Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2751

Appeals PA06-286 and PA06-286-2

Ministry of Community Safety and Correctional Services

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BACKGROUND:

The Criminal Intelligence Service of Canada (CISC) held meetings in Ottawa on January 7, 8, 9, 10 and 11th, 2001 about a planned child pornography investigation by Canadian law enforcement authorities. The investigation was to be based on information received from American law enforcement authorities, including the Dallas Police, arising from an investigation that culminated in the execution of search warrants and the seizure of the computer equipment of a website in Texas (the American website). The seized computer equipment contained a database which law enforcement officials later used to identify individuals suspected of purchasing child pornography through the American website. The investigation of American suspects identified in the seized computer equipment was called Operation Avalanche. The January 2001 meetings in Ottawa related to the ensuing investigation of Canadian suspects identified in the database. The investigation in Canada was called Operation Snowball.

NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received two requests for access to information under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from the same requester, who is a journalist. The first was for access to the following information:

> Any briefing material provided to the Commissioner [of the Ontario Provincial Police (O.P.P)] or any Assistant Commissioner, regarding the National Strategy Briefing in Ottawa, Jan 7, 8, 9, 10, 2001 with respect to the case history of [a named corporation that was the operator of the American website].

The second request was for access to the following information:

> All minutes of, material distributed at or for, agendas, records or decisions, for the National Strategy Briefing held in Ottawa on Jan 7, 8, 9, 10, 2001 with respect to the case history of the investigation into [the named corporation], including any draft or interim version if not complete yet.

The Ministry issued one decision letter in response to both requests. The decision letter stated that a search for records responsive to the first request was conducted and no responsive records were found.

With respect to the second request, the Ministry denied access, in full, to the responsive records it located. In support of its decision to deny access, the Ministry relied on the following exemptions in the *Act*: sections 14(1)(a), (b), (c), (d), (e), (g), (h), (i) and (l); 14(2)(a) (law enforcement); 15(b) and (c) (relations with other governments); 19 (solicitor-client privilege); and 21(1) (personal privacy).

The requester (now the appellant) appealed the Ministry's decision, and in addition to objecting to the denial of access, the appellant took issue with the reasonableness of the search for

responsive records. The appellant also claimed that there is a public interest in the information she requested, raising the possible relevance of section 23 of the *Act*.

The appeal was assigned to a mediator. During mediation, the Ministry provided this office with a copy of the responsive records it had located in relation to part 2 of the request. The Ministry claimed that portions of the responsive records were unresponsive, and these portions were highlighted on the copy provided. As a result of discussions between Ministry staff and the mediator, it was subsequently agreed by the Ministry that the information in the records that was originally identified as non-responsive was in fact responsive to the request. The Ministry also agreed to conduct a further search for responsive records. The search was conducted and no additional records were found.

Also during mediation, an index of records was prepared by the Ministry, which indicates that it no longer relies on the exemptions in sections 14(1)(d) and (e), and section 15(c). As well, the appellant confirmed that she relies on the public interest override in section 23 of the *Act*, and reiterated her view that the Ministry had not conducted a reasonable search for records responsive to part 1 of the request. As no further mediation was possible, this appeal was moved to the adjudication stage of the appeal process, in which an adjudicator conducts an inquiry under the *Act*.

I began the inquiry in this appeal by issuing a Notice of Inquiry to the Ministry. I invited the Ministry to provide me with written representations on the issues set out in the Notice, and to any other issues that are relevant to this appeal. The Ministry submitted representations. In its representations, the Ministry raised the application of the discretionary exemption found in section 15(a) (relations with other governments). As the application of this discretionary exemption was not raised at the request stage or during mediation, I added the issue of the late raising of this discretionary exemption to the issues to be decided in this appeal, as well as the possible application of the section 15(a) exemption. In view of my disposition of the application of section 15(a), below, it is not necessary for me to determine whether the Ministry should be permitted to raise it.

As well, the Ministry contends in its representations that the first 19 pages of the record are a report that meets the criteria under section 14(2)(a) of the *Act*, but does not make representations supporting this argument for the remainder of the records. I take this as an indication that the Ministry no longer claims section 14(2)(a) for the remainder of the records.

I then issued a modified Notice of Inquiry to the appellant and provided her with a complete copy of the Ministry's representations. I invited her to submit representations in response to the issues set out in the notice and to the representations that were filed by the Ministry. I received representations from the appellant.

A few days following the receipt of the appellant's representations, the Ontario Court of Appeal released its decision in *Criminal Lawyers' Association v. The Ministry of Public Safety and Security* (2007), 86 O.R. (3d) 259 (*CLA*). The appellant immediately provided supplementary representations on the implications of this decision, which "reads in" sections 14 and 19 of the *Act* as exemptions to which the public interest override at section 23 of the *Act* may apply.

I then invited the Ministry to submit reply representations and shared complete copies of the appellant's initial and supplementary representations. I received reply representations from the Ministry.

I subsequently issued a Supplementary Notice of Inquiry inviting the Ministry to submit supplementary representations regarding part 1 of the request in relation to the appellant's claim that the Ministry had not conducted a reasonable search for responsive records. The Ministry submitted supplementary representations. In its supplementary representations, the Ministry stated that it had conducted a second search for responsive records and although it found some non-responsive records, no additional responsive records were found as a result of the search. The Ministry's representations took the form of two affidavits.

The two affidavits provided by the Ministry as its supplementary representations on the reasonable search issue were shared with the appellant, along with the Supplementary Notice of Inquiry, and she was invited to submit representations in response, which she did. In her representations, the appellant asked that the reasonable search issue be bifurcated from the other issues in the appeal and that the Ministry be required to produce to this office copies of the "non-responsive" records referred to in the preceding paragraph so that I would be able to consider their responsiveness.

A complete copy of the appellant's representations responding to the Ministry's affidavits was shared with the Ministry, and it was invited to submit representations in response. The Ministry responded to this invitation. It agreed to the bifurcation of the issues. Accordingly Appeal PA08-286-2 was opened. The Ministry also agreed to provide me with copies of the records it claimed were non-responsive to part 1 of the request, and subsequently did so. As requested by the appellant, I have reviewed them for responsiveness, and my findings in that regard appear below. As well, the Ministry provided a third affidavit to answer questions arising from the earlier affidavits.

I then invited the Ministry to answer specific questions I had arising from its representations. The Ministry provided further representations in response.

I have decided to issue one order that deals with the issues in appeal PA06-286 and PA06-286-2. As a result, sections 14(1)(a), (b), (c), (g), (h), (i), (l), 14(2)(a), 15(a) and (b), 19, 21(1), the responsiveness of records and reasonable search are all being dealt with in this order.

RECORDS:

As noted, the Ministry has not located any records that are, in its view, responsive to part 1 of the request, although the responsiveness of the records referred to in the Ministry's response to the Supplementary Notice of Inquiry is an issue to be decided in this order.

The Ministry has identified a 152 page document, which the Ministry's index refers to as the "National Strategy Briefing/Training Package," as responsive to part 2 of the request. Having inspected the records, I conclude that they do not consist of one single document; instead, they

consist of an operational plan and a series of power point presentations, as well as several pages of handwritten notes (pp. 121-127) and what appears to be a handout (pp. 151-152). A table showing the exemptions claimed by the Ministry for the various pages of the records appears below:

Page Numbers	Exemptions Claimed
1 to 152 (all of the records)	14(1)(a), (b), (c), (g), (l) and 15(a) and (b)
1-19	14(2)(a)
48, 49, 50	14(1)(h)
69-76, 80-82, 151-152	14(1)(i)
2, 11, 16	19
23, 36-42, 62-68, 86, 89-93, 121, 146	21(1)

For the purposes of my analysis, I have identified nine distinct records, as follows:

Record 1 (pages 1-19) – Project Snowball Operational Plan
Record 2 (pages 20-44) – Project Overview
Record 3 (pages 45-65) – Search Warrant Presentation
Record 4 (pages 66-83) – Computer Forensics Presentation
Record 5 (pages 84-109) – Data Base Presentation
Record 6 (pages 110-120) –Federal Agency Presentation
Record 7 (pages 121-127) – Handwritten Notes
Record 8 (pages 128-150) – Operation Avalanche Briefing by Dallas Police department
Record 9 (pages 151-152) – High Tech Crime Forensics – RCMP

DISCUSSION:

SCOPE OF REQUEST/RESPONSIVENESS OF RECORD

As noted above, during my inquiry the Ministry found additional records that it claimed were not responsive to the request and the appellant has raised the responsiveness of these records as an issue in this appeal. The records that the Ministry states are non-responsive can be described as follows:

1. Statistical Information regarding Operation Snowball for the period from 2001 to 2002,
2. Project Snowball Report dated July 24, 2002,
3. Project Plan – Final Report – dated May 9, 2003,
4. Project Funding Request dated December 13, 2000
5. Covering memo with minutes of meeting dated January 4, 2001 with attached appendices,
6. Covering memo and minutes of meeting of February 13, 2001
7. List of attendees at National Strategy briefing,
8. Investigative note undated with attached fax dated May 8, 2000,
9. Handwritten notes dated January 7, 2001 to January 9, 2001,
10. Notice, undated.

As already noted, the request that is the subject of this appeal has two parts. Although the additional records were found as a result of searches that were conducted during this inquiry, specifically in relation to part 1 of the request, I will consider whether the records are responsive to part 1 or 2, or to both parts. For ease of reference, I will repeat the two parts of the request. Part 1 was for access to:

> Any briefing material provided to the Commissioner [of the O.P.P.] or any Assistant Commissioner [of the O.P.P.], regarding the National Strategy Briefing in Ottawa, Jan 7, 8, 9, 10 2001 with respect to the case history of [a named corporation that was the operator of the U.S. based internet service].

