followed this event, and in April 2016, the Ontario government publicly released a redacted version of the report. It also ordered that the Honourable Michael Tulloch, a Justice of the Ontario Court of Appeal, be appointed as Independent Reviewer to review and make recommendations on matters related to police oversight and the transparency thereof. A coroner's inquest into the individual's death was also held in the summer of 2017.

[3] The appellant, a reporter, submitted two requests to the Ministry of the Attorney General (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to certain records relating to the SIU's investigation.[1]

[4] One request was for the SIU Director's Report relating to the SIU investigation.[2] The appellant asserted that there is a public interest in the disclosure of this information.

[5] The other request was for the following:

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[1] The SIU is an arm's length agency of the ministry.

[2] The request was initially for "all Special Investigations Unit director's reports since 1990 inclusive", but during mediation at the IPC, the appellant narrowed the scope of its request to the SIU Director's Report in question.

> The names of the officers involved in the fatal shooting of [a named individual] by Toronto police on [a particular date], 2015. The name of the subject officer and the name of the witness officer in the SIU investigation.
>
> This request is being made by the media [the named media outlet] in the public interest …

Appeal PA16-387

[6] The ministry denied the request for the full SIU Director's Report (the SIU report), citing the application of the exemptions at sections 14(2)(a) (law enforcement report) and 21(1) (personal privacy) of the *Act.* The ministry noted that the public interest override at section 23 of the *Act* cannot apply to records withheld under section 14.

[7] The appellant appealed the ministry's decision to this office and Appeal PA16-387 was opened. Mediation did not resolve the issue of access to the SIU report, and the appeal was moved to the adjudication stage.

Appeal PA16-389

[8] The ministry issued a decision denying access to the names of the officers involved in the shooting (the subject officer and witness officers in the SIU investigation), again citing the application of the exemptions at sections 14(2)(a) and 21(1) of the *Act*, and again noting that the public interest override at section 23 of the *Act* does not apply to records withheld pursuant to section 14.

[9] The appellant appealed the ministry's decision to this office and Appeal PA16-389 was opened. During the course of mediation, the ministry maintained its decision to deny access to both the subject and witness officers' names, which are listed on a record titled "Witness List." No further mediation was possible and the appeal was moved to the adjudication stage.

Developments during adjudication

[10] In each appeal, I issued a Notice of Inquiry inviting representations from the ministry. In Appeal PA16-389, I also invited representations from the affected police officers. Another Notice of Inquiry was then sent to an additional affected party. Other parties then indicated a desire to participate in the appeals and they were added as affected parties. Ultimately, several parties including the appellant, the ministry, the affected police officers and the Toronto Police Service participated in both appeals.

[11] Some parties to Appeal PA16-389 then raised an allegation of bias or a reasonable apprehension of bias on my part, in light of certain comments made to the Toronto Star by the Information and Privacy Commissioner (the Commissioner).

[12] Several parties also requested that these appeals be placed on hold pending 1) the issuing of the report of Justice Tulloch, and 2) the outcome of the coroner's inquest into the death of the individual in question. After receiving submissions from the appellant, who objected to the appeal being placed on hold, I decided to place the appeals on hold pending the conclusion of these matters.

[13] The report of Justice Tulloch was released on March 31, 2017 and is publicly available. In Chapter 6 of his report, Justice Tulloch made several recommendations with respect to both the release of the names of subject and witness officers (as well as those of civilian witnesses), and the release of SIU Director's reports. I discuss those recommendations in more detail under Issue B below.

[14] During the coroner's inquest, which took place in June 2017, the identities of some officers interviewed in the SIU's investigation, including the subject officer, were made public.

[15] Following the conclusion of the inquest, I contacted the ministry to inquire about its intentions with respect to the release of further information, in light of Justice Tulloch's recommendations. The ministry responded as follows:

> Concerning the release of subject and witness officers, Justice Tulloch recommends only the names of charged officers be released (s. 6.200 of the Justice Tulloch Report). In this case, the officers were not charged and the ministry's decision remains unchanged.
>
> Concerning the release of the director's report, there is no change to the ministry's decision. Please see below:
>
> > • Starting in December, the ministry will release past SIU Director's reports involving extensive police interaction where a fatality occurred from the last ten years, while giving affected family members the opportunity to raise concerns.
> >
> > • Reports prior to 2005 involving extensive police interaction where a fatality occurred will be released starting in spring 2018, while giving affected family members the opportunity to raise concerns.
> >
> > • For all other past reports, such as those where a serious injury occurred, the affected person can request a copy of their report starting in early 2018.
> >
> > • In accordance with Justice Tulloch's recommendations, a third party, like the media, may request a report when there is a significant public interest.

> • Again, the reports will be released in a form that appropriately balances transparency and privacy and safety concerns.

[16] In light of the above-mentioned developments, I issued a Revised Notice of Inquiry to the ministry and affected parties. In the Revised Notice of Inquiry, in addition to inviting representations on the exemptions claimed by the ministry, I asked the parties to comment on the relevance of the fact that it appears that some officers' names are now public as a result of the coroner's inquest. The parties were also asked to speak to the impact, if any, of Justice Tulloch's recommendations on the issues in the appeals. I also asked the parties for submissions on the bias issue.

[17] The Toronto Police Service and the affected police officers filed representations in response to the Revised Notice of Inquiry.[3] The affected police officers maintained their position on bias, submitting that a reasonable apprehension of bias exists in respect of both appeals.

[18] Severed copies of these representations[4] were provided to the appellant, who was asked to provide representations. The appellant provided a response adopting representations he had made earlier in the adjudication stage responding to the "on hold" issue.

