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

ORDER PO-2913

Appeal PA08-319

Ministry of Community Safety and Correctional Services

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

On June 24, 2008, the Ministry of Community Safety and Correctional Services (the Ministry) received an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The request was for the following:

1. A copy of the current OPP [Ontario Provincial Police] framework for Police Preparedness for Aboriginal Critical Incidents.

2. A copy of the job description for a member of the OPP's Aboriginal Relations Team.

3. A copy of the job description for an Aboriginal Intelligence Officer assigned to gather information relative to Aboriginal criminal activities.

4. A copy of all OPP policies, regulations, orders and training material pertaining to the use of firearms by OPP officers.

5. A copy of all OPP policies, regulations, orders and training material pertaining to the use of tasers by OPP officers.

6. A copy of all OPP policies, regulations, orders and training material pertaining to the use of restraints for individuals when lodged in cells while in police custody.

The Ministry advised the requester on July 22, 2008 that due to the volume of responsive records, in order to process his request it required a 30-day time extension pursuant to section 27 of the *Act*. The Ministry subsequently issued a decision on October 9, 2008 granting partial access to the responsive records. Specifically, the Ministry responded to each part of the request as follows:

Item 1: *Ontario Provincial Police Framework for Police Preparedness for Aboriginal Critical Incidents.*

The Ministry granted full access to these records, identified as Records 1-9.

Items 2 and 3: *Job Descriptions for the Aboriginal Relations Team and the Aboriginal Intelligence Officer*

The Ministry granted full access these records, identified as Records 10-13.

Items 4, 5, and 6: *OPP Policies, Regulations and Orders*

> The Ministry granted partial access to these records, identified as Records 14-23, applying the exemptions at sections 14(1)(e) (endanger life or safety), (i) (security) and (l) (facilitate commission of unlawful act) of the *Act* to deny portions of Records 18 and 19.

Items 4, 5, and 6: *Training Materials*

> The Ministry denied access to these records, identified as Records 24-116, pursuant to the exclusion at section 65(6) (employment related records) of the *Act*.

The requester, now the appellant, appealed the Ministry's decision.

In his appeal letter the appellant stated that, in his view, the exemptions at sections 14(1)(e), (i) and (l) did not apply to the severed portions of the policies, regulations and orders regarding the use of firearms, tasers and restraints. He also indicated that, in his view, the exclusion at section 65(6) did not apply to the training material regarding the use of firearms, tasers and restraints.

In his appeal letter the appellant objected to the time taken by the Ministry to respond to the request and issue its decision. The appellant contended that the Ministry failed to comply with section 27(2) of the *Act* as it did not respond to the request within the extended time frame. The appellant submitted that there was a delay of 49 days after the time extension deadline before the Ministry issued its access decision on October 9, 2008.

The appellant also objected to the adequacy of the Ministry's decision, contending that the Ministry failed to provide reasons in its decision. Specifically, the appellant submitted that the Ministry failed to comply with section 29(1)(b)(ii) of the *Act* because it did not provide reasons explaining how the exemptions or the exclusion specifically apply to each of the records.

Finally, the appellant took the position that the Ministry had an obligation to disclose the records pursuant to section 11 of the *Act*.

During mediation, following discussions with the mediator, the appellant advised that he was not interested in pursuing access to the severances made to the records under section 14. Accordingly, the application of section 14 and the withheld portions of Records 18 and 19 were removed from the scope of the appeal.

Also during mediation, the Ministry confirmed that the training materials for which section 65(6) has been claimed can be grouped as follows:

- *Training Materials relating to use of Firearms* Records 24-36
- *Training Materials relating to use of Tasers* Records 37-103
- *Training Materials relating to use of Restraints* Records 104-116

Subsequently, the Ministry issued a revised decision letter granting partial access to the training materials, identified as Records 24 to 116, which had previously been withheld in full under the exclusion in section 65(6). The Ministry also claimed that portions of Records 109 and 111 are non-responsive to the request. The Ministry disclosed the following records to the appellant, pursuant to its revised decision:

- *Firearms* Records 24-28 and 33, in full
  Records 29, 30, 31, 32, 34, 35 and 16, in part
- *Tasers* Records 37-41, 43, 46-49, 58, 59, 61, 63, 64, 68, 72 -75, 77-92, 97, 98, 101, in full
  Records 42, 44, 60, 62, 65-67, 70, 71, and 93, in part
- *Restraints* Records 104 -107, in full
  Records 108, 109, 111 and 116, in part

The appellant confirmed that he wishes to pursue access to all training information denied under section 65(6), as well as those portions of Records 109 and 111 that the Ministry identified as non-responsive to his request.

