Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3963

Appeal PA16-459

Ministry of the Solicitor General

June 6, 2019

Summary: The Ministry of the Solicitor General[1] (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to policies and procedures applicable to the requester's interactions with the Ontario Provincial Police (the OPP). The ministry located responsive records and issued a decision granting access in part, while denying access to the remaining information under the discretionary law enforcement exemption in section 14 of the *Act*.

In this order, the adjudicator upholds the ministry's decision that the information at issue is exempt under section 14(1)(c). She also finds that the ministry's search for responsive records was reasonable.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F. 31, as amended, sections 14(1)(c) and 24.

Orders Considered: Order PO-2751.

OVERVIEW:

[1] The Ministry of the Solicitor General (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for access to

[1] In this order, I refer to the ministry by its current name, notwithstanding the fact that it was known as the Ministry of Community Safety and Correctional Services at the time the request was submitted.

policies and procedures applicable to the requester's interactions with a specific Ontario Provincial Police detachment (the OPP).[2] The request stated, in part:

> … [I] ask for a copy of their policies and procedures that officers of the OPP must comply to when on the job.

[2] When the ministry received the request, it wrote the appellant seeking clarification of his request. The ministry sent the requester a letter that stated as follows:

> Your request does not provide sufficient details for experienced ministry staff to identify the requested records. In this regard, the following information must be provided to enable us to locate the records: the specific policies and procedures you are interested in. Please keep in mind that publicly available records are not provided through the FOI[3] process.

[3] In response to the letter, the ministry and the appellant had a conversation. Following the conversation, the ministry sent the appellant a letter that stated as follows:

> This letter is to confirm our conversation of June 3, 2016, where your request was clarified to be the policies and procedures that dictate how police officers do their jobs. This will not include any Acts of legislation. In our conversation I indicated that due to the broad scope of the request a fee could be assessed for the general records. You did not want to reduce the scope of your request at this time.

[4] Subsequently, the ministry issued a decision stating that access could not be provided. The ministry's decision stated, in part:

> For your reference, OPP policies and procedures are stored electronically on various records management systems. In addition, policies and procedures relating to civilian and uniform members are not stored or written separately. As a result, it would be very difficult to separate the policies without the policies being rewritten. Policies and procedures would also include all Standard Operating Procedures (SOP) involving all bureaus of the OPP.
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> The OPP would have to retrieve, and analyze each policy, and its respective SOP, to ensure the protection of law enforcement information.

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[2] The OPP is part of the ministry.
[3] Freedom of information.

> This includes concerns relating to investigative techniques and the protection of the public and law enforcement personnel.
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> In view of the forgoing, please be advised that it is the position of the ministry that section 2 of regulation 460 under the *Act* is applicable in the circumstances of your clarified request. This regulation states:
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> > A record capable of being produced from machine readable records is not included in the definition of "record" for the purposes of the Act if the process of producing it would unreasonably interfere with the operations of an institution.

[5] The requester, now the appellant, appealed that decision.

[6] During the mediation process, the appellant provided the ministry with a detailed letter dated April 20, 2017 outlining his concerns and a description of the applicable policies and procedures that he felt may exist related to his interactions with the OPP.

[7] In response to the appellant's letter, the ministry agreed to revisit its decision. After a follow-up search, the ministry issued a supplemental decision and disclosed a number of policies and procedures of the OPP to the appellant. The ministry withheld a portion of these records in accordance with the law enforcement exemptions in section 14(1)(c) (reveal investigative techniques and procedures) and section 14(1)(l) (facilitate the commission of an unlawful act) of the *Act.* Portions of the records were also withheld as non-responsive to the request.

[8] Upon receiving the supplemental decision, the appellant advised the mediator that he believes that other policies and procedures exist based on his observations of the differences in the ministry's responses. He also believes that the ministry should have these policies readily available for the public to review.

[9] The appellant sent a second letter to the mediator outlining the policies and procedures relating to his interactions with the OPP that he believes may still exist, but have not been located. The mediator forwarded the appellant's concerns to the ministry. In response, the ministry confirmed its decision.

[10] The appellant advised that he wished to appeal the ministry's supplemental decision. He objected to the information being withheld under sections 14(1)(c) and (l) of the *Act.* Since the appellant believes that further records ought to exist, he does not think the ministry conducted a reasonable search or provided adequate information regarding the issues he says he experienced during his interactions with the OPP.

