Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3998

Appeal PA16-219

Ministry of the Solicitor General

October 10, 2019

Summary: A reporter sought access to information about the Ontario Provincial Police's acquisition of cell site simulators. The Ministry of the Solicitor General[1] (the ministry) initially refused to confirm or deny the existence of any records. In a revised decision, the ministry confirmed that it had responsive records and withheld access to them, relying on the exemptions in sections 14 (law enforcement), 15 (governmental relations), 16 (national defense), 17 (third party information) and 19 (solicitor-client privilege). In this decision, the adjudicator determines that section 14(1) applies to some of the information. However, standard contractual terms, prices, and descriptions of the equipment corresponding to information in the public domain, are not exempt.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 14(1)(a), (c), (e), (g), (i), (l), 15(a), 16, 17(1), 19.

Orders and Investigation Reports Considered: Order MO-3177-I, MO-3236, MO-3656.

OVERVIEW:

[1] This appeal arises out of a request made by a reporter to the Ministry of the Solicitor General (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

[1] Formerly the Ministry of Community Safety and Correctional Services.

1. Records regarding Ontario Provincial Police's acquisition of cell site simulators (also referred to as "IMSI catchers", "StingRay" devices, "DRTBox" devices or "KingFish" devices – "cell site simulators" below), including but not limited to invoices, purchase orders, contracts, loan agreements, evaluation agreements, solicitation letters, correspondence with companies and public agencies that provide the devices, and similar documents.

2. A copy of all meeting minutes for meetings pertaining to cell site simulators, IMSI catchers, "Stingray" devices, "DRTBox" devices or "KingFish" devices.

3. A copy of all memos or emails between the Ontario Provincial Police and [company #1].

4. A copy of all memos or emails between the Ontario Provincial Police and [company #2].

5. A copy of all memos or emails between the Ontario Provincial Police and [company #3].

6. A copy of all letters, agreements or other records containing guidelines or instructions for responding to Freedom of Information requests pertaining to the [named companies] cell site simulators, IMSI catchers, "Stingray" devices, "DRTBox" devices or "KingFish" devices.

7. Records regarding any offer, proposal, arrangement, agreement, or memorandum of understanding with Ontario Provincial Police, Royal Canadian Mounted Police, Toronto Police Service, Canadian Security Intelligence Service, the Communications Security Establishment, the Department of National Defense, the Canadian Armed Forces, Canada Border Services Agency, Correctional Service Canada, or any agency or corporation in Canada, the United States, or elsewhere, to borrow, permanently acquire from, or use any cell site simulator owned or possessed by these organizations.

8. All nondisclosure agreements with [5 named companies] any other corporation, and any provincial or federal agencies, regarding your agency's actual or potential possession or use of cell site simulators.

9. Records regarding policies and guidelines governing use of cell site simulators, including but not limited to:

    a. when, where and how they may be used

    b. logging, retention and purging of data from the devices

    c. what kind of legal process (including an administrative warrant, judicial warrant, or other legal process) should or should not be obtained to use the devices

10. Training materials for use of cell site simulators.

11. Any licenses, waivers, agreements or other records with federal or provincial communications regulatory agencies (e.g., Canadian Radio-television and Telecommunications Commission, etc.) concerning use of cell site simulators.

[2] In its decision, the ministry denied the request, relying on the law enforcement exemption contained in section 14(3) of the *Act*. This section states a head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) of section 14 may apply.

[3] The reporter, now the appellant, appealed the decision.

[4] During the course of mediation, the appellant took the position that this issue is a matter of great public interest and wished to rely on section 23 of the *Act* (compelling public interest) in this appeal. As mediation did not resolve the appeal, it was transferred to adjudication.

[5] I sent a Notice of Inquiry to the ministry, initially, following which the ministry reconsidered its initial access decision and advised that it was no longer relying on section 14(3) of the *Act*. In the ministry's revised decision, dated September 6, 2016, it advised that although the ministry now confirms the existence of records, access to the information is denied in accordance with sections 14(1)(a), (c), (e), (g), (i), (l) (law enforcement), 15(a), (b) (relations with other governments), 16 (national defence), 17(1) (third party information) and 19 (solicitor client privilege) of the *Act*.

Exchange of representations

[6] Based on the revised decision and appeal, I sent a Revised Notice of Inquiry to the ministry. I also sent a Notice of Inquiry to two affected parties, who chose not to submit representations. The ministry objected to sharing its representations with the appellant and I issued a decision to the ministry, in which I accepted its request to withhold portions of the representations. I decided that the bulk of the representations did not meet the criteria for withholding under the IPC's Practice Direction #7 (*Sharing of representations*).

[7] I then shared the ministry's redacted representations, including an index of records prepared by the ministry, with the appellant, who also provided representations.

[8] During the course of the inquiry, I decided to send a Supplementary Notice of Inquiry to the ministry only, to request a response to additional questions raised during my review of the issues. The ministry sent a response and, based on that response, I found it unnecessary to send the Supplementary Notice to the appellant.

