Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4503

Appeal PA23-00043

Ministry of the Solicitor General

March 28, 2024

Summary: The Ministry of the Solicitor General (the ministry) received a request under the *Act* for a specified Ontario Provincial Police weapons strategy report. The ministry claimed the section 14(2)(a) (law enforcement report) exemption to withhold the record in its entirety. The appellant claimed the application of the section 14(5) (success of a law enforcement program) exception to the exemption. In this order, the adjudicator finds that the record is exempt from disclosure under section 14(2)(a) and the section 14(5) exception does not apply. He upholds the decision of the ministry and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 14(2)(a) and 14(5).

Orders Considered: Orders 188 and PO-3112.

OVERVIEW:

[1] The Ministry of the Solicitor General (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a specified Ontario Provincial Police (OPP) weapons strategy report (the record). The ministry denied access to the record, citing section 13(1) (advice to government), sections 14(1)(a), (c), (e), (i), and (l) (law enforcement), section 15(a) (intergovernmental relations), and section 22(a) (information published or available to the public). The requester (now the appellant) appealed the decision to the Information and Privacy Commissioner of Ontario (IPC).

[2] During mediation, the ministry advised that it was no longer relying on section 22(a), but continued to rely on the remainder of the exemptions to deny access to the record in its entirety. No further mediation was possible, and the appeal was transferred to the adjudication stage of the appeals process. I conducted an inquiry in which I sought and received representations from the parties and reply representations from the ministry. Representations were shared in accordance with the IPC's *Code of Procedure*.

[3] In its initial representations, the ministry stated that it was no longer relying on the section 14(1)(i) exemption, but raised the application of section 14(2)(a) (law enforcement report). The appellant objected to the raising of this new exemption and also claimed the application of the section 14(5) (success of a law enforcement program) exception to the section 14 exemptions.

[4] For the reasons that follow, I uphold the decision of the ministry and dismiss the appeal.

RECORDS:

[5] The sole record at issue is an OPP weapons strategy report.

ISSUES:

A. Should the ministry be allowed to claim the discretionary section 14(2)(a) exemption outside of the 35-day window for doing so?

B. Does the section 14(2)(a) exemption apply to the record? If so, does the section 14(5) exception to the exemption apply to the record?

C. Did the ministry exercise its discretion in withholding the record under section 14(2)(a)?

DISCUSSION:

Issue A: Should the ministry be allowed to claim the discretionary section 14(2)(a) exemption outside of the 35-day window for doing so?

[6] The section 14(2)(a) exemption is discretionary. This means that an institution can choose to withhold the information but could also choose to disclose it. Here, the institution did not claim the discretionary section 14(2)(a) exemption until it made its representations in this inquiry.

[7] The IPC's *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before the IPC. 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.

[8] The purpose of the 35-day guideline is to provide an opportunity for institutions to raise a new discretionary exemption without compromising the integrity of the appeal process. Where an institution is aware of the 35-day guideline, disallowing a discretionary exemption claimed outside the 35-day period is not a denial of natural justice.[1]

[9] In deciding 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 institution and to the requester.[2] The specific circumstances of the appeal must be considered in making this decision.[3]

Representations, analysis, and finding

[10] The ministry acknowledges that it did not initially claim section 14(2)(a), but now claims that it applies to the entirety of the record. It submits that relying on section 14(2)(a) does not change the number of records that the ministry is withholding, as it was already refusing access to the entirety of the record. It further states that it has already claimed the application of section 14 and is simply now claiming an additional exemption in this section. It also states that there are important policy reasons for claiming this section.

[11] The appellant objects to the consideration of section 14(2)(a) at the adjudication stage, stating that this is a "fundamental change" to the ministry's position. He points to previous requests that were made to the ministry concerning similar subject matter to the record, and states that, despite the responsive records in those requests being similar to the record in this appeal, section 14(2)(a) was not claimed by the ministry. He submits that allowing the late-raising of the exemption would be prejudicial to him because it did not form part of the ministry's initial refusal to disclose, and is simply being deployed as

---

[1] *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.).
[2] Order PO-1832.
[3] Orders PO-2113 and PO-2331.

yet another hurdle for the appellant to overcome in accessing the responsive records.