[19] In this order, I find that there is no reasonable apprehension of bias on my part and I deny the request to recuse myself from these appeals. I uphold the ministry's application of section 14(2)(a) (law enforcement report) to the SIU report, but I order the ministry to re-exercise its discretion under section 14(2)(a). With respect to the list of witnesses, I find that the question of access to the name of the subject officer is moot because his name was made public during the coroner's inquest. I find that neither section 14(2)(a) nor section 21 applies to the remainder of the names and I order the ministry to disclose their names as they appear in the witness list to the appellant.

RECORDS:

[20] There are two records at issue:

- the SIU report, except for the portions already publicly disclosed
- a Witness List containing the names of the subject and witness officers

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[3] I also received correspondence from an affected party.

[4] Certain portions of the representations were withheld in accordance with the confidentiality criteria found in *Practice Direction 7: Sharing of Representations.*

ISSUES:

A. Is there bias or a reasonable apprehension of bias on my part?

B. What is the significance of the recommendations found in the Tulloch Report with respect to the issues in these appeals?

C. Does the discretionary exemption at section 14(2)(a) apply to the records?

D. Does the witness list contain "personal information" as defined in section 2(1)? If so, does the mandatory personal privacy exemption at section 21(1) apply to the information at issue?

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

DISCUSSION:

A: Is there bias or a reasonable apprehension of bias on my part?

[21] The police officers, through their counsel, have raised an allegation of bias or a reasonable apprehension of bias on my part, in light of certain comments that the Commissioner made to the Toronto Star.

[22] I begin by setting out the Commissioner's statements at issue. The following statements, which pre-date either of these appeals being filed with this office, were made to the Toronto Star:

1) Commissioner's statement sent to the Toronto Star on April 15, 2016

> *While the name of a police officer who has been the subject of an investigation by the Special Investigations Unit (SIU) would likely be personal information, there may be circumstances of significant public interest where the SIU may disclose the name or other information associated with its completed investigations for the purposes of fostering accountability and public confidence in police services, and ensuring transparency in its operations.*

2) Commissioner's statement sent to the Toronto Star on April 29, 2016

> *I'm pleased that, at a minimum, a redacted version of the report has been released. Having not seen the witness statements, it is difficult to determine whether they should have been released with names redacted. It does seem likely that some portions of those statements could have been disclosed without identifying witnesses, in compliance with privacy laws. I understand the*

> *position of the government that formal assurances of confidentiality were made and the reluctance to retroactively change the rules of the game. However, I continue to believe that there is a significant public interest in the release of some personal information in reports of this nature, for example, the names of subject officers. Going forward, I believe the rules need to be revised immediately so that families and the public have all the information they need, including personal information, to assess SIU investigations and findings. I'm hopeful that the appointment of Justice Tulloch will lead to a more open and transparent process and I look forward to contributing to his work.*

[23] When I invited representations from the parties on the bias issue, I provided them with other documents that may also be relevant to this issue, including an April 27, 2016 letter from the Director of the SIU to the Commissioner and the Commissioner's response of May 9, 2016, slides from the Commissioner's presentation at the Ontario Connections conference on June 8, 2016, and the Commissioner's *Submission to the Ministry of Community Safety and Correctional Services on its Strategy for a Safer Ontario* dated April 29, 2016. I invited the parties to provide submissions on whether there is an issue of actual bias or a reasonable apprehension of bias in this case, and I set out a number of questions for the parties to address:

1. Do you allege that institutional bias exists in light of the Commissioner's statements? Please explain.

2. Do you allege that bias by association exists in light of the Commissioner's statements? Please explain.

3. Is the doctrine of corporate taint relevant to the bias issue that has been raised? Please explain.

4. Is there an allegation of actual bias on the part of myself, or on the part of the Commissioner, or both? Please explain.

5. What is the test for reasonable apprehension of bias, in light of the nature of the activities and the functions of the Commissioner? (see, for example, *Bell Canada v. Canadian Telephone Employees Assn.*, 2003 SCC 36 (CanLII), [2003] 1 S.C.R.) Please explain.

6. Does the doctrine of necessity apply here? Please explain.

7. Does the fact that the subject officer's name is now public affect the bias issue? Please explain.

[24] I also asked the parties to refer to the Divisional Court's decision in *Ontario Medical Association v Ontario (Information and Privacy Commissioner)*[5], where the Court stated:

> [T]here is no basis upon which it could be concluded that because the Commissioner made some statements, to which objection was taken, that every other decision-maker associated with IPCO is equally "tainted".

[25] I asked the parties to comment on whether the Divisional Court's reasoning on the allegation of bias in that case is applicable here.

Representations

[26] Counsel for the police officers made submissions on bias in his representations. Another party, who had initially also raised the bias issue, did not again raise the bias issue in response to the Revised Notice of Inquiry, but I have reviewed that party's initial submissions on the bias issue and have taken them into account in coming to my conclusions.

[27] The affected police officers note that section 52 of the *Act* provides that "the Commissioner" may conduct an inquiry to review a decision. Under section 56(1) of the *Act*, the Commissioner can delegate decision-making to adjudicators. The officers submit that adjudicators are not independent of the Commissioner and they exercise powers of the Commissioner under section 52 of the *Act*.

[28] The officers submit, correctly, that actual bias need not be shown; an applicant is only required to show that there is a reasonable apprehension of bias. The officers cite a number of authorities fleshing out the test for a reasonable apprehension of bias. They submit that given the context within which the Commissioner's comments were made, his comments demonstrate either a bias or a reasonable apprehension of bias such that it is not appropriate for him or one of his designates to conduct the inquiry or make a decision on the issue of access to the SIU report before me. The officers submit that a properly informed and reasonable observer would be of the view that the Commissioner (and by extension, his adjudicators) has already made a determination that more information could be disclosed than has been disclosed and that doing so would be consistent with the privacy legislation in Ontario.