Production of records

[9] During the course of my inquiry, I issued an order that the ministry produce the records at issue, in their entirety, to me. The ministry complied with this direction.

RECORDS:

[10] The records at issue in this appeal are described in the index that the ministry provided with its representations. They consist of agreements, purchase orders, invoices, records related to procurement approvals, a tax declaration form and a Standard Operating Protocol.

[11] The records correspond to parts 1 (records of acquisition, including contracts), 9 (records of policies and guidelines governing use) and 10 (training materials) of the request. The ministry stated that it found no other responsive records.

ISSUES:

A. Late raising of discretionary exemptions.

B. Does the discretionary exemption at sections 14(1)(a), (c), (e), (g), (i) and (l) apply to the records?

C. Does the discretionary exemption at section 15 apply to the records?

D. Does the discretionary exemption at section 16 apply to the records?

E. Does the mandatory exemption at section 17 apply to the records?

F. Does the discretionary exemption at section 19 apply to the records?

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

DISCUSSION:

Issue A: Late Raising of Discretionary Exemptions

[12] The *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

> In an appeal from an access decision an institution may make a new discretionary exemption claim within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[13] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.[2]

[14] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the ministry and to the appellant.[3] The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.[4]

[15] In this appeal, the ministry's initial decision was to refuse to confirm or deny the existence of responsive records, based on section 14(3) of the *Act*. It did not directly claim the application of any of the exemptions in section 14(1) or (2). As described above, the ministry subsequently issued a revised decision in which it withdrew the claim under section 14(3), and relied on a number of exemptions under the *Act*, including the discretionary exemptions under sections 14(1)(a), (c), (e), (g), (i), (l), 15(a), (b), 16 and 19.

[16] The appellant does not assert any prejudice, and I find none, in permitting the ministry to rely on the discretionary exemptions cited in its revised decision. There would be considerable prejudice to the ministry, however, in excluding consideration of those exemption claims. I see no reason to take such a step which would, in circumstances such as these, act as a disincentive to withdrawing a claim under section 14(3). I will permit the ministry to rely on the discretionary exemptions outside of the 35-day period.

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[2] *Ontario (Ministry of Consumer and Commercial Relations v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.); see also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).
[3] Order PO-1832.
[4] Orders PO-2113 and PO-2331.

Issue B: Does the discretionary exemption at sections 14(1)(a), (c), (e), (g), (i) and (l) apply to the records?

[17] The records at issue can be grouped into the following categories:

- contractual documents (agreement plus two amending agreements and two service agreements)
- procurement approvals
- purchase orders/vendor invoices
- tax declaration
- Standard Operating Protocol

General principles

[18] 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,
>
> > (a) interfere with a law enforcement matter;
> >
> > (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
> >
> > (e) endanger the life or physical safety of a law enforcement officer or any other person;
> >
> > (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
> >
> > (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
> >
> > (l) facilitate the commission of an unlawful act or hamper the control of crime.

[19] 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).

[20] This office has stated that, generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[5] However, it is not enough for an institution to take the position that the harms under section 14 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.[6] The institution must provide detailed 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.[7]

[21] There is no dispute, and I find, that all the records relate to "law enforcement" within the meaning of the *Act*. They were created by the OPP, a law enforcement agency, in relation to the cell site simulator, a technology purchased and used by the OPP as part of surveillance-based law enforcement operations.

New evidence

[22] In its representations of November 26, 2016, the ministry indicated that "there is information about cell site simulators posted on the Internet and released in the context of court decisions." Subsequently, in a Supplementary Notice of Inquiry, I brought to the ministry's attention various news articles and other material in the public domain, discussing the type of equipment at issue in this appeal, and its functionality. The essential question on which I sought the ministry's response was whether the widespread availability of this information diminished the force of any argument that disclosure of the same information, in the records, could harm law enforcement interests.

[23] In the ministry's response to the Supplementary Notice, it raised an objection about my reliance on material that postdated its decision, stating that its decision was rendered on the basis of information before it in 2016. The ministry submits that the decision should be reviewed on the basis of its reasonableness when it was made, and not as a result of information that appears to have entered into the public realm in the

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[5] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[6] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.
[7] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

2 and half years since. It submits that no "review" of its decision in fact occurs if it is being reviewed on the basis of facts and evidence that may have become relevant after it issued its decision.

[24] The ministry submits that to have regard to evidence postdating its decision would lead to delays in disposing of the matters at issue in the appeal, and conflicts with the principle that appeals should be reviewed on an "expeditious" basis.

[25] Apart from its objections to the introduction of this evidence (and apart from specific submissions respecting two pages of the Protocol, discussed below), the ministry does not address whether the existence of this information in the public domain affects the applicability of the section 14(1) exemptions to any of the records.

[26] In determining whether disclosure of the information in the records could reasonably be expected to result in the harms described in these sections of the *Act*, I find that I can and should have regard to the additional evidence.

[27] The evidence is relevant to the applicability of the exemptions claimed by the ministry in its decision. If I do not consider this evidence as part of my inquiry, the appellant would be obliged to make a new request, thus generating a new decision and potentially a further appeal. Such a prospect does not serve the fair and expeditious determination of the issues on their merits.