Part 2 was for access to:

> All minutes of, material distributed at or for, agendas, records or decisions, for the National Strategy Briefing held in Ottawa on Jan 7, 8, 9, 10, 2001 with respect to the case history of the investigation into [the named corporation], including any draft or interim version if not complete yet.

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Previous orders of this office have found that institutions must give a broad and liberal interpretation to the scope of the request. [see Order P-880, MO-1406, P-134, PO-2175]. In Order P-880 former Inquiry Officer Anita Fineberg stated:

> In my view, the need for an institution to determine which documents are relevant to a request is a *fundamental first step* in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by

> asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. *While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.*
>
> [T]he purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the Act to assist the requester in reformulating it. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records. It must outline the limits of the search to the appellant. [emphasis added]

Applying the approach taken in Order P-880, I find that, in order to be responsive to the two parts of the request, taken together, the information in the records must be reasonably related to:

- Briefing materials regarding the National Strategy Briefing; or
- Minutes of, or materials distributed at, the National Strategy Briefing.

In this regard, I note that in the final representations provided by the Ministry on the reasonable search issue, the Ministry submits that Appeal PA07-286-2 should be dismissed because the appellant's last set of representations characterize part 1 of the request as being for access to all briefing material provided to the Commissioner or Assistant Commissioner of the O.P.P. "at" the four-day meeting. The Ministry has clarified that, while the O.P.P. does not have an "Assistant" Commissioner, it does have a "Deputy" Commissioner. The Ministry has, correctly in my view, interpreted reference to the "Assistant" as references to the "Deputy". The Ministry bases its submission that Appeal PA07-286-2 should be dismissed on the fact that neither the Commissioner nor the Deputy Commissioner actually attended the four-day meeting.

I disagree with this submission. The appellant's reference to briefing materials presented "at" the meeting is a departure from the request, and from any other description of it by the appellant. It comes near the end of a lengthy and complex process of providing and responding to representations. In my view, the narrowing proposed by the Ministry would require far more express language than this statement by the appellant, which she did not identify as intended to narrow her request, nor would it be fair from the circumstances to infer any such intention. I have therefore decided not to dismiss Appeal PA07-286-2 on this basis.

The Ministry states that record 9 of the records claimed to be non-responsive is a duplicate of a record that it has already agreed is responsive to part 2 of the request. It continues to state that the other records are not responsive because they were either not provided to the Commissioner or the Deputy Commissioner of the O.P.P. and therefore are not responsive to part 1 of the request, and they were not distributed at or for the National Strategy briefing and are therefore not responsive to part 2 of the request.

I have carefully reviewed the records alleged to be non-responsive. I agree with the Ministry that record 9 (pages 256-262) of the records claimed to be non-responsive is in fact a duplicate of

pages 121-127 of the records already identified as responsive to part 2 of the request (which I have identified as record 7 in the list of responsive records, above). In addition, pages 221-237 of record 6 of the records claimed to be non-responsive are duplicates of pages 3-19 of the responsive records (part of what I have identified as record 1). I find that, other than these duplicate pages, the records claimed to be non-responsive are, in fact, not responsive to either part 1 or part 2 of the appellant's request.

I have reached this conclusion because there is no evidence, either in the representations or in the records in question, that they were provided as "briefing materials" to the Commissioner or Deputy Commissioner in relation to the National Strategy briefing, nor any other reason to infer that they were. The available evidence suggests the contrary. They are therefore not responsive to part 1 of the request. Nor do these records consist of "minutes of, or materials, distributed at the National Strategy briefing" (including "agendas, records or decisions") and they are therefore not responsive to part 2 of the request.

I also note that records 1-3, 5 and 6 of the records claimed to be non-responsive either postdate the National Strategy briefing and/or include information that was gathered following the National Strategy briefing, and for that reason are not responsive to either of parts 1 or 2 of the request. Accordingly, I find that other than the duplicates, which need not be considered twice, the records that the Ministry has provided to this office that it claims are non-responsive are not reasonably related to the request and have been properly claimed as non-responsive by the Ministry.

REASONABLE SEARCH

As noted, the appellant contends that the Ministry did not conduct a reasonable search in relation to part 1 of the request.

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624]. Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

As noted, the Ministry provided me with two affidavits in support of its claim that it has conducted a reasonable search for records responsive to this request. One of the affidavits was sworn by the "Contentious Issue Coordinator". The other affidavit was sworn by the Provincial Coordinator for the Ontario Provincial strategy protecting children from sexual abuse and exploitation on the internet (the Provincial Coordinator).

The Contentious Issue Coordinator states that searches were conducted in the Corporate Communications bureau and the electronic database where all briefing notes provided to the Commissioner and Deputy Commissioner are stored. She also did a search of the backup paper copies that are kept of all briefing notes provided to the Commissioner and the Deputy Commissioner. Following the commencement of this appeal, a second search was conducted by the same individual of the same record storage locations. As a result of those searches, no additional responsive records were found.

The Provincial Coordinator also conducted a search for records responsive to these requests. He states that, following the receipt of the request that led to this appeal, he conducted a search of a "secure vault" at the O.P.P. Investigation Bureau and provided the records that he discovered as a result of that search to the freedom of information coordinator's office. Subsequently, a determination was made that there were no records responsive to the first part of the appellant's request. The Provincial Co-ordinator's affidavit did not, however, explain how or why the contents of the "secure vault" at the O.P.P. Investigation Bureau were related to the request, or to records provided to the Commissioner or Deputy Commissioner. This was later explained in a third affidavit, referenced below, which explains that the Investigation Bureau is responsible for preparing briefing materials.

As noted, the appellant responded to the initial affidavits by asking that the records that were located, and deemed non-responsive, be provided to me for my review in relation to the issue of responsiveness. They were later provided to this office, and as outlined above, I have reviewed them and found them to be non-responsive to both parts of this request. The appellant also noted that the affidavits provided by the Ministry do not indicate whether the Commissioner or the Deputy Commissioner of the O.P.P. were contacted to determine whether they had responsive records and that no search appears to have been conducted of their offices. The appellant also pointed out that the request was for access to briefing "materials" and not just briefing "notes," and that this request encompasses records more than just "briefing notes" for which the Contentious Issues Coordinator is responsible.

In response to the appellant's representations, the Ministry provided representations and a third affidavit, which was sworn by the Team Leader, Crime Prevention Section, Investigation Bureau (Team Leader). In the affidavit, the Team Leader states:

> My search for responsive records to the request did not include either the Office of the Commissioner of the Offices of the Deputy Commissioner. First, there were no records located in response to the above noted request for briefing materials that had been provided to the Deputy Commissioner or Commissioner. Second, it is the responsibility of the Investigations Bureau to create briefing material for this matter, not that of the offices of the Commissioner or Deputy Commissioner. Since the offices of the Deputy Commissioner or the Commissioner did not receive any responsive records, nor were they responsible for creating them, I concluded it was not necessary to contact the Commissioner or Deputy Commissioner or their respective staff. I am also not aware of anyone else doing so.

In its representations, the Ministry states:

> Although the OPP has produced this affidavit, I question how it is relevant to the determination of whether a reasonable search was conducted. First, the request is for briefing material provided to the Commissioner or any Assistant Commissioner. The [appellant] requests evidence that does not provide any assistance in determining whether briefing material was provided to the Commissioner or an Assistant Commissioner. Second, as [the Team Leader] explains in his affidavit, no search was conducted of the Commissioner or Assistance Commissioner's offices because it was not reasonable to expect that any responsive records would be located there. These offices neither received any responsive records, nor would staff in these offices have been responsible for creating any of them. Accordingly, the onus should be on the requester to explain how the affidavit evidence is relevant to determining whether a reasonable search was conducted.

In its supplementary representations relating to the issue of responsiveness of records, the Ministry added that the O.P.P. have a procedure requiring that mail logs of documents that are provided to the Commissioner and the Deputy Commissioner be kept, and stated that the mail logs were searched for the period between October 2000 to February 2001. The search did not yield any evidence that the records the Ministry viewed as non-responsive were provided to the Commissioner or Deputy Commissioner. In addition, the Ministry states that there is no evidence that the Commissioner or the Deputy Commissioner attended the National Strategy Briefing in Ottawa, and moreover, there is no evidence that the records provided at the session were distributed to anyone else other than the attendees.

As noted above, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624] in circumstances where the requester believes that additional records must exist. The question of what is reasonable will turn on the circumstances of each case. For the reasons that follow, I find that the Ministry has not conducted a reasonable search for responsive records in this appeal.

Although it is not incumbent on the Ministry to prove that records do not exist, in my view a search for records responsive to a request is not reasonable if the offices of the individuals to whom the records are believed to have been sent are not searched. Despite the procedures outlined by the Ministry for providing briefing materials and tracking mail, I would have expected that a search of the Commissioner's and Deputy's (or deputies') offices would be high on the list of places to look for responsive records. Despite the extensive exploration of the search issue during these appeals, the Ministry candidly says that it never searched these offices.

Although I accept the evidence of the Ministry regarding the logs that are maintained of records delivered to the Commissioner and the Deputy Commissioner, I conclude that the searches performed by the Ministry in this case were not reasonable because they did not include a search of the offices of the Commissioner and the Deputy (or deputies). Nor is it sufficient to conduct a search of the record holdings of those responsible for creating records of this nature or to claim that the records do not exist because there is no evidence that they were ever prepared. As

potential recipients of these records, I find that a reasonable search for responsive records should include a search of the offices and record holdings of these individuals and their staff.

As well, although it is possible that no briefing materials were ever provided to the Commissioner and/or the Deputy Commissioner(s) in relation to a National Strategy Briefing on an issue with the huge public profile of child pornography, it does seem surprising. This is particularly so given that the records identified as responsive contain information about more than one important law enforcement investigation, including an investigation in the United States that was the source of investigations by police forces throughout Ontario and in other parts of Canada. These investigations involved the expenditure of valuable resources and the coordination of efforts both nationally and internationally with other law enforcement agencies.