The appellant also advised during mediation that he believes that the following records should exist:

- Police orders
- *Firearms Standard Operating Procedures Manual*
- *2004 Use of Force Model*

In response, the Ministry advised that the police orders are contained in Records 14 to 23 which were released, in part, to the appellant. The Ministry advised that the *2004 Use of Force Model* is available online; however, it did not provide a website address for its location. At this point, the Ministry had not yet addressed the existence of the *Firearms Standard Operating Procedures Manual.*

The appellant confirmed that he was not satisfied with the Ministry's response and that he believes that other policies, police orders and regulations should exist. Accordingly, whether the Ministry conducted a reasonable search for responsive records remains at issue in this appeal.

Finally, the appellant has confirmed that he wishes to pursue the issues of the time taken to issue a decision and the adequacy of the Ministry's decision letter. In addition, the appellant takes the position that the Ministry's actions constitute an abuse of process.

As further mediation was not possible, the file was transferred to the adjudication stage of the appeal process for an inquiry.

The adjudicator previously assigned to this file sent a Notice of Inquiry, setting out the facts and issues on appeal to the Ministry, seeking representations. The Ministry provided representations

in response. In its representations, the Ministry indicated that it had provided the appellant with the website information for the *2004 Use of Force Model*. The Ministry stated further that it was prepared to grant the appellant partial access to the *Firearm Standard Operating Procedures Manual*, denying access to portions of it pursuant to section 65(6). The Ministry provided this office with a copy of the revised decision letter sent to the appellant, which enclosed a severed copy of the record.

The previous adjudicator then sent a Notice of Inquiry, modified to reflect the most recent disclosure, to the appellant, along with a copy of the Ministry's representations. The appellant provided representations in response. The appellant confirmed receipt of the website information regarding the *2004 Use of Force Model* and indicated that this record was no longer at issue. As the appellant's submissions raised issues to which the previous adjudicator believed the Ministry should be given an opportunity to reply, she sought further representations from the Ministry by way of reply. The Ministry provided reply representations in response.

Shortly after the Ministry provided its reply representations, it copied this office on a clarification letter addressed to the appellant. In that letter, the Ministry advised that although it took the position that section 65(6) applied to the training materials (identified as Records 24 to 116) and the *Firearm Standard Operating Procedures Manual*, it exercised its discretion to release much of that information to the appellant. The Ministry explained that although it was still claiming that the exclusion at section 65(6) of the *Act* applies to the undisclosed portions of that information, it was of the view that much of the information is similar to the information on pages 18 and 19 of the responsive records for which it claimed the law exemptions at sections 14(1)(e), (i), (j) and (l) of the *Act*. The Ministry advised that if the exclusion at section 65(6) was found not to apply to the training materials and the *Firearm Standard Operating Procedures Manual*, in the alternative, it claims that the exemptions at sections 14(1)(e), (i), (j) and (l) apply to the information for which the exclusion in section 65(6) was claimed.

Although the appellant had previously removed the Ministry's exemption claim of section 14(1) from the scope of the appeal, he advised that, in light of the Ministry's clarification letter, he wished to reintroduce the issue of the possible application of section 14(1) to the information identified by it. Given the particular circumstances of this appeal, the previous adjudicator agreed to do so.

Accordingly, she sent a Supplementary Notice of Inquiry to the Ministry requesting that it make submissions on its alternative claim of the application of the exemptions at sections 14(1)(e), (i), (j) and (l), to the information for which it has claimed the exclusion at section 65(6). The Ministry submitted representations in response.

She then sent a copy of the Supplementary Notice of Inquiry and the non-confidential supplementary representations of the Ministry, to the appellant, inviting representations. The appellant submitted representations in response.

This file was subsequently transferred to me to complete the adjudication process.