[28] The ministry has not suggested, nor do I find, that any procedural unfairness is raised by the use of this evidence in this appeal, as the ministry has been given an opportunity to respond to it, through the Supplementary Notice.

[29] I therefore do not accept that I am obliged to ignore relevant information that comes to my attention during the course of my inquiry. I am supported in this conclusion by a review of other appeals in which new evidence comes to the adjudicator's attention following the institution's original decision, during the course of an inquiry. In Order MO-3177-I, for example, the adjudicator took note of events that occurred during the course of her inquiry, in ordering an institution to re-exercise its discretion under the municipal equivalent to the *Act*. Similarly, in Order PO-3017, the IPC considered evidence relating to a prosecution ongoing at the time of the institution's decision, as well as a prosecution that began during the course of the inquiry, in deciding whether certain records were excluded under section 65(5.2) of the *Act*.

[30] In addition, some institutions seek to raise new exemption claims during the course of an inquiry. The IPC's *Code of Procedure* explicitly permits institutions to claim additional discretionary exemptions within 35 days of the date they are notified of an appeal. Even after the 35-day period, institutions are not precluded from relying on additional discretionary exemptions and, in deciding whether to allow such a change in position, the IPC considers the relative prejudice to the institution and the appellant. In Order MO-3657, for example, the IPC permitted the institution to rely on late exemption

claims where it would otherwise result in serious prejudice to the institution but minimal prejudice to the appellant.

[31] In all the above cases, the IPC did not confine the scope of its inquiry to the facts in existence on the date of the original decision, nor to the four corners of that decision. I agree with the principles applied in those decisions. In the case before me, my consideration of the additional evidence ensures that questions about access to the records at issue are dealt with on their merits. Such an approach also promotes judicial economy, by avoiding unnecessary additional requests and appeals relating to the same records.

[32] In this case, the evidence to which I directed the ministry consists of news articles, an investigation report and court decisions. All of these describe functions which various cell site simulators are capable of performing. Thus, while certain information in the records has never been the subject of public discussion (see below), it is clear that the public has been given information about the different capabilities of this equipment. It is in the public domain that law enforcement agencies have available to them surveillance equipment with these capabilities.

Representations

[33] The ministry submits that the records are about the OPP's acquisition and use of a cell site simulator, which is a surveillance based technology that provides valuable, ongoing assistance to the OPP and other law enforcement agencies in facilitating the investigation of serious crimes, including crimes which may harm the national security of Canada such as terrorism, or preventing such crimes from happening in the first place. It submits that the Supreme Court of Canada has recognized that "police authorities must frequently act under the cloak of secrecy to effectively counteract the activities of sophisticated criminal enterprises."[8]

[34] It states that when such a simulator is used to intercept private communications, the OPP does so in accordance with Part VI of the *Criminal Code*, which requires the use of warrants to intercept private communications, except in limited circumstances. The OPP obtains a warrant to authorize the covert use of its cell site simulator pursuant to section 492.2 of the *Code*, which relates to transmission data.

[35] The ministry states that due to the fact that cell site simulators are used for surveillance related law enforcement activities, the ministry did not issue a competitive public tender using Ontario's designated electronic tendering system, as is normally the case. Instead, it obtained approval to be exempted from that requirement. This process required the ministry to prepare a business case, which forms part of the records.

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[8] *Michaud v. Quebec* (Attorney General) [1996] 3 S.C.R. at para. 51.

[36] It states that disclosure of the records would prevent the OPP from using the cell site simulator, by publicizing detailed information about the make and model, its functionality and the techniques the OPP uses when employing it. The ministry submits that, as with most surveillance technology used by law enforcement, the less that is publicly known about the technology, the greater its usefulness. It expresses a concern that disclosing records about the existence and use of cell site simulators alerts suspects that this technology is being used, resulting in suspects being able to take deliberate measures to evade them.

[37] The ministry submits that this applies even to disclosure of the contract between the vendor and the ministry. Disclosure of the contract would reveal information about the use and functionality of the equipment. The pricing information and the terms and conditions governing the acquisition from the specific vendor would provide information that would reveal, directly or indirectly, that the OPP has a cell site simulator of a particular caliber.

[38] The ministry states that the contract and supporting documents are known only to the vendor and restricted staff in the OPP who are authorized to know about and to operate a simulator. It states that even the identity of the vendor is not known except to authorized personnel. The ministry states that cell site simulators, like cell phones, have differing functionality depending on the kind of simulator being purchased, which varies between vendors. Information even as limited as identifying the name of the vendor would provide additional information as to the functionality of the simulator. Disclosing the name of the vendor or additional information such as the price and the functional specifications contained in the contract would effectively disclose what the simulator can and cannot do, thereby allowing its use to be evaded.

