Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4407

Appeal PA21-00210

Ministry of the Solicitor General

June 21, 2023

Summary: This order deals with a request made to the Ministry of the Solicitor General (the ministry) under the *Act* for records relating to three specified Ontario Provincial Police (OPP) occurrence reports about a motor vehicle collision. The ministry located records responsive to the request and granted the requester partial access to them. The ministry denied access to other information, claiming the mandatory exemption in section 21(1) (personal privacy) and the discretionary law enforcement exemption in section 14(1)(l) (facilitate commission of an unlawful act). The ministry stated that some records had been purged in accordance with the OPP's retention schedule and stated that some information was removed from the disclosed records as it was not responsive to the request. During the mediation of the appeal, the appellant stated that he believes more records exist, raising the issue of the ministry's search for records.

In this order, the adjudicator upholds the ministry's decision, finding that all of the withheld information is exempt from disclosure under either section 21(1) or 14(1)(l). The adjudicator also upholds the ministry's exercise of discretion in withholding the information she has found to be exempt under section 14(1)(l). The ministry's search for records is upheld and the appeal is dismissed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2 (definition of personal information), 14(1)(l), 21(1) and 21(3)(b).

Orders Considered: Orders PO-3742 and PO-4310.

OVERVIEW:

[1] This order resolves the issues raised as a result of an appeal of an access decision made by the Ministry of the Solicitor General (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The access request was for records relating to three specified Ontario Provincial Police (OPP) occurrence reports and a 911 audio recording about a motor vehicle collision.

[2] In response, the ministry located three Occurrence Summaries, and granted the requester partial access to them. The ministry denied access to certain information in the Occurrence Summaries, claiming the discretionary exemptions in section 49(a) (discretion to refuse requester's own information) read with section 14(1)(l) (facilitate commission of an unlawful act) and section 49(b) (personal privacy) of the *Act.* The ministry stated "Please note the officer notes, witness statements and 911 AUDIO were purged in accordance with the retention schedule of the Ontario Provincial Police. The retention schedule is 7 years plus current which expired." The records were created in September of 2003. The access request was made in April of 2021. The ministry also stated that some information was removed from the disclosed records as it is not responsive to the request.

[3] The requester, now the appellant, appealed the ministry's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC).

[4] During the mediation of the appeal, the appellant advised that he believed more records should exist relating to a 911 call that he made following the motor vehicle accident. In response, the ministry advised the mediator that no additional records exist. As a result, the issue of reasonableness of the ministry's search was added to the issues proceeding to adjudication.

[5] The ministry also clarified during mediation that it was no longer applying sections 49(a) and (b) to the records.

[6] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. I conducted an inquiry, seeking and receiving representations from both the ministry and the appellant. The appellant's representations are wide-ranging and raise a number of issues that are not within my jurisdiction, such as the police's conduct during the investigation. I will not address these issues any further in this order.

[7] For the reasons that follow, I find that all of the withheld information is exempt from disclosure under either section 21(1) or 14(1)(l). I also uphold the ministry's exercise of discretion in withholding the information I have found to be exempt under section 14(1)(l). I further uphold the ministry's search for records and I dismiss the appeal.

RECORDS:

[8] The records are three Occurrence Summaries which were withheld in part.

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

B. Does the mandatory personal privacy exemption at section 21(1) apply to the information at issue?

C. Does the discretionary exemption at section 14(1)(l) related to law enforcement activities apply to the information at issue?

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

DISCUSSION:

Preliminary Issue

[9] The ministry withheld one portion of each record, claiming that these portions were not responsive to the access request.

[10] To be considered responsive to the request, records must "reasonably relate" to the request.[1] Institutions should interpret requests generously, in order to best serve the purpose and spirit of the *Act*. Generally, if a request is unclear, the institution should interpret it broadly rather than restrictively.[2]

[11] Neither party provided representations that address the portions of the records that the ministry withheld as not responsive to the access request. I have reviewed the records, and I find that this limited information that was withheld does not, in fact, "reasonably relate" to the access request and is therefore not responsive to the request.

Issue A: Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[12] The ministry relies on the personal privacy exemption to withhold some of the information. To address this claim and, in order to decide which sections of the *Act* apply to this appeal, I must first decide whether the records contain "personal information," and if so, to whom the personal information relates.