[29] The officers submit that while they recognize that the Commissioner has a statutory right under section 59(a) of the *Act* to "offer comment on privacy protection

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[5] 2017 ONSC 4090 (Div. Ct.), appeal dismissed 2018 ONCA 673.

implications of proposed legislative schemes or government programs", his comments do not fall within that permissive provision. The officers note that the comments offered by the Commissioner were specific to the redactions that had been undertaken by the SIU and/or the ministry in respect of the SIU report in question. In the officers' submission, the public's confidence in the administration of the *Act* would be undermined if the Commissioner or his designate were to adjudicate these appeals.

[30] The officers rely on an Alberta decision, *Alberta Teachers' Association v Alberta (Information and Privacy Commissioner)*[6] , where the Court of Queen's Bench found that certain comments made by the Alberta Commissioner about a Court of Appeal decision adverse to him demonstrated a reasonable apprehension of bias that precluded the Commissioner from continuing to adjudicate a matter.

[31] The officers submit that the comments of the Ontario Divisional Court about bias in *Ontario Medical Association v Ontario (Information and Privacy Commissioner)* were made in *obiter*, that it is not clear from the decision whether the Court had the benefit of full argument on the issue, and that the decision does not analyze the statutory structure of the IPC as the police officers have.

[32] Another party also initially made submissions on the bias issue, but did not again raise the bias issue in response to the Revised Notice of Inquiry. As noted above, I have taken that party's initial submissions on the bias issue into account in coming to my conclusions.

Discussion

Statutory framework

The Commissioner's powers and duties

[33] The Commissioner is appointed by the Legislature pursuant to section 4(1) of the *Act*, to "exercise the powers and perform the duties prescribed by this or any other Act".

[34] The Commissioner has multiple functions under the *Act.* Under sections 50(1) and 57(5), parties can ask the Commissioner to review institutions' decisions relating to access, correction and fees. The relevant section for the purposes of these appeals is section 50(1), which states:

> A person who has made a request for,
>
> (a) access to a record under subsection 24 (1);

[6] 2011 ABQB 19.

> (b) access to personal information under subsection 48 (1); or
>
> (c) correction of personal information under subsection 47 (2),
>
> or a person who is given notice of a request under subsection 28 (1) may appeal any decision of a head under this Act to the Commissioner.

[35] Section 52(1) provides that the Commissioner may conduct an inquiry to review the head's decision:

> The Commissioner may conduct an inquiry to review the head's decision if,
>
> (a) the Commissioner has not authorized a mediator to conduct an investigation under section 51; or
>
> (b) the Commissioner has authorized a mediator to conduct an investigation under section 51 but no settlement has been effected.

[36] Under Part V (General) of the *Act*, section 59 gives the Commissioner the power to do various things in addition to hearing and determining appeals under Part IV of the *Act*. Part of the Commissioner's function is to fill an educational and advisory role:

> The Commissioner may,
>
> (a) offer comment on the privacy protection implications of proposed legislative schemes or government programs;
>
> (b) after hearing the head, order an institution to,
>
> (i) cease collection practices, and
>
> (ii) destroy collections of personal information,
>
> that contravene this Act;
>
> (c) in appropriate circumstances, authorize the collection of personal information otherwise than directly from the individual;
>
> (d) engage in or commission research into matters affecting the carrying out of the purposes of this Act;
>
> (e) conduct public education programs and provide information concerning this Act and the Commissioner's role and activities; and
>
> (f) receive representations from the public concerning the operation of this Act.

The Commissioner's power to delegate

[37] Section 8(1) of the *Act* empowers the Commissioner to employ staff for the efficient operation of this office. Section 56(1) allows the Commissioner to delegate most of his powers and duties under the *Act* to those staff:

> The Commissioner may in writing delegate a power or duty granted to or vested in the Commissioner to an officer or officers employed by the Commissioner, except the power to delegate under this section, subject to such limitations, restrictions, conditions and requirements as the Commissioner may set out in the delegation.

Analysis and finding

[38] As the above review of the legislation makes clear, the Commissioner, and by extension his office, serves multiple functions. In *Bell Canada v. Canadian Telephone Employees Assn.*,[7] the Supreme Court, after noting that impartiality is a component of procedural fairness, stated:

> A tribunal may have a number of different functions, one of which is to conduct fair and impartial hearings in a manner similar to that of the courts, and yet another of which is to see that certain government policies are furthered. In ascertaining the content of the requirements of procedural fairness that bind a particular tribunal, consideration must be given to all of the functions of that tribunal. It is not adequate to characterize a tribunal as "quasi-judicial" on the basis of one of its functions, while treating another aspect of the legislative scheme creating this tribunal — such as the requirement that the tribunal follow interpretive guidelines that are laid down by a specialized body with expertise in that area of law — as though this second aspect of the legislative scheme were external to the true purpose of the tribunal. All aspects of the tribunal's structure, as laid out in its enabling statute, must be examined, and an attempt must be made to determine precisely what combination of functions the legislature intended that tribunal to serve, and what procedural protections are appropriate for a body that has these particular functions.

[39] The Court then stated:

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[7] 2003 SCC 36 (CanLII), [2003] 1 S.C.R.

> In answering this question [of whether a reasonable apprehension of bias exists], we must attend not only to the adjudicative function of the Tribunal, but also to the larger context within which the Tribunal operates.

[40] The legislative context for the Commissioner's statements is set out above. The factual context in which the Commissioner's statements were made is also important. In April 2016, the Honourable Michael H. Tulloch (Justice Tulloch) was charged with reviewing Ontario's three civilian police oversight bodies, including the SIU.[8] The report focussed on recommendations to improve the transparency, accountability, and effectiveness of these oversight bodies. As part of his review, Justice Tulloch consulted with various stakeholders. I am not privy to any consultations Justice Tulloch had with the Commissioner.