[12] The appellant further states that the ministry is not prejudiced if the exemption were not to be allowed, as it had not relied on it when refusing information in past requests on the same topic. He also states that the integrity of the appeals process would be compromised because it appears that the ministry is only claiming section 14(2)(a) because its decision was appealed to the IPC, and it is trying to appear more persuasive in the appeal process.

[13] I have considered the representations of both parties on whether I should consider the newly claimed exemption, and I find that there is minimal, if any, prejudice to the appellant by allowing the claim. While I appreciate the appellant's submission that a new exemption being claimed represents an additional hurdle to overcome, I do not agree that the addition of a new exemption amounts to prejudice to the appellant.

[14] In this particular appeal, the ministry is denying access to the entirety of the record, a position it has held throughout the appeal. As the ministry explained in its representations, the ministry denied access to the entirety of the record in its initial access decision, it denied access to the entirety of the record during mediation, and it continues to do so at the adjudication stage.

[15] Regardless of which particular section 14 exemption the ministry is claiming, the appellant would be required to respond to the ministry's representations on why the exemption applies to the record, and he was provided the opportunity to do so here. Additionally, although I can understand the appellant's concern that section 14(2)(a) was not claimed for records responsive to similar access requests, I do not agree that this is relevant to the question of whether allowing a late exemption claim is prejudicial. The ministry has explained why it believes section 14(2)(a) is relevant to this particular appeal, and the appellant was given the opportunity to explain why it is not. The ministry claiming the exemption late has not deprived the appellant of the opportunity to respond to the claim. Considering this, I find that the appellant has not established that allowing the exemption would be prejudicial to him.

[16] Additionally, I find that not allowing the ministry to claim section 14(2)(a) will result in significant prejudice. As discussed below, the section 14(2)(a) exemption is much broader in scope than the exemptions previously claimed by the ministry. If I were to not consider the section 14(2)(a) exemption, the ministry would be much more limited in fully arguing why the entirety of the record is exempt from disclosure, and may be required to disclose portions that are otherwise protected by section 14(2)(a). As such, when considering the prejudice to the appellant and ministry, I find that the balance weighs in favour of allowing the late-raised exemption claim.

Issue B: Does the section 14(2)(a) exemption apply to the record? If so, does the section 14(5) exception to the exemption apply to the record?

[17] Having found that the ministry should be allowed to claim the section 14(2)(a) exemption, I will now consider if it applies to the record. Section 14(2)(a) states:

> A head may refuse to disclose a record,
>
> > 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.

[18] For a record to be exempt under section 14(2)(a), it must be:

1. a report,
2. prepared in the course of law enforcement, inspections or investigations, and
3. prepared by an agency that has the function of enforcing and regulating compliance with a law.[4]

[19] The term "law enforcement"[5] is defined in section 2(1) as:

> "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] The IPC has found that "law enforcement" includes situations such as a police investigation into a possible violation of the *Criminal Code*.[6]

[21] A report is a formal statement or account of the results of the gathering and consideration of information. "Results" do not generally include mere observations or recordings of fact.[7] The title of a document does not determine whether it is a report, although it may be relevant to the issue.[8]

---

[4] Orders P-200 and P-324.
[5] The term "law enforcement" appears in many, but not all, parts of section 14.
[6] Orders M-202 and PO-2085.
[7] Orders P-200, MO-1238 and MO-1337-I.
[8] Order MO-1337-I.

Representations, analysis, and finding

[22] The ministry submits that the record is exempt in its entirety under section 14(2)(a). With respect to the first part of the test, the ministry submits that the record is a report within the above interpretation for two reasons. First, it states that the record has the formality and structure of a report, being prepared on OPP letterhead, with a background section, recommendations, and supporting documents. Second, it submits that the substance of the record is that of a report. Referring to Order PO-3112, it states that for a record to be a report within the meaning of section 14(2)(a), it must "contain some analysis and information that goes beyond merely reporting or facts." It submits that, here, the record is evaluative and analytical because it contains advice and recommendations for mitigating the risk posed by firearms.