[39] The ministry acknowledges that information about cell site simulators has been posted on the internet and released through court decisions. However, in its submission, the records at issue reveal detailed and particular information about the OPP's acquisition of a particular type of cell site simulator and its ongoing use by the OPP, which is not in the public realm. Further, it submits that release of information about the use of a cell site simulator to a defendant in a criminal law prosecution is to be distinguished from disclosure under the *Act*, which does not authorize disclosure of records for the purpose of answering criminal charges.

[40] The ministry states that disclosure of the Protocol, which includes training materials, would reveal the techniques that OPP officers use when using a cell site simulator, allowing suspects to evade law enforcement activities.

[41] The ministry acknowledges a public interest in knowing some information about the kind of surveillance equipment that police use. However, it submits that the kinds of records being requested far exceed this public interest. Indeed, it submits, their disclosure would, on balance, be contrary to the public interest, given the harms it has cited.

[42] The appellant's representations focus on the public interest in transparency about the functionalities and uses of cell site simulators. The appellant submits that the public should be given enough information to weigh the tradeoff between security and privacy presented by this technology. Although acknowledging the need to keep some law enforcement matters confidential in order to keep the public safe, the appellant does not believe it is appropriate for the police to shield every fact about cell site simulators, as the ministry is doing.

[43] The appellant requests that the IPC find the appropriate balance between public safety and the imperative to inform and enlighten citizens of Ontario about the activities of their government and its agencies.

Analysis

[44] I will begin by considering the application of section 14(1)(c) to the records.

Section 14(1)(c): reveal investigative techniques or procedures

[45] The IPC has stated that, in order to meet the "investigative technique or procedure" test, 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. Further, the exemption normally will not apply where the technique or procedure is generally known to the public.[9]

[46] For the following reasons, I find that parts of the records are covered by this exemption. However, I am not satisfied that disclosure of information that is already in the public domain – information about the general functions of cell site simulators - could reasonably be expected to reveal investigative techniques and procedures currently in use or likely to be used, thus hindering or compromising their effective use.

Contractual documents

[47] Information I find exempt under section 14(1)(c) consists of parts of the contractual documents that contain detailed information about the equipment purchased by the OPP, including the identity of the vendor, model numbers, operating procedures and the vendor's descriptions of the products and their capacities. I accept the ministry's submission that disclosure of this type of information could reasonably be expected to result in the harms described in these exemptions, in that this kind of specific knowledge about the equipment purchased by the OPP will allow criminals to better understand how surveillance through this equipment is conducted, and therefore how to evade it.

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[9] Orders P-170, P-1487, MO-2347-I and PO-2751.

[48] In arriving at this conclusion, I accept the ministry's submission that disclosure of the name of the vendor, along with the purchase price, could reasonably be expected to reveal as-yet unknown details about the capacity of the equipment, which could in turn compromise its effectiveness. I find, however, that the disclosure of the purchase price, without any information about the particular vendor who supplied the equipment or any break down of how the price was arrived at, could not reasonably be expected to lead to this result. For this reason, while the name of the vendor is covered by the law enforcement exemption at issue, the purchase price is not.

[49] Other parts of the contractual documents do not meet the requirements of the section 14(1)(c) exemption, as they contain generic contractual language that is not specific to the equipment being purchased. They do not reveal anything about investigative techniques or procedures. I am satisfied that the exempt portions can reasonably be severed from the non-exempt portions.

[50] To be clear, the exempt portions of the contractual documents are:

- Schedule 1, Part A to the agreement
- Schedule 1 to the first amending agreement and Schedule 1 to the second amending agreement
- Any information identifying the vendor
- Attachment B to the Service Level Agreement

Purchase orders/vendor invoices and tax declarations

[51] For the same reasons, the parts of the purchase orders and tax declaration forms that contain information about the vendor, including model numbers, are exempt and can reasonably be severed from non-exempt parts of these records, which do not reveal any details anything about the equipment.

[52] The vendor's invoices contain information covered by this exemption, as they identify the vendor and details about the equipment. The exempt portions of the vendor's invoices cannot reasonably be severed from the non-exempt portions and these records are therefore exempt in their entirety.

Procurement approval documents

[53] In the procurement approval documents, OPP personnel provide a detailed rationale for exempting the purchase of this equipment from the normal public procurement process. They describe the equipment, the justification for purchasing it, its intended use and the process by which it chose the particular vendor's equipment. I am satisfied that these documents contain sufficient detail about the equipment that their disclosure to the public could reasonably be expected to hinder or compromise effective utilization of the equipment. I also find that exempt portions cannot

reasonably be severed from the rest of these documents.

Standard Operating Protocol

[54] The ministry also relied on the section 14(1)(c) exemption to withhold the Protocol in its entirety. As described in the ministry's submissions, this record describes the standard operating procedure governing the use of the cell site simulator.

[55] The ministry states that the Protocol includes instructions based on legal advice provided by counsel of the ministry and, in the ministry's submission, is thus instrumental in ensuring that the use of the cell site simulator is consistent with the *Criminal Code* and its requirements regarding the interception of communications. The Protocol also includes training materials for the use of the cell site simulator.

