Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4321

Appeal PA18-00758

Ministry of Health

November 14, 2022

Summary: The appellant seeks access to five pharmacy inspection reports from the Ministry of Health (the ministry). The ministry denied the appellant access to the responsive records, in full, claiming the application of the discretionary exemptions in sections 14(1)(c) and 14(2)(a) (law enforcement) and the mandatory exemption in 21(1) (personal privacy) of the *Freedom of Information and Protection of Privacy Act*. The appellant appealed the ministry's decision and claimed the application of the public interest override in section 23 to the records. In this order, the adjudicator finds that the records are exempt from disclosure under section 14(2)(a) and upholds the ministry's decision to withhold them, in full.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 14(2)(a); *Personal Health Information Protection Act*, 2004 , S.O. 2004, c. 3, Sched. A, ss. 2 (definitions), 4, 8(1), and 8(4).

OVERVIEW:

[1] The Ministry of Health (the ministry) received a request from a journalist under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for access to inspection/audit reports for nine specified pharmacies in Ontario between 2009 and 2017.

[2] The ministry issued a decision denying access to eight records that it identified as being responsive to the request. The ministry explained that two of the nine pharmacies identified in the request were inspected jointly, and so the responsive record relating to those two pharmacies consisted of only one record.

[3] The ministry denied access to the eight records in full, pursuant to the exemptions at section 14(1)(a), (b), (c) (law enforcement), 14(2)(a) (law enforcement report), and section 21(1) (personal privacy) of *FIPPA*.

[4] The ministry also specified that the reports contained personal health information, as that term is defined in the *Personal Health Information Protection Act* (*PHIPA*). The ministry advised the requester that this information would be withheld from disclosure pursuant to section 8(1) of *PHIPA*. The ministry said that the right of access under *FIPPA* does not apply to personal health information in the custody or control of a health information custodian, such as itself.

[5] The requester appealed the ministry's decision to the office of the Information and Privacy Commissioner (IPC). During the mediation stage of the appeal process, the ministry provided additional information about the nature of the records and the basis for its reliance on the various law enforcement exemptions. The ministry consented to the mediator sharing this information with the appellant. The appellant subsequently narrowed their request to focus on six of the nine pharmacies named in the original request with reports from 2011 and 2012.

[6] The ministry continued to maintain its position regarding the application of the law enforcement exemptions in *FIPPA*. The ministry also advised that as a result of the narrowed request, there were only five records remaining at issue.

[7] A mediated resolution was not achieved and the file was transferred to the adjudication stage of the appeal process where an adjudicator may conduct a written inquiry pursuant to *FIPPA*. Representations were sought and shared with the parties in accordance with the IPC's *Practice Direction Number 7*.

[8] During the course of the inquiry, the ministry withdrew its reliance on sections 14(1)(a) and (b) of *FIPPA*. As such, those sections are no longer at issue. Also, the appellant advised that they were not interested in obtaining any personal health information that might be in the records.

[9] In the discussion that follows, I find that there is personal health information in the records to which the appellant does not have a right of access. I also uphold the ministry's decision to withhold the remaining information in the records pursuant to section 14(2)(a) of *FIPPA* and I dismiss the appeal.

RECORDS:

[10] Five records remain at issue. The ministry says that the records are reports relating to six pharmacy inspections/audits. Each of the records ranges from 170 to 900 pages.

ISSUES:

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

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

DISCUSSION:

Background

[11] The appellant, a journalist, requested copies of the ministry's inspection reports relating to pharmacies that they say overbilled the Ontario Drug Benefit Program. The appellant says they intended to use the reports as part of an investigation into pharmacy fraud in Ontario, which they say has been identified by the Auditor General of Ontario as requiring additional oversight. According to the appellant, the reports would help identify the shortcomings of the inspection process and address the problem of fraud in Ontario pharmacies.