For these reasons, I will order that the Ministry conduct a search of the offices and record holdings of the Commissioner and the Deputy Commissioners of the O.P.P., and their staff, for records that may be responsive to part 1 of the appellant's request.

PERSONAL INFORMATION/PERONAL PRIVACY

Personal information is defined in section 2(1) of the *Act*, as "recorded information about an identifiable individual, …" The definition goes on to specify a number of examples of personal information, and at paragraph (b), refers to information relating to the "criminal history" of this individual. In this appeal, it is clear that information about criminal charges against an individual, or information that an individual has been the victim in a child pornography case, would qualify as personal information.

In her representations, the appellant "… consents to the redaction of the record to remove identifying information" in relation to individuals "who were under investigation or victims of child pornography." I have therefore removed this information from the scope of this appeal, and identified the places in the records where it appears. This information is highlighted in a copy of the records that is being provided to the Ministry with a copy of this order, and is not to be disclosed.

Clearly, the intent of the appellant's representations is to be respectful of, and to protect, individual privacy. On this basis, I have decided *not* to redact information about the conviction and sentencing of two individuals who owned and operated the American website. While it is clear that they were previously "under investigation," they have since been charged and convicted, and the nature of the charges and their sentences is widely known. For example, this information was disclosed at a press briefing introduced by the Attorney General of the United States on August 8, 2001, announcing the results of Operation Avalanche, and has also been reported in the Canadian media, including articles provided by the appellant with her representations.

Accordingly, it would be absurd to withhold this information. One of the exceptions to the "personal privacy" exemption at section 21(1) of the *Act* is found at section 21(1)(f). That exception applies where disclosure of the information "does not constitute an unjustified invasion of personal privacy." Many orders of this office have applied the "absurd result"

principle to information that is already known to a requester (see Orders M-444 and MO-1323). In such cases, disclosure is not considered to be an unjustified invasion of personal privacy. Here, the information has been disseminated far more broadly than just to the requester, and it has not been disclosed with restrictions. It was announced at the U.S. Attorney General's briefing as described above, and has been widely reported in the media. In my view, the absurd result principle clearly applies to the information about these two individuals, which I will therefore not order to be redacted, since I do not find it to be exempt under any of the other claimed exemptions, the analysis of which is set out in the remainder of this order.

I also note that, as identified in the index of records, pages 67 and 68 contain the personal information of a police officer. This information qualifies as employment and educational history, and disclosure is therefore a presumed unjustified invasion of privacy under section 21(3)(d). I find this information is exempt under section 21(1).

SOLICITOR-CLIENT PRIVILEGE

The Ministry claims that this exemption applies to parts of record 1 that appear on pages 2, 11 and 16. Section 19 of the *Act* states, in part, as follows:

A head may refuse to disclose a record,

(a) that is subject to solicitor-client privilege;

(b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; …

Branch 1 of the exemption appears in section 19(a), and applies to records subject to common law solicitor-client privilege or litigation privilege. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)]. In this case, the Ministry relies on common law solicitor-client communication privilege.

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

The Ministry argues that a passage on page 11 "contains confidential legal advice provided by Crown counsel." The appellant submits that without seeing the records, she cannot assess the applicability of solicitor-client privilege, but notes that it may have been waived if shared with outside parties.

I agree with the Ministry that the passage on page 11 contains confidential legal advice. In this regard, I note that advice given by Crown counsel may be privileged when given to the O.P.P., as is the case here (see Order PO-1931). The Ministry has also identified pages 2 and 16 as containing privileged information. Two items on page 2 identify the subject matter of the legal advice revealed on page 11, and a passage on page 16 essentially repeats the discussion on page 11. In my view, these portions of pages 2 and 16 are also subject to common law solicitor-client communication privilege.

I note, however, that record 1 was distributed at the meeting of law enforcement officials from across Canada, as referred to in the request. This raises the question of whether privilege has been waived. Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege [Orders PO-2483, PO-2484].

Waiver of privilege is ordinarily established where it is shown that the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege

[*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)].

Generally, disclosure to outsiders of privileged information constitutes waiver of privilege [J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.)].

Waiver has been found to apply where, for example

- the record is disclosed to another outside party [Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)]
- the communication is made to an opposing party in litigation [Order P-1551]
- the document records a communication made in open court [Order P-1551]

However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party. The common interest exception has been found to apply where, for example:

- the sender and receiver anticipate litigation against a common adversary on the same issue or issues, whether or not both are parties [*General Accident Assurance Co. v. Chrusz* (above); Order MO-1678]

- a law firm gives legal opinions to a group of companies in connection with shared tax advice [*Archean Energy Ltd. v. Canada (Minister of National Revenue)* (1997), 202 A.R. 198 (Q.B.)]

- multiple parties share legal opinions in an effort to put them on an equal footing during negotiations, but maintain an expectation of confidentiality vis-à-vis others [*Pitney Bowes of Canada Ltd. v. Canada* (2003, 225 D.L.R. (4th) 747 (Fed. T.D.)]

In my view, the disclosure to other law enforcement officials also intending to investigate and prosecute individuals identified as a result of the seizure of computer equipment from the American website is sufficient to qualify as a common interest. In the circumstances of this appeal, therefore, I find that privilege has not been waived by this disclosure.

I therefore find that the information I have identified on pages 2, 11 and 16 are exempt under branch 1 of section 19. The exempt information is highlighted on a copy of record 1 provided to the Ministry with this order.

LAW ENFORCEMENT

I now turn to consider the Ministry's claim that the record is exempt pursuant to portions of sections 14(1) and (2) of the *Act*. The sections relied on by the Ministry state as follows:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
>
> (h) reveal a record that has been confiscated from a person by a peace officer in accordance with an Act or regulation;
>
> (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

> (l) facilitate the commission of an unlawful act or hamper the control of crime.
>
> (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;

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, and
>
> (c) the conduct of proceedings referred to in clause (b)

The term "law enforcement" has been found to apply in the following circumstances:

- a municipality's investigation into a possible violation of a municipal by-law [Orders M-16, MO-1245]
- a police investigation into a possible violation of the *Criminal Code* [Orders M-202, PO-2085]
- a children's aid society investigation under the *Child and Family Services Act* [Order MO-1416]
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997* [Order MO-1337-I]

The term "law enforcement" has been found *not* to apply in the following circumstances:

- an internal investigation to ensure the proper administration of an institution-operated facility [Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.)]
- a Coroner's investigation under the *Coroner's Act* [Order P-1117]

- a Fire Marshal's investigation into the cause of a fire under the *Fire Protection and Prevention Act, 1997* [Order PO-1833]

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

Where section 14(1) (except section 14(1)(e), which is not at issue here) uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

In the case of section 14(1)(e), based on its relationship with physical safety, a lower evidentiary standard has been applied. Where section 14(1)(e) is claimed, and arguably in other instances where physical safety is involved, the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.)].

It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

Sections 14(4) and 14(5) create exceptions to the exemption in section 14(2)(a). Section 14(4) states:

> Despite section 14(2)(a), a head shall disclose a record that is a report prepared in the course of routine inspections by an agency that is authorized to enforce and regulate compliance with a particular statute of Ontario.

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 practices laws, environmental protection schemes, and many of the other regulatory schemes administered by the government [Order PO-1988]. The records at issue do not relate to these subjects, nor am I satisfied that they were prepared in the course of routine inspections. I will not consider this section further.

Section 14(5) is referred to by the appellant in her representations. 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.

I will refer to section 14(5) later in my analysis.

By way of background the Ministry states as follows concerning the records created for the National Strategy Briefing referred to above:

> The record created for the 2001 [Criminal Intelligence Service Canada (CISC)] briefing includes, more specifically, the following:
>
> - A summary of the history of Operation Snowball to that date
> - Tips on how to catch the Canadian customers of Operation Snowball, including how to conduct searches for online predators;
> - Procedures for obtaining and executing search warrants;
> - Examples of the kinds of images that constitute child pornography;
> - The types of criminal charges that could be laid pursuant to a child pornography investigation;
> - How to preserve information contained on seized computers; and
> - Presentations about the roles played by other law enforcement investigations in Operation Snowball, and in general, in combating child pornography.
>
> The OPP believes that the "sensitivity" with which the courts have held that the law enforcement exemption is to be interpreted can perhaps be no greater than in this instance. This is due both [to] the particular sensitivity of this record, and the fact that it continues to be used for a law enforcement purpose. The OPP believes that past decisions also support a finding that the record falls within the law enforcement exemption. For example, in Order 106, then Commissioner Sidney B. Linden accepted based on a description of the "general content" of OPP Criminal Intelligence records collected over a 20 year period that they fit within the various components of the law enforcement exemptions. The OPP submits that that reasoning, applied to the facts of this appeal, would also result in a finding that the exemptions apply.

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

I will begin by considering whether section 14(2)(a) applies to record 1, which comprises pages 1-19, of the responsive records. Record 1 is an operational plan presented under a cover page entitled "Criminal Intelligence Service Canada," indicating that the record was produced by the CISC.

In order for a record to qualify for exemption under section 14(2)(a) of the *Act*, the Police must satisfy each of the following requirements:

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.

[Orders MO-1238, P-200 and P-324]

The word "report" is not defined in the *Act*. However, previous orders have found that to qualify as a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact (Order P-200). Previous orders have found that as a general rule, occurrence reports, supplementary reports and similar records of other police agencies have been found not to meet the definition of "report" under the *Act*, because they have been found to be more in the nature of recordings of fact than formal, evaluative accounts of investigations [see Orders M-1109, MO-2065 and PO-1845].