RECORDS:

The Ministry takes the position that all of the records remaining at issue in this appeal are excluded under section 65(6) of the *Act*, or, in the alternative, they are exempt under sections 14(1)(e), (i) (j) and/or (l). The records remaining at issue are the following:

- *Training Materials relating to use of Firearms*
  Records 29, 30, 31, 32, 34, 35 and 36 – in part

- *Training Materials relating to use of Tasers*
  Records 42, 44, 60, 62, 65, 66, 67, 70, 71, 93 – in part
  Records 45, 50-57, 69, 76, 94-96, 99, 100, 102, 103 – in full

- *Training Materials relating to use of Restraints*
  Records 108, 109, 111, 116 - in part
  Records 110, 112, 113, 114, 115 – in full

- *Firearm Standard Operating Procedures Manual*
  Pages 4, 6, 7, 8, 9, 10, 12 – in part

In addition, the appellant believes that additional records should exist, in particular:
- Police Orders
- Other records

PRELIMINARY MATTERS:

The appellant has raised three preliminary matters relating to the manner in which the Ministry has responded to this request and to one other request (PA08-314-2), which was ultimately resolved during the mediation stage of the appeal on the understanding that the Ministry's behaviour in both files would be considered in determining the preliminary issues in the current appeal.

The appellant has set out in some detail the bases for his complaints against the Ministry, and the Ministry has responded to them. I note that the previous adjudicator, in setting the issues out in the Notice of Inquiry, asked the appellant to indicate the remedy sought, detailing what remedy is sought and explaining why such a remedy should be granted.

In each case, the remedy sought by the appellant is the same: he wishes that a "written reprimand" be issued to the Ministry, and that there be "a recommendation from the IPC Adjudicator that all staff in the Ministry's Freedom of Information and Protection of Privacy Services and appropriate senior OPP officials participate in a one-day workshop organized by the IPC…" that would specifically include sessions dealing with the deficiencies described by the appellant in his representations.

I will briefly address each complaint in turn.

TIME TAKEN TO ISSUE DECISION

The appellant takes the position that the Ministry failed to comply with section 27(2) of the *Act* by not responding to the request within the extended time frame. The appellant submits that there was a delay of 49 days after the time extension deadline before the Ministry issued its access decision.

In identifying this issue, the previous adjudicator asked whether the Ministry had put itself in a deemed refusal position in responding to the request.

Section 26 sets out the time period for responding to a request under the *Act*. Section 26 of the *Act* requires the Ministry to issue a decision within 30 days of receipt of a request. Section 26 states:

> Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 25, the head of the institution to which it is forwarded or transferred, shall, subject to sections 27, 28 and 57, within thirty days after the request is received,
>
> (a) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and
>
> (b) if access is to be given, give the person who made the request access to the record or part thereof, and where necessary for the purpose cause the record to be produced.

If a decision is not issued within thirty days, the Ministry is in a "deemed refusal" situation pursuant to subsection 29(4) of the *Act*. The provision states:

> A head who fails to give the notice required under section 26 or subsection 28(7) concerning a record shall be deemed to have given notice of refusal to give access to the record on the last day of the period during which notice should have been given.

Section 27 provides that the head may extend the time limit for responding to the request in certain circumstances. That section states:

> 27(1) A head may extend the time limit set out in section 26 for a period of time that is reasonable in the circumstances, where,
>
> (a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution; or

> (b) consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit.
>
> (2) Where a head extends the time limit under subsection (1), the head shall give the person who made the request written notice of the extension setting out,
>
> (a) the length of the extension;
>
> (b) the reason for the extension; and
>
> (c) that the person who made the request may ask the Commissioner to review the extension.

It is clear from the history of this appeal outlined above, that the Ministry issued a 30 day time extension in order to respond to the appellant's request. Accordingly, the Ministry's decision should have been issued on or before August 22, 2008. After that date and according to section 29(4) of the *Act*, the Ministry's failure to issue a decision placed the Ministry in a deemed refusal situation, and the appellant was then in a position to appeal the Ministry's lack of action to this office. The appellant did not appeal the deemed refusal, but chose, instead, to await the Ministry's access decision, which was issued 49 days later.

Although I appreciate the appellant's frustration in his dealings with the Ministry, I find that the deemed refusal was cured when the Ministry issued its decision letter to the appellant and the issue is now moot. Accordingly, I will not address this issue further.

ADEQUACY OF DECISION LETTER

This appeal raises the issue of whether or not the Ministry has responded to the appellant by issuing decisions in compliance with section 29 of the *Act*.