[12] The ministry provided detailed background information about the nature of the records the appellant requested. To summarize, the ministry explained the following:

- The ministry provides coverage for the majority of the cost of over 4,400 prescription drug products and therapeutic substances for Ontarians who are eligible to receive benefits under the *Ontario Drug Benefit Act* (the *ODBA*) through the Ontario Drug Benefit Program (the ODB Program),
- Approximately 4,500 pharmacies in Ontario have the ability to bill the ministry for supplying a benefit to an ODB recipient,
- A pharmacy operator with billing privileges under the *ODBA* submits claims that are automatically processed and paid,
- Ministry inspectors appointed under the *ODBA* conduct inspections of payments to pharmacies to ensure that claims are for eligible benefits in accordance with *ODBA*, its regulation, and ministry policies,
- Inspectors do not assess or determine whether fraud or professional misconduct has occurred. They asses compliance with the *ODBA* and ministry policies,
- Inspectors search the ministry's database to identify areas of potential concern, such as billing irregularities, and may decide to commence inspections on that basis,

- Inspections may also be prompted by complaints made to the ministry,
- At the conclusion of an inspection, the ministry may decide to take administrative action to recover payments made for invalid claims and revoke a pharmacy's billing privileges under the *ODBA*,
- When the ministry is considering pursuing administrative actions it may prepare a formal report,
- Where an inspection reveals no non-compliance, or non-compliance that only results in the recovery of payments for invalid claims, and the ministry is not considering restricting the pharmacy's ability to participate in the ODB program, no formal inspection report is prepared,
- In addition to the administrative actions described above, the ministry may also decide to submit information to the Ontario College of Pharmacists or make a referral to the Ontario Provincial Police for investigation of potential criminal fraud, and
- The referrals to the College of Pharmacists and Ontario Provincial Police often include the ministry's inspection reports.

[13] The ministry says that the records at issue in this inquiry were created following the inspections of six pharmacies that submitted claims that were unsubstantiated or otherwise not eligible under the ODB Program.

Preliminary Matter

[14] The ministry identified portions of the records at issue in this inquiry that it says contain personal health information within the meaning of the *Personal Health Information Protection Act* (*PHIPA*).[1] The ministry is a "health information custodian" subject to *PHIPA*[2], as well as an institution under *FIPPA*.[3] As a result, in certain circumstances, the ministry is subject to both *PHIPA* and *FIPPA*. This means that when the ministry receives a request for access to information, it must decide whether *PHIPA* or *FIPPA*, or both, apply to the request.[4]

[15] In making this decision, the ministry must consider the nature of the request (i.e., whether the request is for personal health information, for information that is not personal health information, or both); the contents of the record(s) responsive to the request (i.e., whether the responsive record(s) contain personal health information, or information that is not personal health information); and, in the case of a request for

[1] *Personal Health Information Protection Act*, 2004, S.O. 2004, c. 3.
[2] *PHIPA,* section 3(1), at paragraph 7
[3] *FIPPA*, paragraph (a) of the definition of "institution" at section 2(1).
[4] *PHIPA* Decision 17.

personal health information, whether the requester is a person authorized under *PHIPA* to exercise a right of access to that information.[5] It is important to note that under *PHIPA*, the right of access to personal health information belongs only to the individual to whom the information relates,[6] or to his or her lawfully authorized substitute decision-maker.[7] *PHIPA* does not otherwise provide any right of access to records of personal health information.

[16] In this case, the ministry says that some of the records responsive to the appellant's access request contain personal health information of individuals other than the appellant. The identified portions contain copies of receipts of filled prescriptions that contain individuals' health numbers, their dates of birth, names of the prescriptions and dosage information. I agree with the ministry's characterization of this information as "personal health information" within the meaning of paragraphs (a) and (b) of section 4(1) of *PHIPA*. These sections state:

> "personal health information", subject to subsections (3) and (4), means identifying information about an individual in oral or recorded form, if the information,
>
> (a) relates to the physical or mental health of the individual, including information that consists of the health history of the individual's family,
>
> (b) relates to the providing of health care to the individual, including the identification of a person as a provider of health care to the individual,[8]

[17] It is not in dispute that the appellant is not the individual to whom the personal health information in the records relates (and is not a lawfully authorized substitute decision-maker in respect of that information). Therefore, the appellant has no right of access under *PHIPA* to the personal health information in the records at issue.

[18] However, the appellant may still have a right of access, under *FIPPA*, to responsive records that do not contain any personal health information, and/or to responsive records that do contain personal health information if that personal health information can reasonably be severed from the records. Sections 8(1) and 8(4) of *PHIPA* address this situation. These sections state

> (1) Subject to subsection (2) [containing certain exceptions that are not relevant in this complaint], the Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of

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[5] See PHIPA Decisions 17, 27, 73, 96, and 107, and Order MO-3644.
[6] *PHIPA*, section 52.
[7] *PHIPA*, sections 5(1), 23, 25.
[8] Sections 4(3) and 4(4) of *PHIPA* are not relevant to my analysis so I do not reproduce them here.