[11] As mediation did not resolve this appeal, it was transferred to the adjudication stage where an adjudicator conducts an inquiry.

[12] At adjudication, representations were sought from the parties and exchanged

between them in accordance with section 7 of the IPC's *Code of Procedure* and Practice Direction 7.

[13] In this order, I uphold the ministry's decision that the information at issue is exempt under section 14(1)(c). I also find that the ministry's search for responsive records was reasonable.

RECORDS:

[14] The records at issue consist of 25 pages of various OPP Orders and an OPP Field Guide. Only parts of pages 5, 8, 13, 16, and 20 remain at issue. These documents contain OPP operational policies that employees are expected to comply with.

ISSUES:

A. Do the discretionary law enforcement exemptions at sections 14(1)(c) or (l) apply to the information at issue in the records?

B. Did the ministry exercise its discretion under section 14? If so, should this office uphold the exercise of discretion?

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

DISCUSSION:

Issue A: Do the discretionary law enforcement exemptions at sections 14(1)(c) or (l) apply to the information at issue in the records?

[15] The relevant parts of section 14(1) state:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
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> > (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
> >
> > (l) facilitate the commission of an unlawful act or hamper the control of crime.

[16] 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)

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

- a municipality's investigation into a possible violation of a municipal by-law that could lead to court proceedings.[4]
- a police investigation into a possible violation of the *Criminal Code*.[5]
- a children's aid society investigation under the *Child and Family Services Act* which could lead to court proceedings[6]
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997.*[7]

[18] 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.[8]
- a Coroner's investigation or inquest under the *Coroner's Act*, which lacked the power to impose sanctions.[9]

[19] The ministry submits[10] that the exemptions in sections 14(1)(c) and (l) apply as the information at issue contains sensitive and confidential investigative techniques and procedures related to two matters:

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[4] Orders M-16 and MO-1245.
[5] Orders M-202 and PO-2085.
[6] Order MO-1416.
[7] Order MO-1337-I.
[8] 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.).
[9] Order P-1117.
[10] The ministry provided both confidential and non-confidential representations. In this order I will only be referring to the ministry's non-confidential representations, although I have considered the ministry's representations in their entirety in arriving at my decision.

> 1. how the OPP respond to calls for assistance for individuals who may have mental health challenges, and who require police assistance or intervention; and,
>
> 2. the procedures the OPP are required to use for entering and classifying data on Niche RMS[11] and the Canadian Police Information Centre (CPIC), which are both shared databases used by law enforcement agencies, and which contain police records.

[20] I will address section 14(1)(c) first.

[21] As set out above, the ministry has claimed section 14(1)(c) for two types of records. The first type of records are related to responding to calls involving individuals with possible mental health challenges (found at pages 5, 8, and 13 of the records).

[22] With respect to the first type of records, the ministry states that the OPP would rely upon the direction set out in the records when they are investigating these calls that deal with a potential threat to an individual's safety or the safety of the general public, and where a crime may or has in fact already occurred.

[23] The ministry states that the disclosure of the information at issue could hinder the OPP's response to assisting individuals with potential mental health challenges or who require police intervention, to the detriment of these individuals and potentially others. It states that the success of the investigative techniques and procedures at issue depends upon them only being known by law enforcement personnel, who use them to take command of a potentially dangerous incident. Moreover, as these records contain significant detail about critical parts of the OPP's response to calls involving individuals with potential mental health challenges, every effort has been made to preserve the confidentiality of these records.

[24] The ministry relies on Order PO-2751, where the "serious nature of the crimes" influenced the decision of the adjudicator to uphold the ministry's application of section 14(1)(c).

[25] The second type of records for which the ministry has claimed section 14(1)(c) concerns procedures for entering and classifying data on CPIC and Niche RMS databases (found at pages 16 and 20 of the records). The ministry states that these databases are used by both the OPP and other law enforcement agencies when they are engaged in law enforcement investigations. It states that the records in this instance are not generally known to the public and are highly technical because of their subject matter (i.e., data entry and classification of data for police databases), and

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[11] Records Management System.

because they are used solely for communication purposes between law enforcement agencies.

[26] The appellant did not provide representations on this issue.