Sections 26 and 29 are relevant to this issue. The relevant portions read:

> 26. Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 18, the head of the institution to which it is forwarded or transferred, shall, subject to sections 27, 28 and 57, within thirty days after the request is received,
>
> (a) give written notice to the person who made the request as to whether or not access to the record or a part of it will be given; and
>
> (b) if access is to be given, give the person who made the request access to the record or part, and if necessary for the purpose cause the record to be produced.

> 29. (1) Notice of refusal to give access to a record or part under section 26 shall set out,
>
> (a) where there is no such record,
>
> (i) that there is no such record, and
>
> (ii) that the person who made the request may appeal to the Commissioner the question of whether such a record exists; or
>
> (b) where there is such a record,
>
> (i) the specific provision of this Act under which access is refused,
>
> (ii) the reason the provision applies to the record,
>
> (iii) the name and position of the person responsible for making the decision, and
>
> (iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

In order to assist institutions in preparing a decision letter that meets the legislative requirements of the *Act*, the Commissioner's office issued a revised *IPC Practices* publication in September 1998, entitled "Drafting a Letter Refusing Access to a Record." This document, which was sent to all provincial and municipal institutions, sets out the components of a proper decision letter.

The Ministry takes the position that its decision is "standard" and "identical in format to all other decision letters the Ministry has issued in recent years." The Ministry also points out that the letter advised the appellant to contact the analyst if he had any questions. The Ministry also submits that it is very late in the access process to be raising this issue, and that the delay in raising it should be taken into consideration.

The appellant refers to a number of orders of this office that have addressed the issue of the adequacy of decision letters (see, for example: Orders M-913, MO-1650, MO-1731, MO-2190, MO-2226 and MO-2191-I). He submits that the Ministry's decision fails to adequately explain why the exemptions and exclusion apply to the records, and that the Ministry did not provide an index of records.

In Order M-913, former adjudicator Anita Fineberg succinctly explained the purpose and requirements of a proper decision letter:

> In my view, the purpose of the inclusion of the above information in a notice of refusal is to put the requester in a position to make a reasonably informed decision

> on whether to seek a review of the head's decision (Orders 158, P-235 and P-324). In this case, I agree with the appellant that the decision letter of the Police should have provided him with **reasons** for the denial of access. A restatement of the language of the legislation is not sufficient to satisfy the requirement in section 29(1)(b)(ii) of the Act. It does not provide an explanation of why the exemptions claimed by the Police apply to the record. Section 29(1)(b)(i) already requires that the notice contain the provision of the Act under which access is refused.

On review of the Ministry's initial decision letter, I note that the Ministry simply reiterated the language of the legislation regarding the exemptions claimed for the withheld portions of the records. With respect to the Ministry's assertion that section 65(6) applies to portions, it set out a very brief explanation for its decision to claim the exclusion. In my view, the Ministry's decision falls far short of an adequate decision letter as set out in previous decisions of this office, as well as the *IPC Practices*.

The appellant also relies heavily on the decision of adjudicator Daphne Loukidelis in Order MO-2191-I with respect to the Ministry's failure to provide an index of records. I note that the circumstances in Order MO-2191-I were unique and the institution's behaviour in that case impacted the adjudicator's ability to resolve the appeal, as she noted:

> [N]one of the written communications of the Police have constituted an adequate decision letter for the purposes of the *Act*. Furthermore, in my view, the approach taken by the Police in responding to the appellant's request and his appeal has not been in accordance with the procedures set out in the *Act* or the Practice Directions prescribed by this office. The inadequate decision letters, combined with a lack of clarity in the Police's response, has made achieving any meaningful progress toward resolution of the definition of this appeal difficult. It has also, in my opinion, led to an unnecessary duplication of effort on the part of the Police and the appellant.
>
> …
>
> [I]t remained unclear even at the start of the adjudication stage of this appeal what records had been identified as responsive to the appellant's request. For example, none of the letters sent to the appellant by the Police contained an adequate identification, description or itemization of the responsive records.

I have reviewed the Ministry's initial decision letter and note that it has provided some description of the records that it has identified, including the page numbers that pertain to each responsive record. Although an index of records is preferable in order to clearly set out the records at issue, in the circumstances, the number of actual records remaining at issue is not great, and much of the withheld information is contained on different pages of a single record. In the circumstances, the exempt portions of the records have been clearly identified. Nevertheless, the failure of the Ministry to identify each record or portion of a record and explain why it is claiming a particular exemption or exception reflects the overall inadequacy of its decision letter.