The Ministry argues that record 1 meets all three requirements for the application of this exemption. First, it states that it is a "report" because it contains an operational plan which includes a summary of the investigation in the United States, a chronology of events, and information regarding the proposed Canadian investigation and a plan for the investigation of Canadian suspects. It cites Order P-1418 in support of the proposition that to be a "report" a record must be "a formal statement or account of the results of the collation and consideration of information" and states that part 1 satisfies this requirement.

The Ministry also states that the "report" was "prepared in the course of law enforcement" because it was created for the use of other police services as part of Operation Snowball, a law enforcement investigation. With respect to the requirement that it be prepared "by an agency that enforces compliance with the law," it states:

> The OPP argues that CISC, due to its unique role on behalf of Canada's police services, meets this criterion. CISC's mandate is to provide "*the facilities to unite the criminal intelligence units of Canadian law enforcement agencies in the fight against organized crime and other serious crime in Canada*." CISC membership is restricted to law enforcement agencies, and its governing body is comprised solely of law enforcement, its Chair being the Commissioner of the RCMP.

The appellant disagrees with the Ministry's position. Amongst other arguments, she states that the Ministry has not established that the record is a "report prepared in the course of law enforcement." She also states that CISC is not an agency which has the function of enforcing and regulating compliance with the law, as it does not itself enforce the law.

In reply, the Ministry states that the appellant's assertions about the CISC and its status as a law enforcement agency are not substantiated in any way and that the appellant has failed to respond to its arguments.

For the reasons that follow, I find that record 1 does not qualify for exemption under section 14(2)(a). In my view, depending on how its terms are interpreted, section 14(2)(a) could be a very broad exemption that could prevent public access to a huge variety of law enforcement-related materials. Unlike section 14(1), no harm need be demonstrated for records to qualify as exempt under this provision. In my view, an overbroad interpretation of this section is not appropriate because the detailed provisions of section 14(1), which *is* a harms-based exemption, provide broad protection for specific law enforcement interests, and in that context, a sweeping interpretation of section 14(2)(a) would be contrary to the public access and accountability purposes of the *Act* elaborated in section 1(a). The latter section refers to the principles that government-held information "should be available to the public," and "necessary exemptions from the right of access should be limited and specific."

In relation to the wide variety of law enforcement interests addressed by section 14(1), I note that it specifically protects or facilitates each of the following:

- law enforcement matters or investigations (sections 14(1)(a) and (b));
- current investigative techniques and procedures, or those likely to be used in the future (section 14(1)(c));
- confidential sources and the information they provide (section 14(1)(d));
- the life and physical safety of law enforcement officers and others (section 14(1)(e));
- the right to a fair trial (section 14(1)(f));
- the gathering of intelligence information (section 14(1)(g));
- records that have been lawfully confiscated (section 14(1)(h));
- security of buildings, vehicles, systems and procedures (section 14(1)(i));
- ensuring individuals do not escape from lawful detention and protecting the security of detention facilities (sections 14(1)(j) and (k));
- the suppression of unlawful acts and the control of crime (section 14(1)(l)).

In that context, I believe that the words of section 14(2)(a) should be carefully considered and should be given no more scope than their evident legislative purpose requires. For example, I note that, rather than simply exempting a "law enforcement" report, where "law enforcement" is, as noted above, a defined term under the *Act*, the legislature adopted much more restrictive wording by exempting "a report prepared in the course of law enforcement *by an agency which has the function of enforcing and regulating compliance with a law*." This wording is not seen elsewhere in the *Act* and in my view supports a strict reading of section 14(2)(a).

I now turn to consider record 1. Under the first requirement of the exemption, I am not satisfied that record 1 qualifies as a "report". The record is an operational plan in relation to investigations that had, at the time of its preparation, not yet been undertaken. Rather that reporting on the outcome of completed investigations, it provides a blueprint for carrying them

out. While it briefly refers to information gleaned from an American law enforcement investigation, it is not an evaluative summary of that investigation, nor of the investigations for which it provides the blueprint. On this basis alone, I would not exempt it under section 14(2)(a), but there are further reasons for not doing so.

As regards the second requirement of this exemption, it is not apparent, from the evidence provided to me, that record 1 was prepared "in the course of" law enforcement, investigations or inspections. As noted above, Operation Snowball was contemplated, but not operational, at the time of its preparation. Although this was not specifically raised in the Ministry's representations, one might anticipate an argument to the effect that since the operational plan was a precursor of Operation Snowball, it meets the requirement of being prepared "in the course of" law enforcement. In the context of section 14(2)(a), as outlined above, I do not agree with this interpretation since, in my view, "in the course of" means "during," and the law enforcement processes contemplated for Operation Snowball had not yet commenced.

In any event, even if record 1 did meet the requirement of being prepared "in the course of" law enforcement investigations or inspections, it would fail on the third aspect of the exemption because, in my view, the CISC is not an agency which has the function of enforcing and regulating compliance with a law. Rather, it is an umbrella organization of law enforcement agencies which itself has no direct law enforcement function. The CISC's 2007 Annual Report on Organized Crime in Canada describes it as "… an inter-agency organization in Canada designed to coordinate and share criminal intelligence amongst member police forces." The CISC does not, itself, investigate crimes or lay criminal charges. While this may seem like an insignificant distinction, I have already noted, above, that the Legislature did not merely state that section 14(2)(a) exempts "law enforcement" reports; rather, it chose to use much more restrictive language by requiring that the record be prepared by an agency "which has the *function* of enforcing or regulating compliance with a law." The CISC has no such function.

For all these reasons, I find that section 14(2)(a) does not apply to record 1, the only record for which the Ministry relies on this exemption.

Section 14(1)(c): investigative techniques and procedures

I now turn to consider the Ministry's claim that all of the records, in their entirety, are exempt under section 14(1)(c) of the *Act*. This exemption is set out above, and applies to records whose disclosure could reasonably be expected to "… reveal investigative techniques and procedures currently in use or likely to be used in law enforcement."

In order to meet the "investigative technique or procedure" requirement, the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The fact that a particular technique or procedure is generally known to the public would normally lead to the conclusion that its effectiveness would not be hindered or compromised by disclosure and, accordingly, that the technique or procedure in question is not within the scope of section 14(1)(c) [see Orders P-170, P-1487, PO-2470]. The techniques or procedures must also be "investigative". The exemption will not apply to "enforcement" techniques or procedures [Orders PO-2034, P-1340].

In order to establish that the particular harm in question under section 14(1)(c) "could reasonably be expected" to result from disclosure of the records, the Ministry must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [Order PO-1772; see also Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

The Ministry claims that disclosure of the records would reveal investigative techniques and procedures currently in use or likely to be used for the purpose of locating suspected online sexual predators. It states that the records include information relating to the means of locating offenders and that the disclosure of this information could assist offenders in evading prosecution. It relies on Order PO-2470 to support the proposition that police techniques that are not well known are exempt under 14(1)(c).

The appellant argues that the Ministry representations are unsubstantiated and conclusory, and states that there is insufficient information before me to make an informed assessment of the reasonableness of the harm predicted by the Ministry. Before section 14(1)(c) can apply, the appellant states that disclosure of the technique or procedure must hinder its effective utilization and that a technique that is generally known to the public would not normally be compromised by disclosure. The appellant refers to *R. v Mentuck* [2001] 3 S.C.R. 442. She states that in that decision the Supreme Court of Canada held:

> … that the publication of elaborate undercover "operational methods" undertaken by police to gather evidence regarding a murder suspect would not seriously compromise the effectiveness of similar operations, as "there are a limited number of ways in which undercover operations can run" and most of these are known to the public through "common sense perceptions" or "similar situations depicted in popular films and books."

Mentuck was a case involving a proposed publication ban under the *Criminal Code*. The Crown had argued that the "hallmarks of the operation" must be kept from general knowledge. As summarized by the Court, the "hallmarks" included, for example, the fact the accused was given "…the opportunity to join a criminal organization that would provide him with the potential to earn large sums of money so long as he showed his loyalty by confessing any past criminal activity," among others. In rejecting the ban sought by the Crown concerning this type of information, the Court stated:

> The serious risk at issue here is that the efficacy of present and future police operations will be reduced by publication of these details. I find it difficult to accept that the publication of information regarding the techniques employed by police will seriously compromise the efficacy of this type of operation. There are a limited number of ways in which undercover operations can be run. Criminals who are able to extrapolate from a newspaper story about one suspect that their

> own criminal involvement might well be a police operation are likely able to suspect police involvement based on their common sense perceptions or on similar situations depicted in popular films and books. While I accept that operations will be compromised if suspects learn that they are targets, I do not believe that media publication will seriously increase the rate of compromise. The media have reported the details of similar operations several times in the past, including this one.

The Court went on to observe that "…the danger to the efficacy of the operation is not significantly increased by republication of the details of similar operations that have already been well-publicized in the past."

The appellant goes on to argue that there are a limited number of ways in which police can trace online sexual predators and that the means used to track online offenders have been much published in the media. In support, she refers to a number of articles in the media where information relating to this investigation has been publicized.

In reply, the Ministry states that the techniques depicted in the records are still "the same or similar enough" to those used today despite the fact that the records are more than 6 years old and it states that its communications with the public about the investigation have been very different from its communications with other police forces. It argues that just because some details of an investigation were released to the media does not mean that records associated with the investigation are no longer exempt.

I have considered the representations provided to me and conducted a close examination of the records. Portions of the records provide very detailed information about investigative methods used to investigate child pornography. Given the extremely serious nature of the crimes of producing or possessing child pornography, and its very distressing social and personal consequences, I believe it would be inconsistent with the purpose of this exemption to go too far in speculating what might be a "common sense" perception or "similar situation depicted in books or the media" as discussed in *Mentuck*. In my view, any information of this nature in the records that has not been clearly identified in the public domain, or is not a sufficiently obvious technique or procedure to clearly qualify as being subject to inference based on a "common sense perception" as referred to in *Mentuck*, falls under this exemption. It is not possible for me to be more specific in this regard without revealing the contents of the records.