Analysis/Findings re section 14(1)(c)

[27] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[12]

[28] 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.[13] The institution must provide evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[14]

[29] In order to meet the "investigative technique or procedure" test in section 14(1)(c), the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public.[15]

[30] The techniques or procedures must be "investigative". The exemption will not apply to "enforcement" techniques or procedures.[16]

[31] To meet the "investigative technique or procedure" test, the ministry is required to show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. As Senior Adjudicator John Higgins stated in Order PO-2751:

> … The fact that a particular technique or procedure is generally known to the public would normally lead to the conclusion that its effectiveness would not be hindered or compromised by disclosure and, accordingly,

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[12] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[13] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.
[14] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[15] Orders P-170, P-1487, MO-2347-I and PO-2751.
[16] Orders PO-2034 and P-1340.

> that the technique or procedure in question is not within the scope of section 14(1)(c).

[32] The ministry argues that the information withheld under this exemption is information that details investigative techniques and procedures. Concerning the first type of records regarding responding to calls involving individuals with possible mental health challenges, I agree with the ministry that that these records contain significant confidential detail on critical parts of the OPP's response to these calls.

[33] The ministry relies on Order PO-2751 for the first type of records. In Order PO-2751, the records contained very detailed information about investigative methods used to investigate child pornography. In Order PO-2751, the Senior Adjudicator found that section 14(1)(c) applied to many of them, explaining that "any information of this nature in the records that has not been clearly identified in the public domain, or is not a sufficiently obvious technique or procedure to clearly qualify as being subject to inference based on a "common sense perception" as referred to in *Mentuck*[17] falls under this exemption."

[34] Based on my review of the information at issue in the first type of records, as well as the ministry's confidential and non-confidential representations, I find that disclosure of this information could reasonably be expected to reveal investigative techniques and procedures currently in use or likely to be used in law enforcement with respect to a potential threat to an individual's safety or the safety of the general public in situations where there is a potential mental health issue. I find that the first type of records qualify as an "investigative" technique or procedure under section 14(1)(c).

[35] With respect to the second type of records, procedures for entering and classifying data on CPIC and Niche RMS databases, I accept the ministry's submission that disclosure of the specific type of information at issue could reveal how the CPIC and Niche RMS police databases are organized, which would hinder their use, not only for the OPP but for other police services who use these databases.

[36] Based on my review of the information at issue in the second type of records, as well as the ministry's confidential and non-confidential representations, I also find that disclosure of this information could reasonably be expected to reveal investigative techniques and procedures currently in use or likely to be used in law enforcement. I find that disclosure could reasonably be expected to hinder or compromise their effective utilization; specifically, I find that disclosure could reasonably be expected to interfere with the use of the CPIC and Niche RMS databases, whose purpose is to

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[17] [2001] 3 S.C.R. 442, 2001 SCC 76.

control crime.[18]

[37] Accordingly, I find that disclosure of the information at issue in the records could reasonably be expected to reveal investigative techniques and procedures currently in use or likely to be used in law enforcement. This information is exempt under section 14(1)(c) subject to my review of the ministry's exercise of discretion.

[38] As I have found the information at issue subject to section 14(1)(c), there is no need for me to also determine whether it is also exempt under section 14(1)(l).

Issue B: Did the ministry exercise its discretion under section 14? If so, should this office uphold the exercise of discretion?

[39] The section 14 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.

[40] 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.

[41] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[19] This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[42] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[20]

- 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

[18] See also Order PO-3075.
[19] Order MO-1573.
[20] Orders P-344 and MO-1573.

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

[43] The ministry states that it exercised its discretion not to release a small portion of the records on the basis of the following considerations:

> (a) The disclosure of highly sensitive investigative law enforcement records could be expected to result in the records becoming disseminated without restriction, and indefinitely;
>
> (b) The disclosure of the records could be expected to reveal OPP investigative techniques and procedures in potentially high risk situations; and,
>
> (c) The disclosure of the records would reveal how information is evaluated as part of its entry onto Niche RMS and CPIC. [The ministry is] concerned that this could harmfully impact upon the strategic utilization of these databases.

[44] The ministry further states that it has taken a cautious approach in exercising its discretion in light of the fact that the disclosure of these records could have an impact on other law enforcement agencies.

[45] The appellant states that as a member of the public and an active participant of his community, he has a right to know all investigative procedures and any policies of

the OPP unless it is a matter of ensuring Canada's security. The appellant provides examples of what information would be validly withheld in the name of national security and this includes "practices of espionage or any other spy stuff" that does not concern him in his daily activities and with any experiences he has had with the OPP.