The question remains, having found the decision letter to be inadequate, what remedy is appropriate in the circumstances? In Order M-913, adjudicator Fineberg concluded that, despite the inadequacy of the institution's decision letter, there remained no further action to take. She stated:

> Notwithstanding the inadequacy of the decision letter, the appellant has exercised his right of appeal and provided extensive representations which I have referred to in my disposition of all the issues relating to the information in this order. In these circumstances, there would be no useful purpose served in requiring the Police to provide a new decision letter to the appellant.

Similarly, in the current appeal, the appellant has asserted his right to appeal the decision of the Ministry, extensive mediation ensued and the issues on appeal modified. The records at issue have been clearly identified. The appellant has made extensive representations on both the records and the issues, which I will refer to in this order. In the circumstances, I find that no useful purpose would be served in dealing with this issue further, beyond identifying the inadequacy of the Ministry's decision and indicating, as the appellant noted in his representations, that perhaps "it is clearly time for the Ministry to revise its format for decision letters."

ABUSE OF PROCESS

The appellant submits that the Ministry's actions in responding to his two access requests amount to an abuse of process of the access to information scheme. The Ministry was asked to address this allegation initially without reference to the appellant's arguments.

Referring to the definition of abuse of process in Black's *Law Dictionary* (8th edition), as the "improper and tortious use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process' scope," the Ministry submits that such an allegation is very serious and queries why it has been raised in this appeal.

The Ministry submits further that it has not committed any actions in responding to this request and appeal that "come close to constituting abuse of process." The Ministry notes that it has participated in mediation, has responded quickly to numerous e-mails and other communications, and has provided the appellant with information, such as website links. The Ministry submits that it has been "helpful and diligent."

In his submissions, the appellant provides extensive argument and examples of the actions of the Ministry, which, he submits support his contention that there is "a disturbing abuse of process of the access to information process by the Ministry." First, the appellant provides six examples from the mediation stage of the current appeal, and another three examples from Appeal PA08-314-2 to support his position that "the Ministry and the OPP were deliberately stonewalling our request for access to the requested information." Due to the extent of the appellant's representations, I will set out, briefly, the essence of the evidence he provided in support of his complaints.

With respect to the current appeal, the appellant takes issue with the Ministry's position that it responded quickly and that it had been helpful and diligent. In particular, he states that:

- he engaged in active mediation but did not believe that the Ministry reciprocated;
- the Ministry refused to respond to his demands that it provide reasons for withholding records, that it respond to his grounds for appeal, that it provide an index of training materials and that it reconsider its decision;
- there were additional delays apart from those noted above in providing the revised decision letter and when it was finally given, it was inadequate;
- he believes that the decision to claim section 65(6) is contrary to IPC jurisprudence;
- more than half of the training material is "missing or corrupted by deletions";
- the Ministry failed to do a proper records search or it "had deliberately refused to disclose the existence of these important documents…";
- the Ministry misled him and the IPC throughout the mediation process.

Similar complaints were raised with respect to appeal PA08-314-2, including complaints of delay in responding during mediation and providing an inadequate decision letter. The appellant appears to be particularly offended that the Ministry would offer to settle that appeal by providing some information if the appellant would withdraw his appeal for the remaining information.

The appellant submits that the Ministry did not comply with the "best practices" as set out in an IPC discussion paper entitled *Best Practices for Institutions in Mediating Appeals* (March 2004). The appellant submits that the Ministry staff who dealt with his request were not knowledgeable, nor did thy have "quick access to the decision-maker," and that it was not committed to the mediation process.

The appellant believes that the Ministry and OPP deliberately delayed the entire process in both appeals. He then set out a chronology of all the incidents referred to above, and others, as evidence that there has been a "pattern which constitutes an abuse of the access of information process."

In response to the appellant's submissions, the Ministry offered several comments regarding its performance generally, and in respect of the organization that the appellant represents. In view of the vehemence and tenor of the appellant's allegations, I have quoted them in their entirety.