As well, I note that in previous orders of this office, records relating to the procedures and techniques for obtaining and executing search warrants have been found to be exempt under section 14(1)(c). For example, Adjudicator Sherry Liang stated as follows in Order MO-1633-I, in relation to the techniques for obtaining a search warrant:

> Although the use of search warrants by police forces is known to the public, I accept the submissions of the Police in this appeal that the details of how they are obtained, the required investigation, drafting of the information, and the process of obtaining and executing a warrant constitute an investigative technique or procedure that is generally not known.

I am also satisfied that the strategies for catching those involved in child pornography identified in the records are "investigative" rather than "enforcement" techniques, since they pertain to methods of gathering evidence to assist in determining whether the individuals identified as clients of the American website should be charged with *Criminal Code* offences.

In addition, I have considered the appellant's arguments about the age of the records and the advances in technology since these records were prepared. However, having carefully reviewed the records and the representations, I am satisfied with the evidence of the Ministry that these techniques are currently in use.

Having considered the representations and conducted a close review of the records, I have concluded that some, but not all, of the information about investigative techniques in the records is exempt under section 14(1)(c). It is evident from the media articles provided by the appellant, as well as the Wikipedia article on Operation Avalanche, and the press briefing introduced by the U.S. Attorney General on August 8, 2001, announcing the "results" of that operation (referred to above), that a significant amount of information about the methodology used in such investigations is, in fact, already in the public domain, or represents techniques that are obvious enough to be easily subject to inference based on "common sense perception." To the extent that this is so, disclosure would not, in my view, hinder or compromise the effectiveness of these methods, and I find that they are not exempt under section 14(1)(c).

As noted above, however, because of the serious crimes being investigated, I have been cautious in considering what would be a "common sense perception." In my view, therefore, the conclusions I have reached in applying section 14(1)(c) in this appeal are equally consistent with the lower evidentiary threshold for section 14(1)(e) articulated in the *Office of the Worker Advisor* decision cited above. That standard only requires the Ministry to demonstrate a reasonable basis for believing that endangerment will result from disclosure, and that its concerns are not frivolous or exaggerated. Under that standard, I would not exempt any additional information, having taken the serious nature of child pornography-related crimes into account in reaching my conclusions.

As noted in section 10(2) of the *Act*, non-exempt information that can "reasonably be severed" without disclosing exempt information must be disclosed. I find that portions of records 1, 2, 3, 4, 5, 7, 8 and 9, and all of record 6, are exempt under section 14(1)(c), and the remainder can reasonably be severed and disclosed. Accordingly, for records that are partially exempt, I will provide copies to the Ministry with this order showing the exempt portions with highlighting.

Section 14(1)(h): confiscated record

The Ministry argues that portions of record 3 are images seized by the local law enforcement authorities in Dallas, Texas. In addition, it argues that the disclosure of these portions of the record could be expected to reveal the contents of other records seized and therefore they are exempt under section 14(1)(h) of the *Act*.

In response, the appellant argues that the portions of the records are only exempt if they reveal confiscated records and she states that the exemption should be applied no more broadly than is necessary.

The Ministry's reply representations do not address this argument.

These images may be the personal information of victims, to which the appellant does not seek access, as noted above. In any event, having reviewed the portions of the records for which this exemption is claimed, it is clear that they could only have come into the possession of law enforcement officials as the result of a confiscation during a law enforcement investigation. Under the circumstances, and given the history of the Dallas Police operation, I am satisfied that the Dallas Police were acting lawfully, and these images are therefore exempt under section 14(1)(h).

Section 14(1)(g): intelligence information

The Ministry states that all of the records are exempt pursuant to section 14(1)(g) because they either comprise law enforcement intelligence information, or they are derived from law enforcement intelligence information. The import of this submission is that disclosure could reasonably be expected to reveal intelligence information. The Ministry submits further that the definition of law enforcement "intelligence information" referred to in Order PO-2470 should be applied. This definition states that the term "intelligence information" means:

> Information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violations of law. It is distinct from information compiled and identifiable as part of the investigation of a specific occurrence.

With respect to the harms that could reasonably be expected to result from disclosure, the Ministry argues that the record was created for a CISC briefing and that CISC is an organization "dedicated to 'uniting' the Canadian law enforcement intelligence community." The Ministry argues that disclosure of the records could identify who has been monitored and could result in persons of interest going underground or taking additional measures using technology to conceal their identities. The Ministry also argues that disclosure of this type of information could lead to other law enforcement organizations not wanting to share intelligence information with the O.P.P., an apparent reference to the words, "or interfere with the gathering of … intelligence information" in this section.

The appellant agrees that the definition of "law enforcement intelligence" referred to by the Ministry should be adopted for the purposes of this appeal although she references Order M-202 in support. The definition of law enforcement "intelligence information" in Order PO-2470 is virtually identical to the one used in Order M-202, and is quoted above. Order M-202 offers the following further background information before adopting this definition:

The Williams Commission in its report entitled Public Government for Private People, the Report of the Commission on Freedom of Information and Protection of Privacy/1980, Volume II at pages 298-99, states:

> Speaking very broadly, intelligence information may be distinguished from investigatory information by virtue of the fact that the former is generally unrelated to the investigation of the occurrence of specific offenses. For example, authorities may engage in surveillance of the activities of persons whom they suspect may be involved in criminal activity in the expectation that the information gathered will be useful in future investigations. In this sense, intelligence information may be derived from investigations of previous incidents which may or may not have resulted in trial and conviction of the individual under surveillance. Such information may be gathered through observation of the conduct of associates of known criminals or through similar surveillance activities.

The appellant argues that not all information gathered by the police in a covert manner can be "intelligence information" as such an interpretation would result in a blanket exemption for all information gathered by the police. She states that the language of section 14(1)(g) limits the application of the exemption to intelligence information "respecting organizations or persons," and because she is not seeking information about the identity of individuals charged with child pornography or the identity of individuals related to the investigation, the exemption does not apply.

With respect to the harms alleged by the Ministry, the appellant states that she is not seeking information about persons charged and therefore the risk of those individuals "going underground" has not been made out. More generally, she argues that the Ministry has failed to provide the detailed and convincing evidence for a reasonable prospect of harm, as required to support the application of the exemption. She argues that the only possible harm that the Ministry has raised here is the risk that other law enforcement agencies might not want to share intelligence information if they knew that it is likely to be disclosed, a risk that she argues is speculative.

The appellant argues further that, given the age of the information in the records and the amount of information already in the public domain, the other law enforcement agencies are unlikely to "strenuously object" to its disclosure. In this regard, the appellant states that the lead U.S. Postal Inspection Service investigator involved in the investigation of the American website granted interviews with the CBC. She argues that it is highly unlikely that the American authorities would refuse to share intelligence with the O.P.P. if disclosure were ordered, given the amount of information they have already provided to the Canadian media.

The Ministry submits, in reply, that the age of the records is irrelevant to the application of the exemption and that it is patently incorrect to interpret section 14(1)(g) or any other exemption in this manner.

Having carefully reviewed the records, I conclude that some of them contain aggregated information derived from the execution of search warrants on the American website and the seizure of its computer equipment at that time. This operation was not carried out in secret and for that reason cannot, in my view, be described as "covert," as both parties argue is a required precondition for "intelligence" information, a submission with which I agree. In this regard, I also note that details of the investigation of the American website, the execution of the search warrants and the seizure of the website's computer equipment were all described in an interview broadcast on CBC Radio's "The Current" program by a U.S. postal inspector who was part of the investigating team, as verified by a transcript provided by the appellant.

The aggregated information arising from the database seizure consists of the total number of suspects' names obtained from the database, as well as the total number of suspects in the United States, in Canada overall, and in each province of Canada. This information, in whole or in part, appears in Records 1, 5, and 7. Record 6 contains a small amount of aggregated information gathered as a result of other law enforcement activities, but I have already found it exempt under section 14(1)(c).

I have already concluded, above, that the aggregated data in the records was not collected in a "covert" manner as required under section 14(1)(g). That is a sufficient reason for not finding it exempt under this section, but there are further reasons for reaching this conclusion, namely the public availability of a great deal of this information. Public availability, and in particular, voluntary public disclosure to the news media by law enforcement officials, is entirely inconsistent with information, even if it was collected in a covert manner, being regarded as "intelligence" information by the law enforcement community.

In that regard, it is noteworthy that the total number of suspects, and the number of investigations done, was disclosed during the briefing introduced by the U.S. Attorney General on August 8, 2001 referred to above. The total number of suspects is also disclosed in a CBC news story dated March 14, 2006, provided by the appellant, along with the total number of suspects in Canada and the United Kingdom. The number of suspects in the United States, and the total number in Canada, also appear in the Wikipedia article on Operation Avalanche referenced above. The number of suspects in Manitoba appears in an article in the January 17, 2003 edition of *New Winnipeg*, a digital magazine, which references an interview with an R.C.M.P. officer who was part of the Integrated Child Exploitation (I.C.E.) unit.

Some of the records also contain information about identifiable individuals, but this has been redacted because the appellant does not seek access to personal information. This is the only information that could possibly lead to suspects "going underground" as the Ministry suggests.

As I have already noted, it would be absurd to redact the widely publicized information in the records concerning the owners/operators of the American website under section 21(1), and in my view, it would be equally absurd to redact it under section 14(1)(g), given that it has been publicly announced by American law enforcement authorities and widely publicized.

The remaining information in the records relates to planning for the Canadian operation, and does not disclose information gathered in the investigation of the American website or any other law enforcement investigation. Information of this nature that could compromise the investigations has already been withheld under section 14(1)(c). As well, most of the information that does derive from the investigation by the Dallas Police is of a general nature and cannot be described as "respecting organizations or persons."