[56] On my review, I am satisfied that most of the Protocol is exempt under the section 14(1)(c) exemption. Its disclosure could reasonably be expected to reveal procedures for the use of the cell site simulator purchased by the OPP, and thus hinder or compromise its effectiveness in law enforcement. The cover page is not exempt as it does not reveal anything about the equipment or associated procedures.

[57] For the following reasons, I conclude that some of the information in this Protocol is not exempt, as it simply describes some of the general functionalities of the equipment in a manner that corresponds to information in the public realm about cell site simulators.

[58] The IPC has stated that the section 14(1)(c) exemption will normally not apply where a law enforcement technique or procedure is generally known to the public.[10] In such circumstances, the claim that disclosure to a requester under the *Act* could reasonably be expected to reveal the technique or procedure, thus hindering or comprising its effective use, is unconvincing.

[59] The ministry does not disagree with this general principle. In its original submissions, however, it disputed that the information in the records is generally known. As noted above, I sent a Supplementary Notice of Inquiry to the ministry, asking it to comment on the fact that considerable information about cell site simulators has entered the public domain since this request was made. Some of this information, in fact, came from a law enforcement agency, the RCMP, in a public briefing to the press on April 5, 2017. Some of this information is also contained in a public report issued by the Privacy Commissioner of Canada. Other public material describing the capacities of cell site simulators include court decisions and news articles.

[60] The result is that the public knows much more about the capacities of this

[10] Orders P-170, P-1487, MO-2347-I and PO-2751.

equipment than it did several years ago. It is aware of at least some of the very information in the records at issue.

[61] I am not convinced that disclosure of general descriptions of the functionality of the equipment purchased by the OPP, which correspond to publicly available information about this type of equipment, is exempt under these sections of the *Act*. Such disclosure does not reveal anything to the public that it does not already know – that equipment of this nature exists, that it can perform certain types of functions, and that it is used by law enforcement agencies. Given the extent of public awareness about this type of equipment and its use by law enforcement, I am not persuaded that disclosing that the OPP, in particular, has purchased equipment with these functionalities reveals anything about it that could undermine its effective use of the equipment for law enforcement purposes.

[62] In its submissions, the ministry relies on Order MO-3236, in which this office upheld a decision applying section 14(3) (refuse to confirm or deny) of the municipal equivalent of the *Act*. It urges me to adopt a finding in that order that a "cell site simulator is an "investigative technique" that is currently or is likely to be used by the police in law enforcement activities and that the disclosure of this fact could reasonably be expected to hinder or compromise its effectiveness."

[63] The conclusions in Order MO-3236 must be considered in context. In that case, the Toronto Police Service refused to confirm or deny that it held any records relating to the acquisition of a cell site simulator. The adjudicator accepted the contention that confirmation of the mere existence of this investigative tool would harm law enforcement interests. As acknowledged by the ministry, it is not clear that such a contention would prevail today. At the time of that finding, the level of public awareness about the technology was much lower than it is today. Indeed, as noted above, the RCMP has since held a very public briefing to discuss its use of the technology.

[64] The impact of this increase in public awareness is demonstrated by the fact that this ministry is taking a different position from that of the Toronto Police Service in the above case. The ministry is not denying that it has purchased such equipment. Rather, it wishes the details of its purchase, and in particular, detailed information about the equipment it purchased, to be withheld from the public.

[65] Taking account of the current level of public awareness about cell site simulators, I find that disclosure of information about the general capabilities of this equipment could not reasonably be expected to hinder or compromise its effectiveness in law enforcement. I conclude that information in the Protocol which provides a general description of the capacities of the equipment, consistent with information in the public domain, is not exempt under section 14(1)(c) of the *Act*.

[66] While these findings are specific to the Protocol, I acknowledge that the other records at issue, such as the contractual documents, also contain, to a lesser or greater

degree, some information about the capacities of the equipment that is similar to what is contained in the Protocol, and similar to public reports about this equipment. On my review, I find that it is not reasonably practicable to sever such information from the exempt portions of those records.

[67] There are two exceptions to my conclusions above, regarding the information in the Protocol. I accept the ministry's submission that the public statements I included in the Supplementary Notice do not establish that the information at the top of pages 10 and 11 of the Protocol can truly be said to be in the public domain. I conclude that disclosure of this information would reveal more than the public already knows about investigative techniques used or likely to be used by the OPP, which could hinder or compromise their effectiveness. I am unable to refer in detail to the ministry's submissions on this point, as they reveal the contents of the records at issue.

[68] In sum, I find the cover page of the Protocol, as well as the descriptions of the capability of the equipment at the top of pages 6, 7, 8 and 9 are not exempt under the section 14(1)(c) law enforcement exemption.

Sections 14(1)(a), (e), (g), (i) and (l): other law enforcement exemptions

[69] Above, I found parts of the records exempt from disclosure under section 14(1)(c) of the *Act*. It is unnecessary to consider whether they also qualify for exemption under sections 14(1)(a), (e), (g), (i) or (l), as claimed by the ministry.