> First, the Appellant represents an organization that has filed at least 70 separate access requests beginning with 8 in the summer of 2008, and continuing with at least 65 more the following December and January. It is fair to say that this has put an additional burden on Ministry resources. This request has alone yielded well over 100 pages of responsive records.
>
> Ministry freedom of information staff are experienced professionals. In 2008, they responded to 3539 access requests, an increase of over 150 from the previous year. Of this number, there were only 128 appeals, demonstrating that the vast majority of appellants are satisfied with the service they receive. The level of

> performance provided by Ministry staff, particularly when viewed in light of this and other statistics I provided in my original submission is, I submit, exceptional and reflects a much more balanced perspective of Ministry success in complying with the Act than the one provided by the Appellant.
>
> Second, the Appellant has been critical of Ministry efforts to respond to this access request. His criticism is, in my opinion, mostly unfair. When I read the Appellant's submissions, they suggest that the Appellant believes that the Ministry acted deliberately in hiding or delaying the release of responsive records. But I submit the facts do not bear this out: Without going into all of the details from the date of the initial request, I contend that Ministry staff granted full access to many of the records the Appellant requested, and partial access to many others. They have spent countless hours working with the Appellant, and with the IPC-appointed mediator, both during mediation and otherwise. Experienced staff was appointed to work on the request, and they sought [legal counsel's] advice as required. Staff simply did not know that certain records such as the Firearms Standard Operating Procedures manual were even at issue until after the mediation. I submit this is not a deliberate attempt to mislead, but is at most a genuine misunderstanding.

Analysis and Findings

It is well established that the Information and Privacy Commissioner has the authority to control its processes. This includes supervising the processes of institutions under the *Act* so as to prevent an abuse of process that would frustrate the intent of the Ontario Legislature in creating both a freedom of information regime and an office for its administration. [Order M-618]

In Order M-618, former Commissioner Tom Wright addressed the actions of a requester rather than an institution. However, in his decision, the former Commissioner acknowledged the arguments made by intervenors regarding the actions of "unco-operative institutions." He noted:

> In the context of this inquiry, my office has had considerable experience in controlling the potential for abuse of the legislation by institutions and requesters alike. This has been done through use of the specific powers set out in the Act for reviewing decisions of institutions on the reasonableness of their searches for records or on the sufficiency of detail set out in requests (section 17), on time extensions for making a decision on access (section 20), and on fee estimates and fee waivers (section 45).

The former Commissioner explained the role of this office under the freedom of information legislative scheme. In my view, the following comments are relevant to the issue under discussion in this appeal:

> It is clear that a major component of that role is to resolve disputes where issues arising from requests for access to information come to the Commissioner on appeal. In the course of performing that function, the Commissioner is called

upon to develop policies and processes designed to facilitate the stated purposes of the legislation and its proper administration.

The Commissioner is also required to prepare an annual report to the Legislature reviewing the effectiveness of the legislation in providing access to information and protection of personal privacy. The report must include a summary of the nature and resolution of appeals under both the municipal and provincial Acts, an assessment of the extent to which institutions are complying with the legislation and any recommendations with respect to the practices of institutions and proposed revisions to the Acts…

In the decision in the case of John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767 the Divisional Court of Ontario had occasion to comment extensively on the Commissioner's statutory mandate in the following terms:

> The commissioner exercises a supervisory function in respect of compliance by government institutions with provisions of the Act and has exclusive jurisdiction to review the decision of a head of an institution under the Act relating to a request for access (ss. 4 and 50).
>
> ...
>
> [T]he commissioner is at the apex of a complex and novel administrative scheme, involving the regulation of the dissemination of the information in the hands of hundreds of heads of government agencies, whose decision-making under the Act reaches a final administrative focus in such appeals.
>
> The commissioner not only has responsibility for all refusals of requests for access and corrections of personal information, but also manages a unique process mandated by s. 52 of the Act, having administrative authority over the pre-decision-making process of mediation under s. 51.

As I noted above, there have been delays in the processing of the appellant's request, which I addressed above. In addition, I agree that the appeal was in mediation for an extended period of time. Additionally, from my review of the entire appeal file, I would suggest that had the Ministry perhaps given more attention to its initial decision on access, some of the later decisions made during mediation might have been avoided. Nevertheless, the purpose of entering into mediation is to attempt to resolve or, at times, to correct decisions. Mediation is not mandatory and the willingness of parties to engage in meaningful discussions varies in every case. [See: Order MO-2226 for a more comprehensive discussion of this issue].