> Privacy Act do not apply to personal health information in the custody or under the control of a health information custodian unless this Act specifies otherwise.
>
> (4) This Act does not limit a person's right of access under section 10 of the Freedom of Information and Protection of Privacy Act or section 4 of the Municipal Freedom of Information and Protection of Privacy Act to a record of personal health information if all the types of information referred to in subsection 4 (1) are reasonably severed from the record.

[19] Read together, sections 8(1) and 8(4) of *PHIPA* preserve an individual's right of access, under *FIPPA*, to certain information in a record of personal health information, the right of access to which is otherwise governed by *PHIPA*.[9] Those rights are preserved if the personal health information can reasonably be severed from the record.

[20] In this case, the ministry submits, and I agree, that the personal health information in the records at issue can reasonably be severed in the manner contemplated by section 8(4) of *PHIPA*. As such, in the remainder of this order, I will consider the appellant's right of access under section 10 of *FIPPA* to the remaining portions of the records that do not contain personal health information.

[21] For greater clarity, pursuant to 8(4) of *PHIPA*, the personal health information in the records at issue shall be severed by the ministry, and must not be disclosed to the appellant.

Issue A: Does the discretionary exemption at section 14(2)(a) of FIPPA apply to the reports?

[22] The ministry asserts that sections 14(1)(c) and 14(2)(a) apply to exempt the records from disclosure. However, due to my finding below, I will only consider the application of section 14(2)(a). Section 14(2)(a) states:

> (2) A head may refuse to disclose a record,
>
> > (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

[23] Section 14(4) of *FIPPA* provides an exception to section 14(2)(a). It reads as follows:

> Despite clause (2)(a), a head shall disclose a record that is a report prepared in the course of routine inspections by an agency where that

[9] *PHIPA* Decision 30. See also *PHIPA* Decisions 17, 27, and 33.

agency is authorized to enforce and regulate compliance with a particular statute of Ontario.

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

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

1. the record must be a report; and

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

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.[10]

[25] The word *report* means "a formal statement or account of the results of the collation and consideration of information." Generally, results would not include mere observations or recordings of fact.[11] The title of a document does not determine whether it is a report, although it may be relevant to the issue.[12]

[26] 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)

[27] 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[13]

- a police investigation into a possible violation of the *Criminal Code*[14]

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[10] Orders P-200 and P-324.
[11] Orders P-200, MO-1238 and MO-1337-I.
[12] Order MO-1337-I.
[13] Orders M-16 and MO-1245.
[14] Orders M202 and PO-2085.

- a children's aid society investigation under the *Child and Family Services Act* which could lead to court proceedings[15]

- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997*[16]

[28] The IPC 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[17]

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

The ministry's representations

[29] The ministry submits that each of the five records at issue meets the three-part test for exemption pursuant to section 14(2)(a) of *FIPPA* because they contain the ministry's analysis and findings with respect to the inspection of six pharmacies. The ministry says that each of the five records was prepared by a ministry inspector who was appointed under the *ODBA*. The ministry reiterates that it has the function of enforcing compliance with the *ODBA* by carrying out inspections of pharmacies.

The appellant's representations

[30] The appellant denies that section 14(2)(a) applies to the records. They say that the ministry's inspection regime does not constitute law enforcement. The appellant says that the ministry explicitly states in its representations that its inspectors do not look for criminal activity nor breaches of professional standards and that they do not assess or determine whether fraud has occurred, or whether proprietary or professional misconduct has occurred. The appellant says that the ministry's inspectors may only use their inspection powers for the purpose of assessing compliance with the *ODBA* and ministry policies and to pursue "administrative actions."

[31] The appellant also submits that other government institutions have released similar inspection reports in the past. For example, the appellant submits that 300 daycare inspection reports were obtained by way of a freedom of information request to the Ministry of Education. The appellant says that the daycare inspection reports are

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[15] Order MO-1416.
[16] Order MO-1337-I.
[17] Order P-351, upheld on judicial review in *Ontario* (*Solicitor General*) *v. Ontario* (*Assistant Information and Privacy Commissioner*) (1993), 1993 CanLII 9373 (ON SCDC), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 1993 CanLII 9415 (ON CA), 107 D.L.R. (4th) 454 (C.A.).
[18] Order P-1117.

similar to the pharmacy inspection reports in that they involved inspections of unlicensed daycares by ministry employees looking to confirm compliance with regulations. The appellant says that if the inspections led to suspicions of criminality or health infractions, the inspectors would notify the police or public health. According to the appellant, the Ministry of Education released the inspection reports in full after severing only the names of any daycare workers and children and the addresses of the daycare centers.