[41] In addition, in 2016 the Ministry of Community Safety and Correctional Services (MCSCS) was conducting a public consultation on its Strategy for a Safer Ontario, which was to include a review of the *Police Services Act*. As part of that consultation process, the Commissioner made a submission to MCSCS outlining his recommendations on a number of matters including transparency with respect to, among other things, the outcome of police conduct-related decisions including those associated with SIU investigations.

[42] In my view, the Commissioner's statements to the Toronto Star are entirely consistent with his consultative role, in keeping with his powers set out in section 59 of the *Act*. I also note that, while this is not determinative of the bias issue, neither Appeal PA16-389 nor Appeal PA16-387 was open in this office at the time of the Commissioner's statements.

[43] It is significant that the Commissioner's statements were clearly made in the context of providing his views on proposed government policy, not as a commentary on the application of the *Act* to the records at issue in these appeals.

[44] It is true that the Commissioner's statements refer to the possible public interest in disclosure of the records at issue in these appeals, and that the public interest in disclosure is an issue that was raised by the appellant in both these appeals. In my view, however, given the context in which the Commissioner's statements were made and his powers under section 59, this is not enough to establish bias or a reasonable apprehension of bias on my part.

[45] In Ontario Medical Association v Ontario (Information and Privacy Commissioner)[9], the Divisional Court dealt with a circumstance where an adjudicator of

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[8] Report of the Independent Police Oversight Review, The Honourable Michael H. Tulloch (the Tulloch Report).
[9] 2017 ONSC 4090 (Div. Ct.), appeal dismissed 2018 ONCA 673.

this office (who was, like myself, a delegate of the Commissioner) heard and decided an appeal into a matter upon which the Commissioner had made a public statement. In the order in question, Order PO-3617, the adjudicator stated:

> During this inquiry, the issue of public disclosure of the amounts paid to physicians under OHIP has been the subject of extensive discussion in the media, as evidenced by the substantial number of press clippings provided to me by the parties. This order is my independent and impartial decision under the *Act.* It is based on the evidence and argument I have received, and on my own analysis of the legal issues.

[46] Order PO-3617 was the subject of an application for judicial review, which was dismissed. In addressing the allegation of a reasonable apprehension of bias raised by several applicants, the Divisional Court stated:

> One final issue needs to be addressed. The applicants, other than the [Ontario Medical Association] submitted that there was a reasonable apprehension of bias on the part of the Adjudicator. This complaint arises in the context where originally this matter was going to be determined by Commissioner Beamish. However, Commissioner Beamish made certain statements, that were reported in the media, that led the objecting applicants to complain that he had prejudged the matter. It should be noted that the Commissioner has express statutory authority, under s. 59 of *FIPPA*, to comment on privacy protection implications; engage in public education; and provide information concerning *FIPPA* and the Commissioner's role and activities. The Commissioner's statements must be viewed in that context. However, as a consequence of the concerns raised, and without accepting that they were valid, Commissioner Beamish recused himself and the matter was referred to the Adjudicator.
>
> In my view, assuming for the purposes of this submission that a reasonable apprehension of bias existed as it related to the involvement of the Commissioner, there is no merit to the submission that there remained a reasonable apprehension of bias that attached to the Adjudicator. For one thing, no such issue was raised by the objecting applicants with the Adjudicator at any time up to and including the release of the Order. It was only after the Order was received that the complaint was extended to the Adjudicator.
>
> For another, there is no basis upon which it could be concluded that because the Commissioner made some statements, to which objection was taken, that every other decision-maker associated with IPCO is equally "tainted". If that were the result, IPCO would be effectively precluded from deciding the issue at all, a result that would be absurd. If there was a problem arising from the Commissioner's public statements, it was fully addressed when the Commissioner recused himself. The fact is

> that there is no reason or foundation to conclude that the Adjudicator reached anything other than his own personal decision based on the record that was before him. Indeed, the Adjudicator said precisely that in his reasons.
>
> I would add that there is a presumption of impartiality and the threshold for establishing a reasonable apprehension of bias is a high one.[10] It is not even approached, much less met, in this case.

[47] The Court's reasoning is applicable to the instant appeals. In my view, the Commissioner's public statements with respect to transparency and the SIU, when viewed in the context in which they were given, are not indicative of a reasonable apprehension of bias on the Commissioner's part with respect to the appeals before me. In any event, even if there were such a reasonable apprehension of bias on the part of the Commissioner, I find that there is no reasonable basis for finding that any such apprehension of bias extends to me. In my view, the fact that I am the Commissioner's delegate, taken alone, is insufficient to support such a finding.

[48] In Committee for Justice and Liberty et al. v National Energy Board et al.,[11] Justice de Grandpré articulated what has become the widely-accepted test for establishing a reasonable apprehension of bias:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."

[49] I do not accept the submission that because I am the Commissioner's delegate, I am "tainted" as a result of the Commissioner's public statements. As noted above, there is a presumption of impartiality and the threshold for establishing a reasonable apprehension of bias is a high one. In light of the context in which the Commissioner's statements were made, I am not satisfied that the parties alleging bias have demonstrated that an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that I would not decide fairly. Like the adjudicator in Order PO-3617, I have reached my conclusions in these appeals independently and impartially, based on the evidence and argument before me and my own analysis of the issues.

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[10] Here, the Court cited *Martin v. Martin* (2015), 2015 ONCA 596 (CanLII) at para. 71.
[11] [1978] 1 SCR 369, 1976 CanLII 2 (SCC).