For all these reasons, I find that the exemption in section 14(1)(g) does not apply to those portions of the records not already found exempt under section 14(1)(c).

Sections 14(1)(a) and (b): interference with law enforcement matter or investigation

Sections 14(1)(a) and (b) require detailed and convincing evidence to demonstrate that disclosure could reasonably be expected to interfere with an ongoing law enforcement matter or investigation (Order PO-2085). Under section 14(1)(a), the term "matter" may extend beyond a specific investigation or proceeding (*Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.)).

The Ministry submits that:

> ... releasing the record could interfere with a law enforcement investigation that could lead to criminal prosecutions. The Operation Snowball investigations are ongoing in other police jurisdictions in Ontario, and in other provinces. Individuals who are found to have contravened the *Criminal Code* may be charged, for example, with the possession of child pornography.

The appellant submits that the Ministry's representations in this regard are "conclusory" and not "detailed and convincing." The Ministry replies that it has provided all the evidence it could, given that the ongoing investigations are being conducted in other provinces.

I agree with the appellant that the Ministry's representations are not detailed and convincing. They lack specificity in that they fail to point to a single aspect of the records that could, in particular, reasonably be expected to cause the harm alleged. No examples are provided of this type of information, nor of how such harm could be caused.

In my view, the detailed information in the records about investigative techniques that is not already in the public domain could reasonably be expected to cause the harms mentioned in sections 14(1)(a) and/or (b). However, I have already exempted this information under section 14(1)(c). Information identifying suspects could also reasonably be expected to cause this harm if they have not yet been investigated or charged, but the appellant does not seek access to that information and it has been redacted. I find that none of the remaining information in the records could reasonably be expected to cause the harms mentioned in sections 14(1)(a) and (b), and they do not apply to it.

Section 14(1)(i): endanger system or procedure for protecting items

The Ministry claims that section 14(1)(i) applies to information found on pages 69-76, 80-82 and 150-152. It submits that disclosure of this information "could endanger a police established system for protecting computers and more specifically the information contained on them that are seized after a warrant is executed." In this regard, the Ministry argues that releasing this part of the records could cause suspects to "take pre-emptive measures" to erase evidence from their computer systems, thereby hampering the gathering of this evidence.

The appellant submits that this provision does not apply to suspects' computers. She also submits that the way to shut down computers is publicly known.

The Ministry responds that the exemption can apply to any "system or procedure for the protection of items."

Having considered these submissions, I conclude that, insofar as the Ministry argues that disclosure of the records might lead suspects to erase evidence, and that this mandates the application of this exemption, the Ministry's interpretation is overbroad. Unfortunately, the legislative intention underlying this particular subsection is not explained in either *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980* (the *Williams Commission Report*), nor in the committee or legislative debates that took place before the *Act* became law. I can accept that it could apply to exempt processes for keeping seized materials safe, but I do not understand its words as extending to security prior to a seizure taking place in the sense suggested here by the Ministry. The exemption generally addresses the security of buildings, vehicles, and objects, but in my view cannot be taken to include as yet uncollected evidence that is still in the hands of a suspect.

On the other hand, the pages referred to by the Ministry do contain advice in relation to the seizure and proper securing of computer systems by law enforcement officials, and this could be exempt under section 14(1)(i). However, I have already exempted this material under section 14(1)(c), to the extent that it discloses law enforcement techniques that have not been made public or are not sufficiently obvious to be easily inferred based on common sense perception.

In my view, the parts of these pages that I did not exempt under section 14(1)(c) contain only information that is already available to the public, or is the type of common sense information about law enforcement techniques referred to by the Supreme Court of Canada in *Mentuck*, cited above. For these same reasons, I also find that its disclosure could not reasonably be expected to endanger a system or procedure for protecting items, and it is not exempt under section 14(1)(i).

Section 14(1)(l): facilitate unlawful act or crime control

The Ministry submits that this exemption applies because releasing the records:

> … could hamper the control of online child abuse, such as the distribution of child pornography. Criminals would have a better understanding of how police investigate, enforce and prevent online crimes against children, which might

> encourage them to commit child abuse using the Internet. The police combat this sort of crime using stealth and surprise. Once this surprise element is taken away, as it would be if criminals knew about it, then online child abuse becomes that much more difficult to control.

The appellant submits that this is not "detailed and convincing" evidence.

The Ministry replies that the information was prepared solely for law enforcement agencies for officer training purposes, and that it is self-evident that disclosure could facilitate internet-based exploitation crimes.

Again, in my view, the only parts of the records whose disclosure could reasonably be expected to hamper crime control are those that contain detailed information about investigative techniques that is not already in the public domain or sufficiently obvious to be easily inferred. I have already exempted this material under section 14(1)(c). Although I agree that the Ministry's representations are not detailed, and that it takes the position that harm is self-evident, my review of the records indicates that the information I have exempted under section 14(1)(c) could have the effects suggested by the Ministry if disclosed. Generic statistical information, or information about investigative techniques that are already in the public domain or easily inferred, could not reasonably be expected to hamper crime control or facilitate the commission of crimes if disclosed. Also, identifiable information about individuals who may be suspects has been redacted as the appellant does not seek access to it. Accordingly, I find that the remaining information is not exempt under section 14(1)(l).

Section 14(5)

Section 14(5) creates an exception to the exemptions in sections 14(1) and (2) for information concerning the "… degree of success achieved in a law enforcement program including statistical analyses…." The appellant relies on it in her representations, arguing that parts of the record disclose this type of information. The Ministry disagrees that this section applies.

In my view, the records contain little information of this nature, and to the extent that they do, I have not found it to be exempt under any part of section 14(1) or (2), so there is no need to consider section 14(5).

RELATIONS WITH OTHER GOVERNMENTS

Sections 15(a) and (b)

Sections 15(a) and (b) state:

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

> (b) reveal information received in confidence from another government or its agencies by an institution;

The Ministry states that there are three parts to the test it must meet to support the application of section 15(a). It must demonstrate that disclosure of the record could give rise to an expectation of prejudice to the conduct of intergovernmental relations; the relations which it is claimed would be prejudiced must be intergovernmental; and the expectation of prejudice must be reasonable.

The Ministry argues that trust and cooperation amongst law enforcement organizations are essential in order to combat child pornography and that it is essential to that trust that sensitive records will not be disclosed, particularly while investigations are ongoing. The relationships that the Ministry claims will be affected by the disclosure of these records are those between the O.P.P. and the Dallas law enforcement officials, the CISC, the RCMP and another federal agency that participated in the meetings. It also argues that relationships with law enforcement agencies that have ongoing investigations would be prejudiced by disclosure and the Ministry is concerned that relationships with the global network of law enforcement agencies who work collaboratively in their fight against Internet based criminals might also be harmed.

With respect to its claim under section 15(b), the Ministry argues that the records reveal information received in confidence from CISC and that this exemption should also apply to those parts of the record that were prepared by the O.P.P. because they were prepared for CISC.

In particular, with respect to pages 1-19 (record 1), and 110 -152 (records 6, 7, 8 and 9), the Ministry states that these pages reveal information received in confidence by the O.P.P. and prepared by CISC, the RCMP and another federal agency, and the Dallas Police department. It also states that none of these agencies have been consulted about what they provided to the O.P.P. being disclosed and it is reasonable to expect that they would oppose the disclosure, particularly because of the wording and intent of the confidentiality disclaimers in the records.

The appellant argues that the Ministry has not provided detailed and convincing evidence that disclosure could reasonably be expected to lead to the harms suggested. She argues that, given the age of the records and the amount of information released in the public domain by the law enforcement agencies in the United States and Canada, no harm will result from disclosure. In addition, she cites Order PO-1927-I and states that it is clear that an institution cannot establish prejudice "simply on the basis of the impact of disclosing records without notification to a foreign government."

In reply, the Ministry repeats that law enforcement records are not "outdated" just because they are 6 years old and that just because the police have released details of the investigation to the media does not mean that all of the records associated with the investigation are therefore in the public domain. It submits that its claim to section 15(a) and (b) is not based solely on the issue of notification to a foreign government and that the facts of a number of previous orders of this office are analogous to the facts of this appeal namely, Orders P-1406, P-1038 and P-1552.

With respect to the three orders cited by the Ministry, I disagree that they are "analogous" to the facts of this appeal. Order P-1406 was rescinded as the result of a reconsideration, and the superseding decision is more properly cited as Order R-970003. That order relates to negotiations in relation to a first nations land claim, and its application of section 15(a) was entirely based on the evidence provided. In this case, I will also consider the sufficiency of the evidence, and the particular fact situation before me. In Order P-1038, the records concerned out-of-country health care and the records were provided by other provinces. Again, the decision to apply section 15(b) was entirely based on the evidence in that appeal. This was also the case in Order P-1552, in which information provided to Ontario by Atomic Energy of Canada Limited and the Atomic Energy Board of Canada were found exempt under section 15(b). Accordingly, I find that these cases are not "analogous" to the facts here, and do not assist the Ministry. This appeal must be decided on its own facts.

Significantly, however, I note that in Order P-1552, the fact that information had been made public led to a finding that it could not be considered to have been "received in confidence" under section 15(b), and that it would also not be appropriate to exempt it under section 15(a). In view of the public disclosure of information in this case, already alluded to in my discussion of section 14(1), this finding is relevant.

The Ministry concludes its representations by arguing that the subject matter of these records is both sensitive and complex and there is an understanding by the law enforcement community that these records will be kept confidential, and their disclosure will defeat the ability of the O.P.P. to share information with other police services.