Analysis/Findings

[46] Based on my review of the records and the parties' representations, I find that the ministry exercised its discretion in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations.

[47] In response to the appellant's submissions, I note that the ministry took into account the wording of the law enforcement exemption in section 14 and the interests it seeks to protect. I disagree with the appellant that he is entitled to receive access to virtually all OPP policies in full. As set out earlier in this order, although under the *Act* information should generally be available to the public, limited and specific exemptions from the right of access exist, and one of them applies in the circumstances of this appeal.

[48] Accordingly, I uphold the ministry's exercise of discretion and find that the information at issue in the records is exempt under section 14(1)(c).

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

[49] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.[21] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[50] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[22] To be responsive, a record must be "reasonably related" to the request.[23]

[51] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[24]

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[21] Orders P-85, P-221 and PO-1954-I.
[22] Orders P-624 and PO-2559.
[23] Order PO-2554.
[24] Orders M-909, PO-2469 and PO-2592.

[52] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[25]

[53] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[26]

[54] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.[27]

[55] The ministry provided extensive representations on the search it conducted. It states that the issue of whether it conducted a reasonable search must be considered in light of the significant and ongoing difficulties it faced in responding to the appellant's various requests, as follows:

> First, the appellant has entirely and inexplicably changed the scope of their request. Initially, the request was extremely broad, and in fact, the appellant wanted all policies and procedures that OPP officers had to comply with when they are performing their duties. The appellant's position did not change until mediation. At mediation, the appellant wrote a 7-page letter to the mediator, dated April 20, 2017, ostensibly containing the appellant's revised request for records. … However, the vast majority of this "detail" is not helpful in providing the ministry with needed direction to conduct its search. Instead, the appellant used the letter to give voice to grievances against the OPP, some of which are historic…
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> [The] letter strongly suggests that the appellant is not seeking records as much as documenting complaints the appellant has against the OPP. …The *Freedom of Information and Protection of Privacy Act* is not a mechanism to resolve such disputes. If the appellant has complaints against the conduct of the OPP or its officers, then there are other mechanisms for addressing them, such as through the Office of the Independent Police Review Director.
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> Moreover, it appears that the appellant is more interested in voicing criticism, rather than providing necessary direction as to what records the appellant was actually seeking…

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[25] Order MO-2185.
[26] Order MO-2246.
[27] Order MO-2213.

> [The] the appellant has not provided any explanation to the ministry as to why the appellant believes that additional records exist, which have not been identified as a result of our search…
>
> We conducted the search based on the letter the appellant wrote to the mediator on April 20, 2017. It was our view that this letter contained the best direction we were likely to receive from the appellant regarding the scope of the search, based on our experience attempting to respond to the appellant's request prior to mediation. We should note however that we were challenged in interpreting the letter, because of the way it is written, and the fact that so much of it is not framed as a request, but instead contains the appellant's complaints about the appellant's alleged treatment by the OPP. In most cases, the appellant was also requesting policies which did not exist because the topic was so narrow. We had to instead consider whether broader policies were potentially responsive...
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> The ministry reviewed the appellant's letter, and determined that all responsive records would be in the OPP Police Orders Policy archive, which is a computer drive where OPP policies are stored. This archive is digitized and can be searched using search words…
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> [The ministry then listed the responsive records located during its search as related to the appellant's request].

[56] The appellant did not address this issue in his representations.

Analysis/Findings

[57] Based on my review of the ministry's representations, I find that it conducted a reasonable search for the responsive records about OPP policies and procedures as those were described in the appellant's April 20, 2017 letter to the mediator. I agree with the ministry's view of this letter, as set out above, that the vast majority of this letter deals with the appellant's complaints about the OPP.

[58] Interspersed in the appellant's letter are details of the information the appellant believes has not been located by the ministry, which is essentially policies and procedures specific to the appellant's interaction with the OPP. I find that the ministry has satisfactorily determined which portions of this letter provide clarification about the appellant's request and has conducted searches for the records responsive to the request.

[59] Additionally, I find that the appellant has not provided a reasonable basis for me to conclude that additional responsive records exist.

[60] Therefore, I am upholding the ministry's search as reasonable.

ORDER:

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

Original Signed by
Diane Smith
Adjudicator

June 6, 2019