[50] Finally, I will briefly address the officers' reliance on *Alberta Teachers' Association v. Alberta (Information and Privacy Commissioner)*[12]. While a decision of the Alberta courts is not binding on me, it is distinguishable in any event. First, in *Alberta Teachers' Association*, the Alberta Commissioner's impugned comments were made in the context of a preliminary decision deciding that a particular complaint should proceed to an inquiry. In the preliminary decision, the Alberta Commissioner was critical of an Alberta Court of Appeal decision that was relevant to the very issue to be decided in the inquiry. This is an entirely different context from that of the Commissioner's statements in the appeals before me, which were made in the context of his role under section 59 of the *Act*. Second, although the Alberta Court of Queen's Bench found that the Alberta Commissioner's comments gave rise to a reasonable apprehension of bias on his part, the Court did not find that the Commissioner's delegates were automatically "tainted", leaving the bias issue to be raised before whoever would be delegated the task of rehearing the preliminary issue.

[51] For the above reasons, I find that there is no reasonable apprehension of bias on my part with respect to the adjudication of these appeals. I will now address the substantive issues in the appeals, beginning with the impact of Justice Tulloch's recommendations on the issues.

B: What is the significance of the recommendations found in the Tulloch Report with respect to the issues in these appeals?

[52] Justice Tulloch made a number of recommendations in his report relating to the extent to which information gathered in an SIU investigation should be made public. As some of his recommendations touch on the issues in these appeals, I set out the relevant portions of his recommendations below.

[53] With respect to the disclosure of the name of a subject officer, Justice Tulloch stated:

> At the end of an investigation, the SIU should release the name of a subject officer if the officer is charged.

[54] Justice Tulloch, however, stated his opinion that subject officers' names should not be released when they are not charged. He stated that releasing the officer's name would not make the SIU investigation any better and would not improve transparency in a meaningful way; it would not make it any easier to understand why the SIU did not investigate, or why the SIU did not lay charges.

[55] As for witness officers, Justice Tulloch wrote that releasing their names would

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[12] 2011 ABQB 19.

add little to the public's understanding of the SIU's investigation. Therefore, he recommended:

> The names of witness officers should not be released.

[56] Justice Tulloch also made recommendations with respect to the release of SIU reports. His recommendations with respect to past reports (such as the one before me) are:

> The Attorney General should release past reports in the following circumstances:
>
> > (a) In all incidents in which a person died, prioritizing cases in which there was no coroner's inquest, subject to the privacy interests of the deceased's family;
> >
> > (b) In any incident on request of the affected person, or if the affected person is deceased, a family member of the affected person; and
> >
> > (c) On request of any individual, when there is significant public interest in the incident reported on, subject to the privacy interest of the affected person, or if the affected person is deceased, the privacy interests of that person's family.
>
> Past reports should exclude the information set out in recommendation 6.9. Whenever possible, editorial notes should provide a summary of what the excluded information was about and an explanation for why it was necessary to remove it.

[57] Recommendation 6.9 stated the following:

> For cases that do not result in a criminal charge, the director's report should not include the following information:
>
> > (a) Names of subject officers, witness officers, affected persons, or civilian witnesses (or any other evidence or information identifying them to the public);
> >
> > (b) Any information that, in the discretion of the director, could lead to a risk of serious harm;
> >
> > (c) Any information disclosing confidential police investigative techniques and procedures;
> >
> > (d) Any information whose release is otherwise prohibited or restricted by law; and

(e) Any information that could identify a victim of sexual assault.

[58] While the recommendations contained in the Tulloch Report have not been passed into law, they provide some additional context for the issues in these appeals and in my view, they would be relevant considerations for the ministry to consider in exercising its discretion under section 14(2)(a), a matter that I discuss below under Issue E. But it is important to bear in mind that Justice Tulloch's recommendations were intended to inform the government with respect to revising legislation surrounding the amount of information that should be routinely released in the context of SIU investigations. In contrast, the appeals before me arise out of access requests under the *Act*. The *Act* provides for a right of access to the ministry's records unless the information falls within one of the exemptions under sections 12 to 22.[13] I will now consider whether the exemptions claimed by the ministry apply to the information at issue.

C: Does the discretionary exemption at section 14(2)(a) apply to the records?

[59] Section 14(2)(a) 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[.]

[60] 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).

[61] The term "law enforcement" has covered the following situations:

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[13] Or unless the access request is frivolous or vexatious; see section 10. There is no suggestion here that the requests were frivolous or vexatious.

- a municipality's investigation into a possible violation of a municipal by-law that could lead to court proceedings.[14]

- a police investigation into a possible violation of the *Criminal Code*.[15]

- a children's aid society investigation under the *Child and Family Services Act* which could lead to court proceedings.[16]

- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997.*[17]

[62] This office has stated that "law enforcement" does not apply to the following situations:

- an internal investigation by the institution under the *Training Schools Act* where the institution lacked the authority to enforce or regulate compliance with any law.[18]

- a Coroner's investigation or inquest under the *Coroner's Act*, which lacked the power to impose sanctions.[19]

[63] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[20]

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

[64] 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

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[14] Orders M-16 and MO-1245.
[15] Orders M-202 and PO-2085.
[16] Order MO-1416.
[17] Order MO-1337-I.
[18] Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.).
[19] Order P-1117.
[20] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.[21]

[65] 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.[22] The title of a document does not determine whether it is a report, although it may be relevant to the issue.[23]

Analysis and finding

[66] As a preliminary matter, I note that in their representations, the Toronto Police Service submit that the information that was withheld in the report was made public during the coroner's inquest, and that the issues before me are moot. The police officers do not make any submissions on mootness but state that "to the extent that any redacted information was made public through the inquest proceedings, our position is that the balancing of privacy and safety interests favours disclosure in the manner contemplated by the ministry [as outlined above in the background section of this order]".

[67] Other than these representations, I have no information before me with respect to what information in the SIU report became public during the inquest (with the exception of the names of some police witnesses, which I address below under Issue D). Although the testimony given during the coroner's inquest may have been similar to the information in the SIU report, I have no information before me to suggest that any particular portions of the report itself were made public during the inquest. In the circumstances, I cannot conclude that the issue of access to any particular portions of the withheld information in the report is moot. I will, therefore, consider the application of section 14(2)(a) to the entire report.