Section 15(a)

In its representations on section 15(a), the Ministry does not explain how law enforcement agencies are "governments" such that disclosure could reasonably be expected to interfere with relations that could accurately be described as "intergovernmental." Nor does it explain how the alleged disruptions arising from disclosure could reasonably be expected to spill over into relations between Ontario and other provinces, states or countries, nor how the relations of Canada with other provinces, states or countries could be affected by disclosure. In this regard, I agree with the appellant that the Ministry's evidence is not "detailed and convincing." In my view, this is a sufficient basis for not upholding section 15(a), but there are other reasons for not doing so.

As regards relations with the Dallas Police, I have concluded under section 15(b), below, after detailed analysis, that the Dallas Police are a municipal agency and therefore not an agency of another government, and in my view the same conclusion precludes the application of section 15(a) with respect to relations with the Dallas Police.

As well, I have already exempted all of the portions of the records that contain detailed information about investigative techniques that is not already in the public domain or clearly subject to "common sense perception" as discussed in *Mentuck*, including all of record 6. Given that this material is exempt, I am not persuaded that disclosure of the remaining information in the records could reasonably be expected to cause the harm mentioned in section 15(a). In this

regard, I am also mindful of the significant public disclosure of information the Ministry claims to be exempt, which disclosure was made by law enforcement officials in the United States, at the Attorney General's briefing on August 8, 2001; the radio interview given by the U.S. Postal Service investigator; and the interview given by the R.C.M.P. officer to *New Winnipeg*, all referred to earlier in this order. These public disclosures are a strong indication that the information I am ordering disclosed could not reasonably be expected to cause the harm referred to in section 15(a). This view is consistent with the result in Order P-1552, referred to above.

The Ministry also refers to disclosure without notification. The Ministry has, however, failed to provide detailed and convincing evidence of section 15(a) harm, nor provided any other persuasive information or argument to suggest that it would be appropriate to notify other law enforcement authorities of this appeal. Notification of an appeal under section 50(1) of the *Act* is discretionary. Given the nature of the material I am ordering disclosed, the public disclosures by other law enforcement agencies, and the fact that the information to be disclosed does not qualify for exemption under any of the parts of the section 14 law enforcement exemption raised by the Ministry, I have concluded that notification under section 50(1) is not necessary in the circumstances of this appeal in relation to section 15(a).

For all these reasons, I find that section 15(a) does not apply.

Section 15(b)

With respect to section 15(b), my detailed review of the records indicates that Records 2, 3, 4 and 5 are all presentations to the January 2001 meeting by members of the O.P.P., and bear the O.P.P.'s logo. Record 7 consists of notes prepared by an O.P.P. officer attending the meeting. These records originated with the O.P.P. Of these records, only records 5 and 7 contain information that appears to have been provided by another law enforcement authority, namely the Dallas Police. Accordingly, records 2, 3 and 4 do not contain information "received" from another government or an agency of another government and I find that they are not exempt under section 15(b).

Section 15(b) requires a reasonable expectation that disclosure could reveal information "received in confidence from *another government or its agencies*" (emphasis added). In this appeal, that raises the question of whether the Dallas Police are an agency of another government in relation to the information that originated with them in records 5 and 7. As well, record 8 is a presentation by a member of the Dallas Police. Record 1 also contains information that originated with the Dallas Police.

Previous orders of this office have consistently found that municipal entities do not constitute "another government or its agencies" for the purpose of section 15(b) of the *Act*. Most recently, Adjudicator Frank DeVries made this finding in Order PO-2474. In that decision, he referred to the extensive analysis of the issue by Adjudicator John Swaigen in Order PO-2456 (subject to a judicial review application on another point – Tor. Doc. 163/06 (Div. Ct.)). In that case, Adjudicator Swaigen considered the issue of whether a municipal police force could be regarded as a "government agency" for the purpose of section 15(b). Adjudicator Swaigen cited the

potential for inconsistency between the *Act* and its municipal counterpart in concluding that section 15(b) did not include a municipal police force. He stated:

> When the Legislature passed the *Municipal Freedom of Information and Protection of Privacy Act* in 1991, it included a parallel provision to section 15 of the *Act*. Section 9 of the *Municipal Freedom of Information and Protection of Privacy Act* provides:
>
> (1) A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,
>
> (a) the Government of Canada;
>
> (b) the Government of Ontario or the government of a province or territory in Canada;
>
> (c) *the government of a foreign country or state;*
>
> (d) *an agency of a government referred to in clause (a), (b) or (c); or*
>
> (e) an international organization of states or a body of such an organization.
>
> (2) A head shall disclose a record to which subsection (1) applies if the government, agency or organization from which the information was received consents to the disclosure.
>
> Under the *Municipal Freedom of Information and Protection of Privacy Act*, it is clear that a municipality cannot claim the "relations with governments" exemption for information it receives from another municipality or municipal board. That is, section 9 does not apply to information received from another municipality.
>
> It would be inconsistent with the overall scheme of the two freedom of information statutes if a provincial institution could claim the "relations with other governments" exemption for information received from a municipality when a municipality cannot.
>
> Therefore, the Legislature implicitly reaffirmed its intention that information received from municipalities is not covered by this statutory regime when it

> passed the *Municipal Freedom of Information and Protection of Privacy Act*, incorporating section 9.
>
> Accordingly, I find that the municipal police service that provided these records to the Ministry is not an agency of another government for the purposes of section 15 of the *Act*. Therefore, I find that the exemption claimed under section 49(a) in conjunction with section 15(b) does not apply to these records. [Emphasis added.]

I note that sections 9(1)(c) and (d) of the *Municipal Freedom of Information and Protection of Privacy Act* explicitly refer to "the government of a foreign country or state" or an agency of such a government, and so the inconsistency referred to by Adjudicator Swaigen would also result from finding that a foreign municipal police force such as the Dallas Police was an agency of another government. Accordingly, I adopt the approach in Orders PO-2474 and PO-2456, which reflects the interpretation of section 15(b) by this office going back to Order 69. This interpretation is also consistent with the legislative history of the *Act*, cited in Order 69, which refers to a statement by then Attorney General Ian Scott in the Legislature, that the purpose of the exemption was "to protect intergovernmental relations between the provinces or with the feds or with international organizations". (Hansard, March 23, 1987, after second reading of the bill.)

I adopt the approach to this issue taken by Adjudicator Swaigen in Order PO-2456, and find that a municipal police service is not "an agency of another government" for the purpose of section 15 of the *Act*. Therefore the receipt of information from the Dallas Police provides no basis for claiming this exemption, and I find that it does not apply to records 5, 7 and 8.

With respect to record 1, as noted earlier in the discussion of section 14(2)(a), it is an operational plan presented under a cover page entitled "Criminal Intelligence Service Canada," indicating that the record was produced by the CISC. Given that CISC is an "umbrella" organization of law enforcement agencies, I am not persuaded that the record contains confidential information that originated with it. I have already found that information provided by the Dallas Police does not provide a basis for claiming section 15(b). As well, any information that could reasonably be viewed as confidential has been severed from record 1 under section 14(1)(c). In my view, this is a sufficient basis for finding that section 15(b) does not apply to record 1.

In addition, however, I am not persuaded that the O.P.P. "received" record 1. In that regard, I note that record 1 has contributions from both the O.P.P. (specifically, the Director of the O.P.P.'s Child Pornography Section) and the CISC, as evidenced by the title page of the operational plan and the signatures at the end of the document on behalf of both bodies. Accordingly, although the cover page makes it evident that the document was formally produced by the CISC, it cannot be said to have been "received" by the O.P.P. since the Director of the O.P.P.'s Child Pornography Section was involved in its creation. For this reason as well, I find that record 1 is not exempt under section 15(b). There is also reason to conclude that CISC is not an agency of the federal government, despite its use of the "Canada" logo on its website. The Ministry fails to identify how CISC qualifies as an agent of the federal government, and I have been unable to find any reference to this agency or its establishment in any statute or regulation

of the Canadian Parliament. Nor does its website provide any such reference. In my view, this provides yet another reason for finding that section 15(b) does not apply to record 1.

Record 9 is a handout sheet that appears to have been prepared by the R.C.M.P., an organization that clearly qualifies as an agency of the government of Canada. The Ministry argues that this record is implicitly confidential, but it is not marked as such, and I have already applied section 14(1)(c) to exempt the portions that could reasonably be viewed as having been provided in confidence, that is, the portions that reveal detailed information about investigative techniques that is not already in the public domain or clearly subject to inference by means of "common sense perception" as discussed in *Mentuck*. I am therefore not persuaded that the remainder of the record could reasonably be expected to reveal information received "in confidence" from an agency of another government.

Record 6 is a presentation by another agency of the government of Canada, but I have already exempted this record in its entirety under section 14(1)(c).

Accordingly, I find that the portions of the records not exempted under section 14(1)(c) are not exempt under section 15(b). Similar to my findings under section 15(a), I am again bearing in mind the information I have found to be exempt under section 14(1)(c), as well as the significant publicity given by law enforcement officials in the United States and Canada to information the Ministry claims is confidential, in concluding that section 15(b) does not apply, and that notification is not required in relation to this section.

EXERCISE OF DISCRETION

The exemptions in sections 14 and 19 are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

The Ministry states the O.P.P. has properly exercised its discretion by taking into account all relevant considerations including the highly sensitive nature of the information, its continued relevance as a law enforcement record and the harm that would result from the disclosure of the

records. Further, it argues that it has considered the possibility of severing portions of information from the records but has concluded that the entire record should be withheld.

The appellant did not submit any representations on the exercise of discretion issue.

Given the serious nature of crimes associated with child pornography, its enormous impact on victims and on society, and the huge public interest in its suppression, and the apprehension of those involved, I uphold the Ministry's exercise of discretion in relation to the information I have found to be exempt.

PUBLIC INTEREST OVERRIDE

I now turn to consider the appellant's argument that section 23 applies. Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 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.