[23] For the second part of the test, the ministry submits that the record was created for the purpose of "law enforcement," which includes policing. It states that the use of firearms by police is inherently a part of policing, and that this shows that part two of the test is met. It explains how the record was created due to concerns that frontline law enforcement officers were increasingly confronting active gunfire in the course of their duties and the purpose of the record was to address these issues.

[24] With respect to part three of the test, the ministry submits that the OPP is part of the definition of a "police force" in the *Police Services Act*, meaning that it fits squarely within the meaning of this part of the test.

[25] The appellant generally states that the section 14(2)(a) exemption does not apply to the record, but he did not provide specific representations on the three-part test discussed above, focusing his arguments more on the exception at section 14(5).

[26] On its face, the record is a "report." Consistent with the definition outlined in Order PO-3112 and previous decisions, the record is more than an occurrence report that only includes observations or recordings of fact.[9] It contains an overview of the weapons strategies of the OPP and other police forces and recommendations on how the OPP can improve the safety of police officers and the public when responding to crime involving shooting incidents. The record relates to how the OPP and other law enforcement agencies respond to shooting incidents in a broad context and the challenges associated with that in law enforcement situations, and was prepared to address ways that OPP responses can be improved. It is not just a series of observations, but an analysis and evaluation of factual information, with recommendations flowing from this analysis.

[27] It is also clear that it was prepared in the course of law enforcement by an agency that has the function of enforcing and regulating compliance with a law. It is not disputed that the OPP has the function of enforcing and regulating compliance with various laws.[10]

---

[9] See also, for example, Orders 200 and M-1109.

[10] See Order PO-1833, where the adjudicator noted the distinction between an organization that investigates an incident and one that specifically enforces a law through prosecution. Here, the OPP is the

In Order 188, the adjudicator found that the words "prepared in the course of" in section 14(2)(a) contemplates a report that is prepared as part of an actual investigation, inspection, or law enforcement activity. Here, although the report is not about a specific investigation, I find that it does deal with a specific law enforcement activity, namely police responses to incidents involving firearms.

[28] I agree with the ministry's submission that the use of firearms, particularly as it relates to officer and public safety when responding to shooting incidents, is inherently a part of law enforcement. I find that that the strategies and equipment that OPP officers use in responding to such incidents are an intrinsic part of law enforcement. As such, I find that the record is exempt in its entirety under section 14(2)(a), subject to my review of the section 14(5) exception below.

Exceptions to the section 14(2)(a) exemption

[29] Even if the record fits within the 14(2)(a) exemption, it may not be exempt from disclosure if the sections 14(4) or 14(5) exceptions to the exemption apply to it. The appellant has claimed the application of section 14(5).

[30] Section 14(5) creates an exception for records relating to the degree of success of a law enforcement program. It states:

> Subsections (1) and (2) do not apply to a record on the degree of success achieved in a law enforcement program including statistical analyses unless disclosure of such a record may prejudice, interfere with or adversely affect any of the matters referred to in those subsections.

Representations

[31] The ministry did not directly address the application of section 14(5) in its representations.

[32] The appellant notes that the ministry did not address the section 14(5) exception in its representations and submits that the record at issue is a historical record that provided a dated, point-in-time assessment and evaluation of the OPP's then 3-year-old rifle/carbine program and policy that was started in 2004. He submits that information that he has previously received from the ministry in separate requests already provides details about the OPP's standard issue firearms, and that the record would not prejudice, interfere, or adversely affect the decisions about OPP weapon policies. He submits that, per previous disclosures that he received, advice, opinions, and decisions in the record were inherently time-bound and would have been subject to re-evaluation and re-review at a later date, when a weapons contract for the OPP expired.

---

organization that is responsible for enforcing the law in the context of the specific law enforcement activity that the record references: responding to shooting incidents.