[68] There are two categories of records relating to law enforcement that the head of an institution may refuse to disclose under section 14. The first comprises those records the disclosure of which could reasonably be expected to cause certain specified types of harm [sections 14(1), 14(2)(c)].

[69] The second category of law enforcement records that need not be disclosed comprises specified kinds of records. It is not necessary to establish a reasonable expectation of harm from disclosure of these records; it is the nature of the records that is important. The exemption at section 14(2)(a) falls into this second category.

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[21] Orders 200 and P-324.
[22] Orders P-200, MO-1238 and MO-1337-I.
[23] Order MO-1337-I.

The SIU report

[70] In my view, the SIU report at issue falls squarely within the definition of "law enforcement report" for the purposes of section 14(2)(a).

[71] First, the record is a report. It is a document consisting of a formal account of the results of the collation and consideration of information about the circumstances surrounding the death of the individual in question. The 34-page report consists not merely of observations of fact, but also a formal, evaluative account of the SIU's investigation. I am satisfied that it contains facts, analysis, and evaluative elements that demonstrate an exercise of judgment carried out by the SIU.

[72] In a recent order of this office, Order PO-3868-I, Commissioner Beamish found that of a 317-page document detailing the results of an OPP investigation, the only parts that qualified as a "report" were pages 1-46, while the remaining pages did not constitute a report for the purposes of the section 14(2)(a) exemption. Commissioner Beamish found that the first 46 pages contain facts, analysis, and evaluative elements that demonstrate an exercise of judgment carried out by the OPP investigative team. He found, however, that the witness statements appended to the report did not form part of the "report" itself. In coming to this conclusion, he relied on previous orders of this office that have found that appendices or attachments to a report, such as interview notes, will not necessarily form part of the report.

[73] 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, as it consisted 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", because they consisted of observations and recordings of fact rather than formal, evaluative accounts.

[74] In my view, the report before me is distinguishable from the records at issue in both Order PO-3868-I and Order PO-1959. Unlike the records in those appeals, the SIU report before me is one record, and it has no appendices. It is a seamless account of the SIU's investigation and conclusions. As noted at the beginning of this discussion, the section 14(2)(a) exemption is based on the form of the record. I am satisfied in these circumstances that the SIU's report constitutes a "report" for the purposes of section 14(2)(a).

[75] Second, the report was prepared in the course of a law enforcement investigation. Many previous orders of this office have confirmed that an SIU

investigation is a law enforcement investigation for the purposes of section 14(2)(a).[24] Third, the SIU is an agency that has the function of enforcing and regulating compliance with a law.

[76] I conclude, therefore, that the record at issue is a law enforcement report within the meaning of section 14(2)(a) of the *Act*, and, therefore, qualifies for the section 14(2)(a) exemption. Under Issue E below, I will address whether the ministry properly exercised its discretion in deciding to withhold the information at issue in the report.

[77] The appellant raised the public interest in disclosure of the records at issue. Section 23 of the *Act*, the "public interest override" provision, states:

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

[78] Section 14 is not listed in the sections to which the public interest override can apply, and the constitutionality of the absence of section 14 has been upheld by the Supreme Court.[25] However, the existence of a public interest in disclosure is relevant to the ministry's exercise of discretion, which I review under Issue E.

[79] As a result of my finding that the report is exempt under section 14(2)(a), I do not need to consider whether it is also exempt under the personal privacy exemption at section 21.

The witness list

[80] Although the ministry claimed the section 14(2)(a) exemption for the witness list in its access decision, it did not pursue this claim in its representations during my inquiry.

[81] In my view, section 14(2)(a) does not apply to the list of witnesses. The witness list is not an evaluative account; it is simply a list. Moreover, while it is reasonable to expect that the names on the witness list could be derived from the body of the SIU report, it is fair to assume that they can also be derived from other SIU materials. As noted in Order PO-1959, discussed above, incident reports, supplementary reports and police officers' notes do not meet the definition of a "report", because they consist of observations and recordings of fact rather than formal, evaluative accounts.

[82] I find, therefore, that the witness list does not qualify for the section 14(2)(a)

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[24] See, for example, Orders P-1336, PO-1959, and PO-3212.
[25] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815.

exemption. I will now go on to determine whether the witness list is exempt from disclosure under the personal privacy exemption found at section 21(1) of the *Act.*

D: Does the witness list contain "personal information" as defined in section 2(1)? If so, does the mandatory personal privacy exemption at section 21(1) apply to the information at issue?

[83] In order to determine whether the witness list is exempt from disclosure pursuant to the personal privacy exemption at section 21(1), I must first determine whether it contains personal information.

[84] The term "personal information" is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
> >
> > (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
> >
> > (c) any identifying number, symbol or other particular assigned to the individual,
> >
> > (d) the address, telephone number, fingerprints or blood type of the individual,
> >
> > (e) the personal opinions or views of the individual except 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[.]

[85] 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.[26]

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

> (2) Personal information does not include information about an individual who has been dead for more than thirty years.
>
> (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.

[87] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[27]

[88] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[28]

[89] To qualify as personal information, it must also be reasonable to expect that an individual may be identified if the information is disclosed.[29]

[90] The list of witnesses contains a title that identifies the list as pertaining to the SIU investigation in question. A number of officers are then named, along with the type of witness (subject officer or witness officer).

[91] In the Revised Notice of Inquiry that I sent to the parties, I asked them to comment on Order PO-3169, where the adjudicator found that information pertaining to witness officers in an SIU investigation was not personal information.

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[26] Order 11.
[27] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[28] Orders P-1409, R-980015, PO-2225 and MO-2344.
[29] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[92] None of the parties' representations specifically addressed the issue of whether the names of the individuals as they appear on the list constitute "personal information".