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[1] Orders P-880 and PO-2661.
[2] Orders P-134 and P-880.

[13] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual." "Recorded information" is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps.[3]

[14] Information is "about" the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official or business capacity is not considered to be "about" the individual.[4]

[15] In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be "personal information" if it reveals something of a personal nature about the individual.[5]

[16] Section 2(1) of the *Act* gives a list of examples of personal information. The sections relevant in this appeal state:

> "personal information" means recorded information about an identifiable individual, including,
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> > (c) any identifying number, symbol or other particular assigned to the individual,
> >
> > (d) the address, telephone number, fingerprints or blood type of the individual,
> >
> > (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

[17] It is important to know whose personal information is in the record. If the record contains the requester's own personal information, their access rights are greater than if it does not.[6] Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.[7]

Representations

[18] The ministry submits that each of the records contain the personal information of individuals other than the appellant, including their names with their telephone numbers

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[3] See the definition of "record" in section 2(1).
[4] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[5] Orders P-1409, R-980015, PO-2225 and MO-2344.
[6] Under sections 47(1) and 49 of the *Act,* a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.
[7] See sections 21(1) and 49(b).

and related personal information, namely their actions and observations during the accident that forms the subject matter of the request.

[19] The ministry further submits that the records contain the Workplace Identification Numbers (WIN) of OPP Officers, which has been found in past IPC orders to qualify as their personal information because it would reveal something of a personal nature about them.[8]

[20] The appellant concedes that the records contain other individuals' personal information, including the names of individuals, a car insurance policy number, badge numbers, but that other information does not qualify as personal information, such as OPP officer training records and OPP radio codes.

Analysis and findings

[21] I have considered the parties' representations and reviewed the records. I note at the outset that the records do not contain the appellant's personal information. However, portions of the records do contain information about five individuals other than the appellant which I find qualifies as their personal information.

[22] In particular, I find that the records contain the names of three individuals with their telephone numbers, falling within paragraph (d) of the definition of personal information in section 2(1), and the name of one of these individuals with other personal information about them, falling within paragraph (h) of the definition.

[23] I also find that there is information in the records relating to an OPP Officer. While the officer was acting in a professional capacity in responding to the accident at issue, this information would reveal something of a personal nature about the officer, which qualifies as their personal information.

[24] Lastly, I find that the records contain the WIN numbers of two OPP Officers, which the IPC has found qualifies as personal information under section 2(1). I refer to the findings made by Adjudicator Steven Faughnan in Order PO-3742, in which he stated:

> I recognize that the information was recorded in the course of the execution of the police employee's professional, rather than their personal, responsibilities. However, I find that disclosure of the WIN number, particularly when taken with the employee's name (which has already been disclosed to the appellant) reveals something of a personal nature about the employee. I find that the undisclosed information represents an identifying number that has been assigned to the employee, who is also identified in the record by name. I also note that the number provides a link to other personal information of the employee, i.e., human

[8] See, for example, Order PO-3742.

> resources information. Accordingly, I find that the employee number qualifies as the employee's personal information within the meaning of paragraph (c) of the definition.

[25] I agree with and adopt the approach taken in Order PO-3742 and find that the WIN numbers qualify as the OPP Officers' personal information under paragraph (c) of the definition of personal information in section 2(1) of the *Act*.

[26] Because the records do not contain the appellant's personal information, consideration as to whether the personal information of the other individuals' is exempt from disclosure is done so under the mandatory exemption in section 21(1), below.

Issue B: Does the mandatory personal privacy exemption at section 21(1) apply to the information at issue?

[27] One of the purposes of the *Act* is to protect the privacy of individuals with respect to personal information about themselves held by institutions. Section 21(1) of the *Act* creates a general rule that an institution cannot disclose personal information about another individual to a requester. This general rule is subject to a number of exceptions.

[28] The sections 21(1)(a) to (e) exceptions are relatively straightforward. If any of the five exceptions covered in sections 21(1)(a) to (e) exist, the institution must disclose the information.

[29] The section 21(1)(f) exception is more complicated. It allows the institution to disclose another individual's personal information to a requester only if this would not be an "unjustified invasion of personal privacy." Other parts of section 21 must be looked at to decide whether disclosure of the other individual's personal information would be an unjustified invasion of personal privacy.