The ministry's reply

[32] The ministry disagrees with the appellant's assertion that it does not conduct law enforcement activities. It submits that its *ODBA* inspectors conduct law enforcement, as defined in section 2 of *FIPPA* which includes "… inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings."

[33] The ministry submits that the records at issue in this appeal led to the revocation of the pharmacies' billing privileges and suspension of their entitlement to receive payments under the *ODBA*. The ministry says that these statutory powers of decision are akin to proceedings in a tribunal in which a penalty or sanction could be imposed and that, like the decision of a tribunal, these statutory powers of decision are subject to the superior court prerogative writ remedies of prohibition and certiorari.

[34] Furthermore, the ministry says that significant non-compliance observed during an *ODBA* inspection could lead to provincial offence charges being laid by the ministry that are prosecuted in court and could ultimately result in penalties or sanction upon conviction.

[35] Finally, the ministry refers me to Order P-324, where an IPC adjudicator determined that "inspections or investigations that are conducted under the authority of the *ODBA* […] lead or could lead to proceedings in a court or tribunal where a penalty or sanction could be imposed" and that their activities constituted "law enforcement."

[36] With regard to the records at issue in this appeal, the ministry submits that its inspections revealed that the pharmacies submitted ineligible and unsubstantiated claims and that as a result, the ministry took the administrative actions described above and prepared formal inspection reports to support those administrative actions.

[37] In any event, the ministry asserts that section 14(2)(a) of *FIPPA* does not require the ministry to demonstrate that it is has a law enforcement function, it only requires that the ministry demonstrate that the records satisfy the three-part test outlined in IPC Orders 200 and P-324: that "the record must be a report; the report must have been prepared in the course of law enforcement, inspection or investigation; and the report must have been prepared by an agency which has the function of enforcing and regulating compliance with law". The ministry submits that it has satisfied this test in its

submissions.

The appellant's sur-reply

[38] The appellant asserts that in its initial representations the ministry conceded that it does not look for criminal offenses when conducting inspections and that the pharmacists only face "administrative actions" after an inspection. The appellant says that in its reply representations, the ministry changed its language in order to better argue its exemption claim by saying that the "administrative actions" are now allegedly "akin to proceedings in a tribunal."

[39] The appellant argues that the full extent of the actions that the ministry can take after an inspection do not resemble law enforcement in any way. It says that the ministry can recuperate overpayment to a pharmacy by "clawing back" future payments, or terminate a pharmacy's right to bill the ministry directly. The appellant says that the decision to revoke a pharmacy's billing privileges is not "akin" to proceedings in a tribunal.

[40] The appellant also asserts that while the ministry can refer the matter to the OPP's Health Fraud Investigation Unit, which is contracted by the ministry to pursue law enforcement action, for the purposes of law enforcement, the OPP's officers begin each investigation afresh and do not rely on the reports prepared by the ministry's inspectors. The appellant denies that the ministry carries out law enforcement actions, and says that instead, the ministry has hired the OPP to do so.

[41] The appellant says that claiming that because a matter could be referred to the OPP after an inspection, the ministry's inspection reports are part of a law enforcement matter is akin to stating that a person who calls the police after seeing a crime taking place is carrying out law enforcement.

[42] Furthermore, the appellant challenges the ministry's position that the fact that pharmacists "could" be charged with provincial offenses after an inspection is relevant. The appellant says that this is a rare circumstance and that only four pharmacists were charged with a provincial offense in the five years between 2013-2017, a period when more than 800 inspections were carried out.

[43] Finally, the appellant says that the provincial charges are laid by the OPP after they conduct their own investigation. The appellant says the ministry is "trying to have it both ways: it states that it does not look for criminal behaviour while conducting an inspection, but claims that it is nevertheless conducting a law enforcement action." In conclusion, the appellant submits that the ministry has not met the three-part test to exempt the records under section 14(2)(a) of *FIPPA.*

Analysis and findings

[44] For the reasons that follow, I find that the reports meet the three part-test under

section 14(2)(a) of *FIPPA.* To summarize, each of the records at issue satisfies the requirements of the section 14(2)(a) exemption: they properly constitute a "report" as they each consist of a formal account of the results of the collation and consideration of information gathered in the course of investigations or inspections; they each were prepared during the course of law enforcement investigation and/or inspection; and the agency that prepared the reports, the ministry, has the function of regulating pharmacies participating in the ODB Program and enforcing compliance with the *ODBA*.