In *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259 (application for leave to appeal granted, November 29, 2007, File No. 32172 (S.C.C.)), the Ontario Court of Appeal held that the exemptions in sections 14 and 19 are to be "read in" as exemptions that may be overridden by section 23. On behalf of the majority, Justice LaForme stated at paragraphs 25 and 97 of the decision:

> In my view s. 23 of the Act infringes s. 2(b) of the *Charter* by failing to extend the public interest override to the law enforcement and solicitor-client privilege exemptions. It is also my view that this infringement cannot be justified under s. 1 of the *Charter*. … I would read the words "14 and 19" into s. 23 of the *Act*.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest is not automatically established where the requester is a member of the media [Orders M-773, M-1074]. The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

In its first representations, the Ministry states that section 23 does not apply to the disclosure of the record in part because section 23 can not apply to override a law enforcement exemption. It also states:

> There is a significant public interest in educating the public as much as possible about Internet safety, in order to protect children from being victimized by on line child predators but the public interest should not be used in such a way that it thwarts the efforts of the police to protect children, and by extension, the general public.

The appellant argues that the records at issue meet the test for the application of the public interest override. In her representations, she provides the following background information:

> In 1999, police in Dallas, Texas closed down [the American website], for selling child pornography. [The American website] had previously operated a legal adult verification service, whereby consumers paid money, using their credit cards, and in return gained access to adult pornography sites. When [the American website] expanded its business to include taking payments for child pornography websites, the police arrested the owners and business activities ceased.
>
> When the police seized the company's assets, they discovered a database containing more than 100,000 names - including 2,329 from Canada - and credit card details from consumers in countries around the world. This database became the foundation for one of the largest international child pornography police actions. In the United States it was called Project [Avalanche], in the United Kingdom Project Ore and in Canada it was called Project Snowball. The names on the list were apparently shared between police agencies. The operations have had varying degrees of success in terms of the number of convictions.
>
> Indeed, in 2003 the Toronto Police held a press conference in which the police announced the arrests of six men for child pornography. At the press conference, the police listed the names and address of each of the men. There was significant press coverage in 2003 of the police's high profile attack on child pornography.
>
> What has subsequently become clear is that the list seized by the police in Texas included the names of people who had subscribed solely to adult pornography websites, and not to child pornography websites. Police computer experts apparently mistakenly lumped together subscribers who had been involved in legal activities with those who had purchased child pornography. There were also people on the list who had been victims of credit card fraud.

> Globally, there have been a stunning number of acquittals, false accusations and withdrawn child pornography charges in relation to Project [Avalanche] /Snowfall. In some cases, police seemingly did not know the name of the person charged actually came from the adult, not, the child, pornography consumer list. In others, police allegedly ignored evidence which indicated the consumer had been the victim of credit card fraud.
>
> Clearly, the stigma, of being accused and charged with child pornography, a horrific crime, is significant. Indeed, one of the men named at the press conference in Toronto, [named], eventually had the charges against him withdrawn but never recovered from the stigma of being associated with child pornography. He lost his job, friends and reputation and he committed suicide in 2004. In fact, of the six people named at the press conference in 2003, only one has been convicted. One man was never charged, three had the charges withdrawn and one man pled guilty but has since applied for a new trial. Of the more than 500 names of Ontario men on the list, only approximately 50 people have been convicted. The problem is not unique to Canada - there have been numerous acquittals in, for example, the United Kingdom, Ireland and Australia.

The appellant also states:

> There are serious and legitimate concerns with respect to the police publicly naming individuals as consumers of child pornography, only to withdraw and dismiss the charges at a later date. The public has a right to know who should be accountable for these decisions and what information was available to police authorities at the time these charges were made.
>
> …
>
> In this case, in light of the age of the record, no reasonable expected harm arises. The public is entitled to know what precautions the police took and, given the serious stigma attached to child pornography charges coupled with the numerous subsequent acquittals and withdrawn charges, what safeguards are in place to protect innocent Canadians from having their own lives disturbed with unsubstantiated charges.
>
> Public confidence in the OPP is at stake in this appeal. Significant concerns have been raised about the manner in which information was shared between Canada and American authorities in 2001. Order P-344 states that whether "disclosure will increase public confidence in the operations of the institution" is a relevant consideration in determining whether the Ministry exercised its discretion properly. The age of the information is also a legitimate concern.

As noted above, shortly after these representations were submitted by the appellant, the Court of Appeal issued its decision in *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)*, cited above (application for leave to appeal granted, November 29, 2007,

File No. 32172 (S.C.C.)) and the appellant filed supplementary representations on the implications of this decision. The appellant states that Justice LaForme, writing for the majority of the Court of Appeal:

> … held that to the extent that the public interest override does not apply to sections 14 and 19, the *Act* breaches section 2(b) of the *Canadian Charter of Rights and Freedoms* in that it unjustifiably limits the right to free expression:
>
> > In my view s. 23 of the Act infringes s. 2(b) of the *Charter* by failing to extend the public interest override to the law enforcement and solicitor-client privilege exemptions.
>
> As a result, the Ontario Court of Appeal read the words "14 and 19" into section 23 of the Act. In doing so Justice LaForme emphasized the importance of the public's ability to comment on the actions of government bodies as well as the importance of public accessibility to information controlled by the government. He stated that the revised section 23 "ensures that any infringement on free expression (through nondisclosure) is limited to situations where the public interest in disclosure does not outweigh the purpose of the exemptions." Accordingly, the law of Ontario is now that the public interest override applies to sections 14 and 19 of the Act.

The appellant adds that the public has a right to ensure that public prosecutions and investigations are carried out in a responsible and thorough manner. She states:

> This right to information about a very important police investigation that resulted in serious injustice including, it appears, the suicide of several wrongfully accused men in various jurisdictions including Canada, clearly outweighs the purposes of ss. 14 and 19 of the Act, particularly in respect of a document created many years ago.

In reply, the Ministry argues that the appellant has not met the threshold for the application of section 23 to the responsive records. It states the records have little to do with the compelling public interest that the appellant identifies in her arguments. It states further that the records relate specifically to Operation Snowball but also to the issues of training police on the growing problem of internet based child exploitation.

It also argues that the appellant identifies police services other than the O.P.P. as having committed improprieties or at least questionable actions and that the records would not, if disclosed, answer the questions about such improprieties. Therefore, it states, there is no demonstrated link between the compelling public interest argument made by the appellant and the records.

In addition, the Ministry states that the appellant has "trivialized the negative impact of disclosing the records, as well as the impact that any disclosure could have on the future sharing of records between law enforcement agencies." It argues that the impact of an order disclosing

these records might mean that other police forces will be reluctant to share law enforcement records with the O.P.P.. The public would be concerned if the working relationship of the O.P.P. with other police forces was affected by a reluctance to share information.

Analysis

As noted in the citation of the *Criminal Lawyers' Association* case, the decision of the Court of Appeal has been appealed to the Supreme Court of Canada. Argument was heard on December 11, 2008, but no decision has been rendered.

However, in this case, for the reasons that follow, I will not rely on the application of section 23 to override a claim to section 14 or 19. As set out below, I find that, on balance, there is no compelling public interest in the disclosure of the information I have found to be exempt under section 14(1)(c), 14(1)(h) and 19.

The public interests on both sides of this debate are significant. Neither the public interest in the suppression of child pornography and the apprehension of those involved in it, nor the concerns about the manner in which law enforcement investigations are carried out, can be taken lightly.

In my view, the information I have found exempt under sections 14(1)(h) and 19 would cast no light on the public interest concerns raised by the appellant.

It is possible that some of the other information at issue in this appeal, which casts light on the investigative methods proposed to be used in Canada prior to the commencement of Operation Snowball, may address some of the concerns raised by the appellant. However, with the exception of detailed information about investigative techniques that is not either in the public domain or clearly information subject to inference by "common sense perception" as referred to in *Mentuck*, which I have exempted under section 14(1)(c), I have ordered disclosure of these parts of the records.

With respect to the information I have exempted under section 14(1)(c), however, I conclude that the public interest in non-disclosure (as mentioned in the *Hydro* decision, above) outweighs any public interest in disclosure, and for that reason, I find that there is not a compelling public interest in disclosure of that information. Even if there were a compelling public interest, it would be outweighed in this case by the purpose of section 14(1)(c), that is, to protect the efficacy of investigative techniques. I reach these conclusions because of the serious nature of crimes associated with child pornography, its enormous impact on victims and on society, and the huge public interest in its suppression and the apprehension of those involved. This interest must take precedence where investigative techniques that may not be publicly known, or easily surmised, are concerned.

For the foregoing reasons, I find that section 23 does not mandate the disclosure of the information I have found to be exempt.

ORDER:

1. I uphold the decision of the Ministry to withhold access to portions of records 1, 2, 3, 4, 5, 7, 8 and 9, and record 6 in its entirety. I have highlighted the portions of records 1, 2, 3, 4, 5, 7, 8 and 9 on the copy of the records that is being sent to the Ministry with this order. The highlighted portions are *not* to be disclosed.

2. I order the Ministry to disclose the portions of records 1, 2, 3, 4, 5, 7, 8 and 9 that are not highlighted on the copy of the records that is being sent to the Ministry with this order, on or before **January 29, 2009**.

3. I order the Ministry to conduct a further search for records responsive to part 1 of the request. In particular, the Ministry should conduct a search of the offices and record holdings of the Commissioner and Deputy Commissioners of the O.P.P. and the staff in their offices.

4. After conducting the searches referred to in provision 2 of this Order, I order the Ministry to provide a decision letter to the appellant in accordance with sections 26, 28 and 29 of the *Act*, treating the date of this order as the date of the request.

5. To verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant pursuant to order provision 2, above.

Original signed by: January 8, 2009
John Higgins
Senior Adjudicator