[93] As noted, generally, information associated with an individual in a professional capacity is not considered to be "about" the individual, and therefore is not personal information. However, even if information appears in a professional capacity, it is considered personal information if it would reveal something of a personal nature about the individual. In Order PO-2225, former Assistant Commissioner Tom Mitchinson described the second step of this two-step analysis in the following terms:

> I must go on to ask: "*is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual*"? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

[94] Previous orders of this office have consistently found that where an individual's conduct in the professional sphere is called into question, such as through a complaint to the individual's regulating body, that information is considered to reveal something of a personal nature about the individual. In particular, prior orders have held that records relating to an investigation into a police officer's conduct while on duty reveal something of a personal nature about the officer and, as such, qualify as their "personal information" within the meaning of the *Act.*[30]

[95] I agree with the reasoning in these orders. In my view, the appearance of the subject officer's name on the list of witnesses identifies him as the officer whom the SIU was investigating in relation to the shooting death of the individual in question. This constitutes his personal information pursuant to paragraph (h) in conjunction with the introductory wording of the definition of personal information.

[96] I find, however, that the appearance of the witness officers' names on the witness list does not constitute their personal information. In this regard, I agree with Adjudicator Catherine Corban in Order PO-3169 where she states:

> Some of the records, however, contain the information of nine other police officers who were involved in the incident, six of whom provided witness statements. All of these officers are clearly identified in the records as witness officers not subject to the SIU's investigation. Additionally, there are records that contain information about individuals who were involved in conducting the SIU investigation. In my view, the

[30] See Orders PO-2524, PO-2633, PO-3003 and PO-3169.

> activities of the witness officers whose names appear in the records and the individuals involved in conducting the SIU investigation indicate that they were acting strictly in their professional, as opposed to personal, capacities. I find that there was nothing inherently personal about these individuals included in the records that would take the information from the professional to the personal sphere.

[97] This reasoning is equally applicable to the record before me, which is simply a list identifying the subject officer and the witness officers in the SIU's investigation. In my view, there is nothing about the fact that these individuals were witnesses in the SIU's investigation that reveals anything of a personal nature about them.

[98] The ministry relied on the personal privacy exemption at section 21(1) to withhold the witness list. Since only information that is "personal information" can be exempt under section 21(1), that section cannot apply to the names of the witness officers. I will, therefore, order that their information appearing in the witness list be disclosed to the appellant.

[99] In coming to my conclusion, I am aware of Justice Tulloch's recommendation that witness officers' names ought not to be made public. Justice Tulloch's report stated that there is little public interest in the release of the names of witness officers. However, and as I have noted above, the matter of disclosure of information in response to an access request under the *Act* is distinct from Justice Tulloch's recommendation about what the SIU should and should not routinely disclose. As noted by the Divisional Court in *Ontario Medical Association v Ontario (Information and Privacy Commissioner)*,[31] addressing an access request under Part II of the *Act*,

> The proper question to be asked in this context, therefore, is not "why do you need it?" but rather is "why should you not have it?"

[100] I turn now to the subject officer's identity. The subject officer's name as it appears in the record is his personal information, as it identifies him as the subject of the SIU's investigation. However, I find that I do not need to consider whether the section 21(1) exemption applies to this information, because the issue is now moot. The subject officer's identity as the subject of the SIU's investigation became public when he testified at the coroner's inquest into the death of the individual in question.

[101] This office has declined to decide moot issues previously. In Order P-1295, former Assistant Commissioner Irwin Glasberg applied the leading Canadian case on the subject of mootness, *Borowski v. The Attorney General of Canada*.[32] He noted:

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[31] 2017 ONSC 4090 (Div. Ct.), appeal dismissed 2018 ONCA 673.
[32] (1989), 57 D.L.R. (4th) 231 (S.C.C.).

> In the *Borowski* case, Sopinka J., speaking for the court, indicated that a two-step analysis must be applied to determine whether a case is moot. First, the court must decide whether what he referred to as "the required tangible and concrete dispute" has disappeared and the issues have become academic. Second, in the event that such a dispute has disappeared, the court must decide whether it should nonetheless exercise its discretion to hear the case.

[102] This approach has been applied in a number of orders of this office,[33] and I apply it here.

[103] I find that the first part of the test articulated in *Borowski* has been met. The live controversy, which might have been said to exist between the appellant and the ministry relating to the disclosure of the subject officer's name, is now at an end because the name of the subject officer is now public. Thus, the question of whether that information qualifies for exemption pursuant to section 21(1) is purely academic.

[104] With regard to the second part of the test, I have considered whether I should nonetheless review the application of section 21(1) of the *Act* to the subject officer's name regardless of mootness.

[105] In Reconsideration Order PO-2879-R, former Senior Adjudicator John Higgins stated:

> As the Court states at paragraph 43 of *Borowski*, the second factor underlying the mootness doctrine is the need to promote judicial economy. In assessing this factor, the Court assesses whether the decision "… will have practical side effects on the rights of the parties" or may affect future cases in circumstances that will be "evasive of review," which raises the question of whether adjudicating the issue would provide useful guidance for future relations between the parties, and what the likelihood might be of the issue being addressed in a future case.

[106] In Order M-271, former Assistant Commissioner Glasberg dealt with a situation in which the requester had obtained a copy of the record at issue from someone other than the institution. In that case, he proceeded to decide the issue on appeal, based on the unique circumstances in that appeal including the fact that the parties in that case had been involved in an ongoing series of requests and the Assistant Commissioner was of the view that his order might reduce the need for future appeals.