1) The record must be a report

[45] As set out above, the word report means "a formal statement or account of the results of the collation and consideration of information." The title of a document does not determine whether it is a report, although it may be relevant to the issue.[19]

[46] I agree with the ministry that the records at issue are reports, within the meaning of section 14(2)(a) of *FIPPA*. I have reviewed each of the records and all five have approximately the same format: a title page that specifies either "Inspection Report" or "Audit Report," the name of the pharmacy, the date, and the name of the investigator/auditor. Each of the reports contains the same type of content, including:

- A summary of findings;
- Background information detailing why the pharmacy was selected for an inspection/audit;
- A description of the inspection activities conducted with reference to any evidence/documentation collected;
- a section detailing the inspection findings, including "Overpayments," "Claims Review Analysis" and "Purchase/Sales Analysis";
- recommendations for next steps; and
- Appendices containing copies of items and evidence directly referenced in the report.

[47] Based on my review of the records at issue, and considering the ministry's representations, I find that the ministry has satisfied part-one of the three-part test set out above. Each record consists of a description of not just the factual information gathered by the inspector, but also an evaluative assessment of that information, and opinions and advice regarding potential future actions the ministry could take based on the inspector's analysis of the information. As a result, it is clear to me that each record is a report for the purposes of section 14(2)(a) of *FIPPA.*

[19] Order MO-1337-I.

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

[48] Next, I find that the reports are related to investigations or inspections conducted by the ministry.

[49] I have considered the appellant's submissions, including their assertion that the actions that the ministry can take after an inspection do not resemble law enforcement and that the ministry is not conducting investigations for the purpose of prosecuting criminal activity, fraud or professional misconduct.

[50] However, based on previous IPC orders, it is clear that the law enforcement activities being carried out by the agency do not have to be criminal in nature in order to meet the three-part text in section 14(2)(a) of *FIPPA.*[20]

[51] Based on the structure and content of the *ODBA,* I find that the ministry has the power to enforce compliance with the *ODBA.* Inspectors appointed under the *ODBA* may enter pharmacy premises, examine and make copies of records and determine whether an offence has occurred under the *ODBA.* Furthermore, the ministry may suspend or revoke a pharmacy's billing privileges and refer the matter for criminal prosecution. Having reviewed the reports at issue and considered the statutory framework of the *ODBA,* I am satisfied that the reports at issue were prepared in the course of law enforcement, inspections or investigations and as a result, I find that the ministry has satisfied part two of the three-part test.

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

[52] Above, I concluded that the records at issue are reports that were prepared in the course of law enforcement, inspections or investigations. I also find that the reports were prepared by ministry inspectors who have the function of enforcing and regulating compliance with the *ODBA.*

[53] I agree with the ministry that Order P-324 is relevant to the current circumstances. In Order P-324, an IPC adjudicator reviewed the legislative framework of the *ODBA* and determined that reports created by ministry investigators regarding improper drug pricing constituted law enforcement reports. The adjudicator concluded that the investigative processes in the *ODBA* satisfied the requirements of the definition of "law enforcement" under section 2(1) of *FIPPA*. He also determined that inspections or investigations that are conducted under the authority of the *ODBA* could lead to proceedings in a court or tribunal where a penalty or sanction could be imposed.[21] I agree with the reasoning in Order P-324 and find that the records at issue in this appeal

[20] See, for example, Interim Order PO-3087-I, Order PO-3126 starting at paragraph 27; Order PO-3637 and PO-4206-I, in addition to the orders cited above at footnotes 4 to 7.
[21] Order P-324.

consist of law enforcement reports within the meaning of section 14(2)(a) of *FIPPA.*

[54] Before moving on to consider whether the exception in section 14(4) of *FIPPA* applies, I note that the reports all include various appendices. Each appendix is directly referenced in the corresponding report and was clearly attached to the report by the inspectors who authored it.

[55] Previous orders of this office have considered whether attachments to a report, or other documents contained in an investigation file, can be considered part of the report for the purpose of section 14(2)(a).[22]

[56] I have examined the appendices to the reports and considered whether each report and accompanying appendix would be exempt under section 14(2)(a). The appendices to the reports consist of discrete documents such copies of prescriptions (which I have already concluded must be severed pursuant to *PHIPA*), invoices, purchase/sales charts, lists of claims, receipts and email correspondence.