[70] The records or portions of records I found not exempt under section 14(1)(c) include generic contractual language and information about the total price. For similar reasons as in the above, I find that this information does not qualify for exemption under sections 14(1)(a), (e), (g), (i) or (l). I am not satisfied that disclosure of generic contractual terms, pricing information, and parts of the purchase orders and tax declaration could reasonably lead to the harms described in these sections. When the information exempt under section 14(1)(c) is severed from the contracts and related purchasing records, I find unlikely the prospect that disclosure of the remaining information will result in the harms described in these sections.

[71] I arrive at the same conclusion with respect to the information in the Protocol that I have found not exempt under section 14(1)(c) (at the top of pages 6, 7, 8 and 9). I find that widespread public knowledge about these capacities of cell site simulators and their use by law enforcement diminishes the force of claims that disclosure of this same information could result in the harms described in sections 14(1)(a), (e), (g), (i) or (l). Through the Supplementary Notice of Inquiry, I invited the ministry to explain why these exemptions apply in the face of public reports about these capacities. As I indicated above, the ministry did not provide a complete answer to this question, although it did question whether some information in the Protocol is indeed in the public domain (which submission I have accepted).

[72] On my review of the material before me, I conclude that disclosure of the

information at the top of pages 6, 7, 8 and 9 of the Protocol could not reasonably be expected to interfere with a law enforcement matter, endanger the life or physical of a person, interfere with the gathering of or reveal law enforcement intelligence information, or facilitate the commission of an unlawful act or hamper the control of crime, within the meaning of the section 14(1)(a), (e), (g), (i) or (l) exemptions.

Issue C: Does the discretionary exemption at section 15 apply to the records?

[73] In its representations, the ministry withdrew its reliance on section 15(b). In this appeal, the ministry submits that disclosure of the records could reasonably be expected to prejudice the conduct of intergovernmental relations within the meaning of section 15(a), which states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > (a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;

[74] Section 15 recognizes that the Ontario government will create and receive records in the course of its relations with other governments. Section 15(a) recognizes the value of intergovernmental contacts, and its purpose is to protect these working relationships.[11]

[75] As with the section 14(1) exemption, an institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[12]

[76] It is not necessary for me to consider whether the information I have found exempt under section 14(1)(c) is also exempt under section 15(a).

Representations

[77] Some of the ministry's representations on this issue are confidential. The ministry submits that disclosure of the records would be prejudicial to ongoing and long-term relations between the OPP and another governmental organization. During this inquiry, I contacted the organization in question and invited it to provide representations on the issues in this appeal. It has not done so and I therefore only have the ministry's

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[11] Orders PO-2247, PO-2369-F, PO-2715 and PO-2734.

[12] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

submissions on this issue.

[78] The ministry also states that there is an expectation shared between the government and other levels of government that these types of records would never be disclosed in the manner contemplated by this appeal. The ministry states that advice from other government(s) has been incorporated into the technical specifications described in the contract with the vendor and the Protocol. It submits that the records relate to "intergovernmental relations" as that term has been defined. Relying on Order PO-2247, the ministry states that they address "matters of common interest and concern."

[79] The appellant made no submissions on this issue.

Analysis

[80] The ministry's submissions are directed in the main at the detailed technical specifications. Above, I have found this information exempt under the section 14(1)(c) law enforcement exemption. After severing the information to which section 14(1)(c) applies, it is not clear to me how disclosure of the remaining information in the records could reasonably be expected to prejudice the conduct of intergovernmental relations. I find that section 15 does not apply to any information remaining at issue.

Issue D: Does the discretionary exemption at section 16 apply to the records?

[81] The ministry also relies on the "national security" exemption, with respect to all the records. This exemption states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to prejudice the defence of Canada or of any foreign state allied or associated with Canada or be injurious to the detection, prevention or suppression of espionage, sabotage or terrorism and shall not disclose any such record without the prior approval of the Executive Council.

[82] It is evident from the context of this exemption that it is intended to protect vital public security interests. Section 16 must be approached in a sensitive manner, given the difficulty of predicting future events affecting the defence of Canada and other countries.[13]

[83] As with the other exemptions discussed above, the onus is on the ministry to provide detailed evidence about the potential for harm. It must demonstrate a risk of

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[13] See Order PO-2500.

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]

[84] Again, it is unnecessary for me to consider the application of section 16 to records or parts of records I have found exempt under section 14(1).

Representations

[85] The ministry submits that cell phone simulators are an effective surveillance based law enforcement technology, which can be used to prevent or to investigate crimes related to national security, including terrorism. The ministry's concern is that disclosure of the records at issue will result in them being in the public domain and allow suspects, including terrorists, to evade their use.

[86] The appellant made no submissions on this issue.

Analysis

[87] I am not convinced that section 16 applies to the remainder of the information in the records. After severing the information under section 14(1)(c), I find that the records do not contain information whose disclosure could reasonably be expected to prejudice national security interests. The remaining parts of the records consist of information about the price, contractual and commercial terms that can found in many similar documents, as well as information in the public domain about the general functions of the equipment.

[88] The ministry's representations do not convince me that the risk of the harm described in section 16 from disclosure of this remaining information is more than speculative.