[30] Under section 21(1)(f), if disclosure of the personal information would not be an unjustified invasion of personal privacy, the personal information is not exempt from disclosure.

[31] Sections 21(2), (3) and (4) help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy. Sections 21(3)(a) to (h) should generally be considered first.[9] These sections outline several situations in which disclosing personal information is presumed to be an unjustified invasion of personal privacy.

[32] If one of these presumptions applies, the personal information cannot be disclosed unless:

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[9] If any of the section 21(3) presumptions are found to apply, they cannot be rebutted by the factors in section 21(2) for the purposes of deciding whether the section 21(1) exemption has been established.

- there is a reason under section 21(4) that disclosure of the information would not be an "unjustified invasion of personal privacy," or
- there is a "compelling public interest" under section 23 that means the information should nonetheless be disclosed (the "public interest override").[10]

Representations

[33] The ministry submits that the mandatory exemption in section 21(1) applies to the personal information at issue because its disclosure would constitute an unjustified invasion of the privacy of the affected individuals. The ministry goes on to argue that the presumption in section 21(3)(b) applies to all of the personal information at issue because it was collected and prepared by the OPP as part of an investigation arising out of a motor vehicle collision.[11]

[34] The appellant does not refer to the presumption in section 21(3)(b), but argues that a number of the circumstances in section 21(1)(a) through (e) apply, which set out when disclosure of personal information does not constitute an unjustified invasion of personal privacy. For example, the appellant argues that section 21(1)(b) (compelling circumstances affecting the health or safety of an individual) applies because he suffered a concussion as a result of the accident that forms the subject matter of the access request, and that section 21(1)(c) (personal information collected for a record available to the public) applies because he believes the record should be available to the public. The appellant also submits that section 21(1)(d) (another Act of Ontario or Canada expressly authorizes the disclosure) applies because it is his constitutional right to access the personal information at issue, and that section 21(1)(e) (research purpose) applies because he intends to conduct research to verify that the OPP adequately trains its officers.

Analysis and findings

[35] I find that all of the personal information in the records is exempt from disclosure under section 21(1) because its disclosure would constitute an unjustified invasion of the personal privacy of five individuals.

[36] As previously stated, the appellant has raised a number of the circumstances in section 21(1) which set out when disclosure of personal information does not constitute an unjustified invasion of personal privacy. Having reviewed the records and the arguments advanced by the appellant, I find that the circumstances in section 21(1) referred to by the appellant do not apply.

[37] With respect to section 21(1)(b), I find that the appellant has not provided sufficient evidence that the disclosure of the almost 20 year old personal information in

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[10] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).
[11] The ministry relies on Orders PO-3766 and PO-3897 to support its position.

the records qualify as compelling circumstances affecting the appellant's health or safety, or that of any other individual. I find that section 21(1)(c) does not apply because the appellant has not provided sufficient evidence that the personal information in the records should be available to the public. I further find that the appellant has not demonstrated how, under section 21(1)(d), it is his constitutional right to access the personal information at issue. Lastly, I find that section 21(1)(e) (research purpose) does not apply because the personal information in the records was not collected with a reasonable expectation that it would be used for research purposes.

[38] The ministry claims that the presumption in section 21(3)(b) applies to all of the personal information at issue. Section 21(3)(b) states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
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> > (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

[39] The presumption in section 21(3)(b) requires only that there be an investigation into a *possible* violation of law.[12] So, even if criminal proceedings were never started against the individual, section 21(3)(b) may still apply.[13] The presumption does not apply if the records were created after the completion of an investigation into a possible violation of law.[14]

[40] I find that the presumption in section 21(3)(b) applies to all of the personal information of the five individuals referred to above because the disclosure of this personal information would reveal information that was compiled by OPP Officers as part of its accident investigation into a possible violation of the law.

[41] As previously stated, if any of the section 21(3) presumptions are found to apply, they cannot be rebutted by the factors in section 21(2) for the purposes of deciding whether the section 21(1)(f) exception to the section 21(1) exemption has been established. As a result, I find that disclosure of the personal information referred to above would constitute an unjustified invasion of the personal privacy of five individuals under section 21(1)(f), and it is therefore exempt from disclosure under section 21(1) of the *Act*.