Analysis and finding

[33] As discussed above, the entirety of the record relates to the use of firearms by the OPP and other police services generally, with a view to improving public and officer safety in the provision of law enforcement, particularly as it relates to shooting incidents. While there is considerable discussion about the OPP's weapons policies, for the reasons that follow I do not agree with the appellant's submission that the analysis in the record constitutes an evaluation of the "degree of success achieved in a law enforcement program" within the meaning of section 14(5).

Degree of success in a law enforcement program

[34] Contrary to the appellant's submissions, the record is not an evaluation of the OPP's rifle/carbine program and policy that was initiated in 2004. Rather, it is more correctly characterized as a broad, general assessment of the weapons and shooting response strategies of multiple law enforcement organizations, and the ways that the OPP's strategies can be improved. The record does not present a specific program that was implemented by the OPP, but instead provides a systemic overview of how police forces in multiple jurisdictions, including the OPP, operate with respect to officer safety and incidents involving firearms.

[35] Even if I were to find that the record presents a "program" within the meaning of section 14(5), the record would also need to address the "degree of success achieved" by the program. Broadly speaking, the record considers how shooting incidents are responded to in multiple jurisdictions and suggests ways that this can be improved, with a specific focus on the OPP's strategies. In my view, a report saying that general police strategies can be improved is not the same as a report that shows the "degree of success" of a program, as required by section 14(5).

[36] The record does not present a specific program that was implemented by the OPP and then provide an analysis, statistical or otherwise, of how successful the program was. Rather, it broadly shows how police organizations in different jurisdictions respond to shooting incidents and provides recommendations on how to improve OPP responses. I find that the record is an analysis of a general issue that is not specific to the OPP and a collection of responses to the issue, rather than an evaluation of the success of a specific OPP program that was already implemented. Based on this, even if the report were to relate to a law enforcement program, I find that it does not show the degree of success achieved by the program, and section 14(5) is therefore not applicable. I uphold the decision of the ministry, subject to my review of the ministry's exercise of discretion.

Issue C: Did the ministry exercise its discretion in withholding the record under section 14(2)(a)?

[37] The section 14(2)(a) exemption is discretionary, 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.

[38] In addition, the IPC 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; or
- it fails to take into account relevant considerations.

[39] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[11] The IPC cannot, however, substitute its own discretion for that of the institution.[12]

Representations, analysis and finding

[40] The ministry submits that it exercised its discretion properly in not releasing the record. It states that it is concerned that any release of the record will pose risks related to the free flow of advice and recommendations, the provision of law enforcement, the safety of frontline officers, and relationships between the OPP and governments outside of Ontario.

[41] The appellant submits that the ministry did not exercise its discretion in deciding to withhold the entirety of the record. He references previous access requests that he made to the ministry where similar records with similar exemption claims were partially disclosed. He states that its refusal to provide any disclosure here is inconsistent with its previous access decisions and is evidence that it has not exercised its discretion in this case.

[42] I have reviewed the considerations relied upon by the ministry and the appellant's representations, and I find that the ministry properly exercised its discretion in response to the access request. Based on its representations, the ministry considered the purposes of the *Act* and sought to balance the appellant's general right of access to information with the exemptions to access in the *Act*. I do not agree with the appellant's submission that the fact that previous access requests resulted in partial disclosure is evidence of the ministry's failure to exercise its discretion. It is not unreasonable for some records in one request to be partially released while others in a different request are fully withheld, and this distinction will depend on the particular records at issue.

[43] Considering the evidence before me, I find that the ministry did not exercise its discretion to withhold the information for any improper purpose or in bad faith, and that

---

[11] Order MO-1573.
[12] Section 54(2).

there is no evidence that it failed to take relevant factors into account or that it considered irrelevant factors. Accordingly, I uphold the ministry's exercise of discretion in denying access to the record.

ORDER:

I uphold the decision of the ministry and dismiss the appeal.

Original signed by: March 28, 2024

Chris Anzenberger
Adjudicator