[107] However, he also made the following comments of a more general nature about

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[33] See Orders MO-2049-F, MO-2525, MO-2571, MO-2728, MO-2979, MO-3032, PO-2756, and PO-3057-I.

situations where an appellant already possesses the record at issue:

> In the ordinary course of events, I would be extremely reluctant to apply the resources of the Commissioner's office to decide an appeal where the appellant is already in possession of the records at issue through legitimate means. In my view, such an exercise would serve no useful purpose. In addition, appeals of this nature consume the scarce resources of institutions and impede the ability of the Commissioner's office to deal with the files of other appellants.

[108] In these circumstances, I have decided not to proceed with a decision on whether section 21(1) applies to the subject officer's name as it appears in the witness list. In my view, deciding this issue would provide little guidance in future cases where similar records are at issue. This is in large part because the circumstances surrounding each case, and hence the section 21(1) analysis, differ. Here, the very fact that the officer's name is public could itself be an important factor in the section 21(1) analysis.

[109] Also, the issue of whether a subject officer's name is subject to the section 21(1) exemption is not "evasive of review", to use the words of the Supreme Court. There have been a number of appeals before this office involving records of the SIU, and it seems a safe prediction that there will be more.

[110] In my view, the circumstances before me do not serve to justify proceeding to a determination of the section 21(1) issue with respect to the subject officer's name appearing in the witness list. Accordingly, I find that this issue is moot and that no useful purpose would be served by proceeding with a determination of it.

[111] As a final comment, I acknowledge that at least some of the witness officers' identities also became public in the course of the inquest. The parties' representations make note of this fact. However, the information before me is not entirely clear on whose identities became public, and whether those whose identities were made public were specifically identified as having been witness officers in the SIU investigation. For these reasons, I am not satisfied that the issue of access to their names as they appear on the witness list is moot and, as noted above, I will order that they be disclosed.

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

[112] 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.

[113] 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.

[114] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[34] This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Relevant considerations

[115] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[35]

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person

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[34] Order MO-1573.
[35] Orders P-344 and MO-1573.

- the age of the information
- the historic practice of the institution with respect to similar information.

[116] In the Revised Notice of Inquiry, I stated the following:

> In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, the Supreme Court of Canada found that the absence of mention of section 14 in the public interest override at section 23 does not significantly impair any hypothetical right to access government documents, given that section 14, properly interpreted, already incorporates consideration of the public interest and, moreover, confers a discretion on the institution to disclose the information.
>
> Did the ministry specifically take into account any public interest in disclosure of the record in exercising its discretion under section 14(2)(a)? Please explain.
>
> Is there a public interest in the disclosure of information relating to allegations of misconduct by police officers? Please explain.
>
> If the ministry took into account any public interest in disclosure of the record, how was this factor weighed against other factors? Please explain.

Representations of the parties

[117] The ministry did not make representations specifically on the exercise of its discretion under section 14(2)(a). As noted above, the ministry's response during the adjudication stage of these appeals, following the issuance of the Tulloch Report and the conclusion of the coroner's inquest, was as follows:

> Concerning the release of the director's report, there is no change to the ministry's decision. Please see below:
>
> • Starting in December, the ministry will release past SIU Director's reports involving extensive police interaction where a fatality occurred from the last ten years, while giving affected family members the opportunity to raise concerns.
>
> • Reports prior to 2005 involving extensive police interaction where a fatality occurred will be released starting in spring 2018, while giving affected family members the opportunity to raise concerns.
>
> • For all other past reports, such as those where a serious injury occurred, the affected person can request a copy of their report starting in early 2018.

> • In accordance with Justice Tulloch's recommendations, a third party, like the media, may request a report when there is a significant public interest.
>
> • Again, the reports will be released in a form that appropriately balances transparency and privacy and safety concerns.

[118] I have no information before me to suggest that the ministry has disclosed additional portions of the SIU report since the close of representations in these appeals.

Analysis and findings

[119] For the following reasons, I am not satisfied that the ministry has exercised its discretion under section 14(2)(a), or if it has exercised its discretion, I have not been provided with sufficient information about any considerations the ministry may have taken into account in deciding not to disclose the withheld portions of the SIU's report. Accordingly, I will order that it re-exercise its discretion taking into account relevant considerations.

[120] As noted above, the ministry provided no representations on its exercise of discretion under section 14(2)(a). While the ministry provided some general information about its planned release of SIU reports, I have no information to suggest that the ministry has turned its mind to the release of any further portions of the SIU report at issue.

[121] In my view, a relevant factor for the ministry to consider in its re-exercise of discretion is the fact that apparently much of the information in the report, or similar information, was made public during the coroner's inquest. Another relevant factor is whether there is a continuing public interest in the disclosure of the report. The recommendations of Justice Tulloch are yet another relevant factor. In particular, the ministry should consider Justice Tulloch's recommendations with respect to the release of past SIU reports. The ministry should consider these factors and any other relevant factors in its re-exercise of discretion.

[122] In re-exercising its discretion, I assume the ministry will also consider whether it has notice obligations given that the report may contain some personal information (for example, in civilian witness statements). The ministry should also be mindful, however, that only disclosing information if an affected party consents would be an improper fettering of the ministry's discretion.[36]

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[36] See Orders PO-3322-I, PO-3402-F, and PO-3868-I.

ORDER:

1. I order the ministry to disclose a copy of the Witness List containing the names of the witness officers to the appellant by **March 8, 2019** but not before **March 3, 2019**. As the issue of the disclosure of the subject officer's name appearing in the list is moot, I make no order with respect to it.

2. I order the ministry to re-exercise its discretion under section 14(2)(a) with respect to the SIU report, in accordance with these reasons, and to issue a decision on its re-exercise of discretion, treating the date of this order as the date of the access request for the purpose of its decision.

3. I order the ministry to provide me with a copy of its decision, together with representations on its exercise of discretion, at the same time that it provides its decision to the appellant.

4. I remain seized of these appeals to review the ministry's re-exercise of discretion.

Original Signed by: January 31, 2019

Gillian Shaw
Senior Adjudicator