[57] Based on my review of the attachments to the reports, I find that they are similar to the attachments considered by the adjudicator in Order PO-3637. They form an integral part of the report at issue and are referred to and relied upon by the inspector who prepared the report. The reports refer to the appendices explicitly and rely on them to form the conclusions and findings of the inspectors after the collation and consideration of the information contained in the appendices. As a result, I find that the reports as a whole, including the attachments or appendices, are law enforcement reports within the meaning of section 14(2)(a).

[58] In making this decision, I have considered all of the appellant's representations, including their assertion that other institutions have released information that is similar to the reports at issue in this inquiry. However, the decision of another institution to release information is not relevant to the ministry's application of section 14(2)(a) in this instance. The records released by the other ministry are not before me, and in any event, the ministry in this inquiry is not bound by a decision another ministry may make about other records. I also note that section 14(2)(a) is a discretionary exemption and it is possible that the daycare inspection reports were disclosed despite the fact that they could have been withheld under section 14(2)(a).

[59] I will now consider whether the records at issue fall within the exception at section 14(4) of *FIPPA*.

Exception under s. 14(4): Routine inspection report

[60] Section 14(4) states the following:

[22] See, for example, Orders PO-1959, PO-3169 and PO-3637.

> (4) Despite clause (2)(a), a head shall disclose a record that is a report prepared in the course of routine inspections by an agency where that agency is authorized to enforce and regulate compliance with a particular statute of Ontario.

[61] The section 14(4) exception is designed to ensure public scrutiny of material relating to routine inspections and other similar enforcement mechanisms in such areas as health and safety legislation, fair trade practice laws, environmental protection schemes, and many of the other regulatory schemes administered by the government.[23]

[62] Because section 14(2)(a) creates an exemption for "law enforcement reports", they do not usually have to be disclosed. However, the exception in section 14(4) treats reports related to "routine inspections" differently.

[63] Generally, inspections resulting from a specific complaint are not considered to be "routine inspections".[24] The existence of a discretion to inspect or not to inspect is a factor in deciding whether an inspection is "routine".[25] For example, a regular annual inspection that is required by law (that is, is not discretionary) might be "routine," whereas an inspection that is based on a specific complaint or is not a regular inspection might not be "routine" because there is discretion about whether to investigate.

The ministry's representations

[64] The ministry submits that the exception under section 14(4) of *FIPPA* does not apply to the reports at issue in this appeal because they were not prepared in the course of routine inspections.

[65] The ministry says that inspection reports are not typically generated in the routine inspection of pharmacies that the ministry conducts on a regular basis. It asserts that the vast majority of pharmacy inspections do not result in inspection reports. The ministry submits that its inspection of the six pharmacies listed in the access request led to the creation of the five inspection reports due to the serious nature of the non-compliance that warranted ministry enforcement action.

[66] The ministry says that for these six pharmacies, the inspections revealed that the pharmacies had submitted a significant number of improper claims that were not eligible for reimbursement under the ODB program and that violated the *ODBA* and ministry policies. As such, the ministry submits that the exemption under section 14(4) does not apply as the inspection reports were not prepared in the course of inspections that are routinely conducted by the ministry.

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[23] Order PO-1988.
[24] Orders P-136 and PO-1988.
[25] Orders P-480, P-1120 and PO-1988.

The appellant's representations

[67] The appellant submits that, on average, the ministry conducts more than 150 audits of pharmacies in Ontario per year for the purposes of confirming the veracity of billing through the ODB Program. By the appellant's calculations, that is almost three inspections per week. The appellant also points out that the ministry referred to the inspections as "routine" in several parts of its representations.

[68] The appellant submits that *FIPPA* clearly states that reports prepared "in the course of routine inspections by an agency that is authorized to enforce and regulate compliance with a particular statute of Ontario" must be released. They argue that the fact that the reports are only prepared after a minority of inspections does not absolve the ministry of its obligation to release the reports, since the inspections themselves were routine.

The ministry's reply

[69] The ministry reiterates its position that the exception under section 14(4) does not apply because the reports were not prepared in the course of routine inspections. The ministry submits that the inspections were not routine as some were initiated due to complaints from members of the public, as in IPC Order 136.

[70] Furthermore, the ministry says that the six pharmacies were inspected because the ministry identified improper billings to the ODB Program. The ministry notes that each of the reports at issue contains a purchase and sales analyses. It states that routine inspections do not include this type of analysis and, as noted in its original representations, the report process is only commenced when significant non-compliance is suspected that warrants enforcement action by the ministry, which does not occur in a routine inspection.