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[12] Orders P-242 and MO-2235.
[13] The presumption can also apply to records created as part of a law enforcement investigation where charges were laid but subsequently withdrawn (Orders MO-2213, PO-1849 and PO-2608).
[14] Orders M-734, M-841, M-1086, PO-1819 and MO-2019.

Issue C: Does the discretionary exemption at section 14(1)(l) related to law enforcement activities apply to the information at issue?

[42] Section 14 contains several exemptions from a requester's right of access, mostly related to the context of law enforcement.

[43] The ministry is claiming the application of section 14(1)(l), which states:

> (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > (l) facilitate the commission of an unlawful act or hamper the control of crime.

[44] The term "law enforcement"[15] is defined in section 2(1):

> "law enforcement" means,
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> > (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)

[45] The IPC has found that "law enforcement" can include a police investigation into a possible violation of the *Criminal Code.*[16]

[46] Many of the exemptions listed in section 14 apply where a certain event or harm "could reasonably be expected to" result from disclosure of the record.

[47] Parties resisting disclosure of a record cannot simply assert that the harms under section 14 are obvious based on the record. They must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 14 are self-evident and can be proven simply by repeating the description of harms in the *Act.*[17]

[48] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.[18] However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends

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[15] The term "law enforcement" appears in many, but not all, parts of section 8.
[16] Orders M-202 and PO-2085.
[17] Orders MO-2363 and PO-2435.
[18] *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.

on the context of the request and the seriousness of the consequences of disclosing the information.[19]

Representations

[49] The ministry submits that the OPP is a law enforcement agency and that it has applied the discretionary exemption in section 14(1)(l) to portions of the records that were created and used in the course of an OPP investigation of the accident.[20] This information, the ministry submits, contains police codes, including patrol zone codes, and other codes that are used by police to routinely communicate with one another using terminology or coded language that would not be expected to be known to the general public. The ministry argues that it has withheld these codes as per its usual practice, and because the disclosure of these codes could make it easier for individuals carrying out criminal activities to have internal knowledge of how systems within the OPP operate. The ministry goes on to argue that disclosure of police codes could jeopardize the security of law enforcement systems and the safety of the OPP staff identified by them. Finally, the ministry submits that a long line of IPC orders has found that police operational codes qualify for exemption under section 14(1)(l) because of the reasonable expectation of harm were they to be released.[21]

[50] The appellant's representations do not address this issue.

Analysis and findings

[51] For section 14(1)(l) to apply, there must be a reasonable basis for concluding that disclosure of the information at issue could be expected to facilitate the commission of an unlawful act or hamper the control of crime.

[52] Numerous orders issued by the IPC have considered the application of the law enforcement exemption in section 14(1)(l) to police-code information,[22] including Order PO-4310, in which I considered Order MO-2871, where Adjudicator Diane Smith found that the disclosure of ten-codes could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. She stated:

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[19] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc.* v. *Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

[20] The ministry's position is that previous IPC Orders, such as Order PO-3013 have confirmed that the OPP is an agency which has the function of enforcing and regulating compliance with the law under section 14.

[21] See, for example, Order PO-3742.

[22] The equivalent to section 14(1)(l) in the *Municipal Freedom of Information and Protection of Privacy* is section 8(1)(l).

> This office has issued numerous orders with respect to the disclosure of police codes and has consistently found that section 8(1)(l)[23] applies to "10- codes" (see Orders M-93, M-757, MO-1715 and PO-1665), as well as other coded information such as "900 codes" (see Order MO-2014). These orders adopted the reasoning of Adjudicator Laurel Cropley in Order PO-1665:
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> > In my view, disclosure of the "ten-codes" would leave OPP officers more vulnerable and compromise their ability to provide effective policing services as it would be easier for individuals engaged in illegal activities to carry them out and would jeopardize the safety of OPP officers who communicate with each other on publicly accessible radio transmission space...

[53] For the purposes of this appeal, I agree with and adopt these findings that "police ten-code" and similar police code information is subject to the exemption at section 14(1)(l) of the *Act*.[24] I have reviewed the information at issue and find that the information clearly contains law enforcement code information recorded by OPP Officers.