Issue E: Does the mandatory exemption at section 17 apply to the records?

[89] The ministry relies on the third party exemption in section 17(1) to withhold all of the records, except those relating to the procurement approval process.

[90] Based on the ministry's submissions in this appeal, the relevant parts of section 17(1) state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information,

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[14] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

> supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
> >
> > …
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

[91] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[15] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[16]

[92] For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

[93] During the inquiry, I notified the vendor and invited it to submit representations on the issues in the appeal. It has not done so, although the ministry included excerpts from its own correspondence with the vendor in which it sets out its position on disclosure of the records. I have considered these excerpts even though they were not submitted directly to me.

[94] The appellant made no submissions on the application of this exemption.

[95] In the discussion below, it is not necessary for me to consider the application of

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[15] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).
[16] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

section 17(1) to the information I have found exempt under section 14(1)(c).

Part 1: type of information

[96] The ministry submits that the information in the records constitutes technical, commercial and financial information, within the meaning of section 17(1). These terms have been discussed in past orders of this office as follows:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[17]
>
> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[18] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[19]
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[20]

[97] Among other things, the ministry submits that the information qualifies as technical information because it describes how the cell site simulator is operated and maintained. It submits that the records constitute commercial information because the contract relates to the buying and selling of the cell site simulator, and contain financial information because they reveal the price for the purchase of the equipment.

[98] The vendor's submission to the ministry also states that the records contain technical, commercial and financial information.

[99] I agree with the ministry that many of the records remaining at issue qualify as commercial information relating to the purchase of surveillance equipment from the

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[17] Order PO-2010.
[18] Order PO-2010.
[19] Order P-1621.
[20] Order PO-2010.

vendor, by the ministry. However, I find that the Standard Operating Protocol does not contain information of a type described in this exemption. The Protocol does not qualify as "commercial information" as it is intended to be a training document, and not part of the contractual documents relating to the purchase. It does not contain "financial information."

[100] I also find that it does not contain "technical information." To qualify as "technical information", it is not enough that the information describe the operation or maintenance of equipment, as submitted by the ministry. The information must be derived from the application of expertise in an organized field of knowledge. There is no evidence that the descriptions of the operation or maintenance of the equipment in the Protocol are based on any special technical expertise. Rather, they are general descriptions of the capacities of the equipment that people without special knowledge could formulate and grasp.

[101] On this basis, I find that section 17(1) has no application to the Protocol.

Part 2: supplied in confidence

[102] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[21]

[103] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[22]

[104] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.[23]

[105] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential

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[21] Order MO-1706.
[22] Orders PO-2020 and PO-2043.
[23] This approach was approved by the Divisional Court in *Boeing Co., cited above, and in Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*).

information supplied by the third party to the institution.[24] The "immutability" exception arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.[25]

[106] The ministry submits that this transaction was not conducted in accordance with ordinary competitive procurement requirements, and there were no negotiations as would occur in a standard competitive procurement process. It further submits that the contract contains information supplied by the vendor, in that the vendor offers a specific type of cell site simulator, and the ministry purchased it on the basis of its particular specifications.

[107] The ministry states that the information in the contract that was supplied by the vendor is non-negotiated confidential information, and falls under the inferred disclosure or immutability exceptions to the general principle applying to contracts.

Analysis

[108] As stated above, the contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The ministry submits that this principle does not apply here, because of the special procurement process through which it purchased the equipment. I find that the nature of the procurement process followed in this case does not change the outcome of the analysis under this provision. The result of the process is a contract reflecting the mutual agreement between the ministry and the vendor.

[109] Leaving aside the portions of the contractual documents that I have found exempt under section 14(1)(c), the remainder of those documents do not meet this part of the test for exemption under section 17(1). They are not information supplied by the vendor. In fact, on my review, they consist of contractual terms covering subjects that are standard to the supply of goods or services. On my review, I see no basis for finding that any of this information is "immutable", or that it would permit accurate inferences about underlying non-negotiated confidential information.

[110] Earlier, I found the parts of the purchase orders and tax declaration form that contain information about the vendor, including model numbers, exempt under section 14(1). Leaving aside these portions of these records, the remainder of the purchase orders do not contain information supplied by the vendor.

[111] Once information identifying the vendor is severed from the tax declaration form, the remainder of the form does not contain information supplied by the vendor.

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[24] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[25] *Miller Transit*, above at para. 34.

[112] To summarize, the Protocol does not meet Part 1 of the test for exemption under section 17(1). The records or parts of the records that have not already been found exempt under section 14(1) do not meet Part 2 of the test for exemption under section 17(1).

[113] Given my conclusion under Parts 1 and 2 of the test for exemption under section 17(1), it is unnecessary to consider Part 3, relating to harm from disclosure.

Issue F: Does the discretionary exemption at section 19 apply to the records?

[114] The ministry applied the solicitor-client privilege exemption to the Standard Operating Protocol, in its entirety. Since I have found most of the Protocol exempt under section 14(1)(c), it is only necessary to consider the application of the solicitor-client privilege exemption to the information that I decided was not exempt under that section.