[71] Finally, the ministry submits that inspection reports are not typically generated in routine inspections. For instance, in 2018/2019, the ministry conducted approximately 250 inspections under the *ODBA*. Of those 250 inspections, only 3 inspections identified significant non-compliance with the *ODBA* that warranted enforcement action and the preparation of inspection reports. In other words, in 2018/2019, only 1.2% of *ODBA* inspections resulted in inspection reports.

The appellant's sur-reply

[72] The appellant argues that the ministry has modified its language in its reply representations in order to maintain its exemption claim. The appellant says that in its original representations, the ministry referred to its inspections as "routine" and said that they are conducted "on a regular basis." However, the appellant says that after realizing that the law requires the release of records produced during routine inspections, the ministry revised its language in an attempt to avoid its statutory obligations.

[73] The appellant submits that the ministry's claim that section 14(4) does not apply is based on a misreading of the law. The appellant says the law is clear that "when an inspector is required to write a report as a part of a routine inspection, the ministry is required to release it." The appellant says that the ministry's argument is essentially that the five inspection reports were not prepared in the course of "routine inspections" because not all inspections result in reports. Or in other words, that because the report was prepared afterwards, it was not "in the course of" a routine inspection.

[74] The appellant submits that "in the course of" does not mean that the inspector must be typing his report while standing in the pharmacy. They assert that "in the course of" means that it is prepared as a matter of normal procedure and that "just because the inspector does not prepare a report after every inspection doesn't mean that the reports themselves are not part of the routine inspections." For example, the appellant submits that if a plumber conducts a routine inspection of some pipes, but only fills out a work order if a problem is found, it does not follow that the work order is not a part of the process of his or her routine inspections.

Findings and analysis

[75] I have reviewed each of the reports at issue and agree with the ministry that they are not reports prepared in the course of routine inspections for the reasons that follow.

[76] Previous IPC orders have emphasized that it is the "nature of the inspection itself which should be considered in deciding whether it falls within the scope of subsection 14(4)."[26] Other previous orders have concluded that the existence of a discretion to inspect or not to inspect is an important factor in deciding whether an inspection is "routine."[27] For example,

> …if the official or agency is not given the power to decide whether or not to carry out the inspection, as in the case of mandated monthly inspections, these types of inspections would most likely be considered "routine."[28]

[77] However, as noted in MO-2303-I, it has also been observed that because this discretion can take different forms and may be of varying significance within a given scheme of regulatory enforcement, discretion alone cannot be the determining factor, and the nature of the inspection itself must also be assessed.[29]

[78] Each of the reports at issue in this inquiry includes a background section that provides detailed reasons why each pharmacy was selected for an "audit" or

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[26] P-136; See also PO-3637 at paras. 35 to 37.
[27] Orders P-480, P-1120 and MO-2303-I.
[28] MO-2303-I.
[29] Orders P-136 and PO-1988.

"inspection." I am not able to describe the specific reason for each inspection without revealing the actual information at issue in the reports. However, based on my review of the reports, I confirm the ministry's representation that some of the inspections were commenced as a result of public complaints about the pharmacies. Other inspections were commenced after ministry inspectors reviewed various data and identified patterns of concern. It is clear to me from reviewing the reports that the ministry has the discretion to determine which pharmacies to inspect and that different factors may inform its inspectors' decisions. In my view, this discretion weighs in favour of a finding that the reports are not the result of routine inspections.

[79] Furthermore, it is clear to me from reviewing the reports at issue that the information in the reports was gathered for the purpose of investigating particular offences under the *ODBA.* Previous orders have suggested that these types of investigations are ineligible for the routine inspection exception in section 14(4).[30]

[80] Moreover, the content of the reports at issue does not suggest that the inspections were routine. While each of the reports follows a somewhat similar structure, the content and inspection activities described varies for each pharmacy. For some of the inspections the inspectors attended at the pharmacy multiple times and the purpose of their visits and activities are described in the reports. Some of the inspectors gathered and reviewed significant amounts of evidence and information, whereas others were focused on single issues.

[81] The reports also differ in how the information collected is presented: for example, some inspectors create tables to display the information they gathered and then refer to the tables in their narrative analysis. Other inspectors rely more heavily on the appendices they include in the reports to support their findings and analysis. Each of the reports varies in length and detail. However, they all span a considerable amount of time and amass a large amount of information. For example, one of the inspections took several months to complete and the corresponding report is over 900 pages. In my view, this type of detailed investigation is not "routine" in nature.