[54] I accept that disclosure of this type of information has consistently been found to reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. I also accept that the disclosure of this information could reasonably be expected to compromise the ability OPP Officers to provide effective policing services by enabling individuals engaged in illegal activities to conduct such activities. As a result, I find that this law enforcement code information is exempt from disclosure under section 14(1)(l) of the *Act*, subject to my findings regarding the ministry's exercise of discretion.

[55] The section 14(1)(l) exemption is discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[56] The ministry submits that it properly exercised its discretion in withholding information under section 14(1)(l) in accordance with its historical and usual practice, and that past IPC Orders have consistently upheld its discretion under section 14(1)(l).

[57] The appellant does not address this issue in his representations.

[58] I am satisfied that the ministry exercised its discretion based on proper

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[23] Section 8(1)(l) of the *Municipal Freedom of Information and Protection of Privacy Act* (the municipal *Act*) is the equivalent of section 14(1)(l) of the *Freedom of Information and Protection of Privacy Act*.
[24] See also Orders MO-3640, MO-3682, MO-3773, MO-4073 and PO-4017 in which similar findings were made with regard to police ten-codes.

considerations, including the importance of the law enforcement exemption, and did not take into account irrelevant considerations. I note that the ministry disclosed as much information as possible to the appellant, withholding only the limited amount of police code information contained in the records. As a result, I uphold the ministry's exercise of discretion.

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

[59] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 24 of the *Act*.[25] If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

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

[61] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;[27] that is, records that are "reasonably related" to the request.[28]

[62] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.[29] The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[30]

[63] If the requester failed to respond to the institution's attempts to clarify the access request, the IPC may decide that all steps taken by the institution to respond to the request were reasonable.[31] I asked the ministry to provide a written explanation of all steps taken in response to the access request.

Representations

[64] The ministry submits that many of the records were purged in accordance with its retention schedule, but that it nevertheless conducted a search for records that were retained. The ministry provided its evidence regarding its search by affidavit, sworn by

[25] Orders P-85, P-221 and PO-1954-I.
[26] Order MO-2246.
[27] Orders P-624 and PO-2559.
[28] Order PO-2554.
[29] Orders M-909, PO-2469 and PO-2592.
[30] Order MO-2185.
[31] Order MO-2213.

the Regional FOI Coordinator (the Coordinator) for the OPP's Highway Safety Division. The Coordinator states that she is knowledgeable in respect of the requirements and procedures for responding to FOI requests and that she is also familiar with the record holdings of the OPP that were searched in response to the request.

[65] The Coordinator states that she contacted the OPP's Communication and Technology Service Bureau in order to search for a 911 audio recording. She also contacted the OPP detachment that responded to the accident to search for any responsive records. In both cases, the Coordinator states, she was advised that the records that were requested were no longer available because they had been purged due to the retention schedule, which was seven years plus the current year from the date the records were created. Finally, the Coordinator submits that she searched the OPP's records database, referred to as the "Niche RMS," and located the three records that are the subject matter of this appeal.

[66] The appellant does not address the ministry's search for records in his representations.

Analysis and findings

[67] To locate records, I accept that the ministry conducted searches in its record holdings in Niche RMS, and at the Communication and Technology Service Bureau and the relevant OPP detachment. I also accept the ministry's evidence that the Coordinator was knowledgeable about the OPP's records holdings and the records that are the subject matter of this request.

[68] The *Act* does not require the ministry to prove with absolute certainty that further records do not exist. However, the ministry must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. In this case, I find that at least three employees knowledgeable in the subject matter of the request expended a reasonable effort to locate the three records that were responsive to the request. I also accept the ministry's argument that if there were other records responsive to the access request, they may no longer exist due to the OPP's records retention schedule.

[69] As a result, I find that the ministry has made a reasonable effort to identify and locate responsive records and I uphold its search for records as being reasonable.

ORDER:

1. I find that the withheld information is exempt from disclosure under either the mandatory exemption in section 21(1) or the discretionary exemption in section 14(1)(l).

2. I uphold the ministry's search for records responsive to the appellant's access request.

Original signed by: June 21, 2023

Cathy Hamilton
Adjudicator