[115] The relevant portions of section 19 of the *Act* state:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
>
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation;

[116] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 (prepared by or for Crown counsel) is a statutory privilege that applies where the records were prepared by or for Crown counsel "for use in giving legal advice or in contemplation of or for use in litigation." The statutory exemption and common law privileges, although not identical, exist for similar reasons. An institution must establish that one or the other (or both) branches apply.

[117] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. In this appeal, the ministry relies only on solicitor-client communication privilege.

[118] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[26] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal

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[26] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

matter.[27] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[28] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[29]

[119] Confidentiality is an essential component of the privilege. Therefore, an institution must demonstrate that the communication was made in confidence, either expressly or by implication.

[120] The ministry submits that the Protocol is the product of a "continuum of communications" in the obtaining of legal advice, has been treated in strict confidence, and has not been disclosed to non-law enforcement personnel. Its position is that it is based expressly on advice provided by legal counsel at the Ministry of the Attorney General, and that the Protocol regulates the use of the cell site simulator, in accordance with requirements set out in the *Criminal Code* and the *Canadian Charter of Rights and Freedoms*.

[121] In the ministry's response to the Supplementary Notice of Inquiry, it revised its application of the solicitor-client privilege exemption, and now seeks to apply it only to certain portions of the Protocol.

Analysis

[122] On my review, I find that the remaining information at issue (the cover page and descriptions of the general capacities of the equipment at the top of pages 6, 7, 8 and 9) are not communications of a confidential nature between ministry counsel and ministry employees, made for the purpose of obtaining or giving legal advice. The ministry's own submissions in response to the Supplementary Notice do not maintain that the solicitor-client privilege exemption applies to these parts of the Protocol. I find they are not exempt under section 19 of the *Act*.

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

[123] Discretionary exemptions permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to do so.

[124] In this order, I have found that some records and parts of records qualify for

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[27] Orders PO-2441, MO-1925 and MO-2166.
[28] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[29] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

exemption under the discretionary exemptions at section 14(1). Consequently, I will assess whether the ministry exercised its discretion properly in applying that exemption to those withheld records and parts of records.

[125] This office 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

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

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

- 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

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

Representations

[128] The ministry submits that in exercising its discretion to not disclose the records, it took into account:

- the harm to law operations that would ensue from release of the records into the public domain;
- the harm to relationships between the OPP and another governmental organization that would be caused by disclosure of the records;
- the harm to national security;
- the harm to a third party vendor;
- the practice of the ministry not to disclose information subject to solicitor-client privilege.

[129] In her submissions, the appellant did not address the exercise of discretion explicitly. On disclosure of the records, generally, she submits that the public should be given enough information about the use of cell site simulators by law enforcement agencies to participate in the discussions about security and privacy that are raised by this new technology. She acknowledges that, as the *Act* recognizes, the police must keep some law enforcement matters secret in order to keep the public safe. She states, however, that it is inappropriate for the police to shield every single fact about cell site simulators.

[130] In short, the appellant submits that there is a public interest in disclosure of the records.

Analysis

[131] Section 23 of the *Act* provides for a "public interest override", in cases where a compelling public interest in disclosure of a record clearly outweighs the purpose of the applicable exemption. This section does not apply to records that are withheld under the section 14 law enforcement exemption.

[132] In this case, I have found that section 14(1)(c) applies to parts of the records, and section 23 is therefore not available. However, the appellant's arguments are relevant to an assessment of the ministry's exercise of its discretion.

[133] Although it did not refer to the public interest in discussing its exercise of discretion, the ministry does, in its submissions, acknowledge that there is a public

interest in knowing about the kinds of surveillance equipment the police use. It submits, however, that the kinds of records being requested far exceed this public interest. The ministry also submits that disclosure of the records would, on balance, be contrary to the public interest, given the harms it has identified.

[134] In assessing the ministry's exercise of discretion to not disclose the remainder of the information, I am satisfied that it took into account relevant factors weighing against the disclosure of the law enforcement information at issue, and did not take into account irrelevant considerations. The public interest in knowing more about this type of surveillance equipment is also a relevant factor and while it could be argued that the ministry should have given it more weight, it is clear that it turned its mind to it.

[135] In this case, the result of my findings is that some information about the purchase of the equipment, such as the generic terms of the agreements, pricing information, parts of purchase orders and a tax declaration, as well as general information about the functionality of the cell site simulator, will be released to the requester. I have found that disclosure of the remaining information could reasonably be expected to reveal details about the equipment that could compromise its effective use.

[136] On balance, I do not find that the ministry exercised its discretion improperly in deciding to withhold the exempt information.

ORDER:

1. I uphold the ministry's decision in part. I order the ministry to disclose the records with the exception of the information I have highlighted in the copy of the records I am providing with this order by **November 18, 2019** but not before **November 13, 2019**.

2. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the records sent to the requester pursuant to order provision 1.

Original Signed by: October 10, 2019

Sherry Liang
Assistant Commissioner, Tribunal Services