[82] I have considered the appellant's assertion that the ministry conducts many "routine" inspections and the fact that it only prepares reports for some of those inspections does not absolve it of its obligation to release the reports pursuant to section 14(4). I agree that finding problems on inspection does not automatically transform a routine inspection into a non-routine inspection. If the ministry is suggesting that the outcome of an inspection determines whether or not the inspection was routine, then I disagree. However, I have reviewed the reports at issue and I do not agree with the appellant's characterization of the process or the reports.

[83] In my view, the ministry's representations could have been clearer, but based on the totality of the information before me the inspections that resulted in the reports at

[30] See Order MO-2303-I.

issue in this inquiry were not routine. While the ministry inspectors may conduct routine monitoring of pharmacies enrolled in the ODB Program, I find that the reasons for initiating an inspection, the varied approach of the inspectors, the length of time the inspections took to complete and the actions undertaken by the inspectors all weigh in favour of a finding that these were not routine inspections. I also note that each inspection was undertaken with a view to determining whether action should be taken against the pharmacy pursuant to the *ODBA.* In my view, this is another factor that weighs in favour of a finding that the inspections were not routine.[31]

[84] Accordingly, I find that section 14(4) does not apply in the circumstances of this appeal and the records are, therefore, exempt from disclosure under section 14(2)(a) of the *FIPPA*. I will next consider whether the ministry properly exercised its discretion to apply that exemption.

Issue B: Did the ministry exercise its discretion under section 14(2)(a)? If so, should I uphold the exercise of discretion?

[85] After deciding that records or portions thereof fall within the scope of a discretionary exemption, an institution is obliged to consider whether it would be appropriate to release the records, regardless of the fact that they qualify for exemption. Section 14(2)(a) is a discretionary exemption, which means that the ministry could choose to disclose the information, despite the fact that it may be withheld under *FIPPA*.

[86] In applying the exemption, the ministry was required to exercise its discretion. On appeal, the IPC may determine whether the ministry failed to do so. In addition, the IPC may find that the ministry erred in exercising its discretion where it did so in bad faith or for an improper purpose; where it took into account irrelevant considerations; or where it failed to take into account relevant considerations. In either case, I may send the matter back to the ministry for an exercise of discretion based on proper considerations.[32] According to section 54(2) of *FIPPA*, however, I may not substitute my own discretion for that of the ministry and order disclosure of the records.

[87] As I upheld the ministry's decision that section 14(2)(a) applies to the records, I must review its exercise of discretion under that exemption.

[88] The ministry submits that it properly exercised its discretion in withholding the records subject to the section 14(2)(a) exemption. It says that it considered relevant factors and did not take irrelevant factors into account in exercising its discretion.

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[31] See, for example, Interim Order PO-4207-I, where an IPC adjudicator concluded that the fact that an investigation was commenced to determine whether or not charges should be laid under the offence provisions of the *Fire Protection and Prevention Act, 1997,* took the resulting report "out of the realm of a report that arises out of a routine inspection."
[32] Order MO-1573.

[89] The appellant submits that the ministry used its discretion to apply *FIPPA* in such a way as to exempt the entirety of the records requested from release.

[90] In determining whether the ministry has exercised its discretion to apply section 14(2)(a) I considered the ministry's initial representations and its sur-reply, in addition to the records themselves. Based on my review of all of this information, I find that the ministry considered relevant factors in exercising its discretion and did not take into account irrelevant considerations. I am satisfied that the ministry exercised its discretion properly and in good faith and provided reasons why it decided not to disclose the information at issue, despite the fact that it could exercise its discretion to do so. As such, I uphold ministry's decision to withhold the records under section 14(2)(a) of *FIPPA*.

[91] Due to this finding, I do not need to consider whether the other exemptions claimed by the ministry, namely section 14(1)(c) and 21(1), also apply to the records. Furthermore, while the appellant raised the possible application of the public interest override in section 23 of *FIPPA* to the records, section 23 of *FIPPA* cannot apply to records that are exempt under section 14(2)(a).[33] Therefore, I do not need to consider whether the public interest override applies to the records and I dismiss the appeal.

ORDER:

The appeal is dismissed.

Original Signed by: November 14, 2022

Meganne Cameron
Adjudicator

[33] Section 23 of *FIPPA* states: An exemption from disclosure of a record under sections 13, 15, 15.1, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.