Based on my review of the process of the appeal from receipt of the appellant's request through mediation, much of which has been set out above, I am not persuaded that the Ministry's actions constitute an abuse of the access to information process. I note that the Ministry was engaged in mediation despite delays, that it reconsidered its decisions, offered settlement options that could be accepted or rejected by the appellant, and provided the appellant with additional records during mediation. I also note that a number of records were disclosed to the appellant in the Ministry's initial decision. The examples and argument provided by the appellant, and my review of the appeal file, lead me to conclude that there is insufficient evidence before me that supports a finding that the Ministry has deliberately attempted to obfuscate or otherwise mislead this office or the appellant.

I also note that many of the complaints raised by the appellant pertain to the very issues to be adjudicated. In my view, the Ministry has made its position on access clear, and has provided submissions to support its position. The appellant disagrees with the Ministry's position. He has been provided with the vast majority of the Ministry's representations and given the opportunity to challenge the Ministry's position. As the final arbiter of the Ministry's decisions in this appeal, I will consider the representations made by both parties, review the records, and issue a decision either upholding the Ministry's decision or not. Moreover, even if I were to make a finding that the Ministry's decision cannot be upheld, that does not validate an argument that the Ministry is abusing the processes of the access to information scheme. This is simply one of the possible outcomes of the appeal process.

Accordingly, I reject the appellant's argument that the Ministry's actions in responding to his two access requests amount to an abuse of process of the access to information scheme.

DISCUSSION:

RESPONSIVENESS OF RECORDS

The Ministry submits that portions of Records 109 and 111 are not responsive to the appellant's request.

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).

To be considered responsive to the request, records or portions of the records must "reasonably relate" to the request [Order P-880]. Previous orders of this office have determined that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

In explaining its position, the Ministry notes that the records that are the subject of this appeal are training materials relating to the use of firearms, tasers and restraints. The Ministry submits that the portions of Records 109 and 111 at issue in this discussion pertain to "stopping a violator" and "traffic stops."

The appellant's request as set out above, clearly requests training materials pertaining to the use of firearms, tasers and restraints. In his representations, the appellant notes that the incident that he is researching "is an incident where the OPP conducted what it described as a routine traffic stop, arrested a well-known Mohawk leader, set up a road blockade and proceeded to carry out arrests of Mohawk activists…" Unfortunately, this information was not communicated to the Ministry at the time the request was made. Had the information contained in Records 109 and 111 been found elsewhere, I would have concluded that it fell outside the scope of the request.

That being said, however, I note that the portions of these records (which are actually comprised of consecutive pages of the training material) are found within the sections referring to the areas identified by the appellant in his request. The portions pertaining to stopping a violator and traffic stops must be read in the context in which they are situated. Taking a liberal approach to identifying responsive records, I find that they are reasonably related to the appellant's request, and are, therefore, responsive to it.

The Ministry has not indicated whether it would have claimed the exclusion in section 65(6) or the exemptions in section 14 for these portions of the records. I note that the information in the portion of Record 111 that the Ministry withheld as non-responsive is continued on page 112. The Ministry has clearly claimed the application of section 65(6) and 14 for page 112, and I note that a portion of the Ministry's confidential submissions make reference to the subject matter of this page. Accordingly, I will consider whether the claimed exception and exemptions apply to Record 111. Given that the Ministry has disclosed other portions of the training material, however, I will not assume that it intends to withhold the portion of 109 that it has claimed to be non-responsive. Accordingly, I will order the Ministry to issue a decision regarding the portion of Record 109 that it has withheld as not responsive.

SEARCH FOR RESPONSIVE RECORDS

As I noted above, the appellant does not believe that the Ministry's search for responsive records was reasonable. He is of the opinion that other policies, police orders and regulations than those identified by the Ministry should exist.

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.

Representations

The Ministry indicates in its representations that it did not contact the appellant for additional clarification of the request because it determined that the request was clear. The Ministry attached an affidavit, sworn by the Manager of the Leadership and Design Unit of the OPP Academy (the Manager), of the steps taken to search for responsive records. The Ministry indicates further that it is unlikely that any records have been destroyed because they are scheduled to be archived. The Ministry also indicated that an additional search would be undertaken and an affidavit of search provided. This second affidavit was provided to this office at a later date. The results of the second search did not produce any additional records.

In his initial affidavit, the Manager indicates that his duties include addressing access requests relating to OPP training records. He indicates that in conducting his search for responsive records, he:

- searched the Court Training Standard database for documents relating to the topics requested because these documents outline in detail the specifics of training being delivered at the OPP Academy;
- consulted with the OPP Academy Recruit Training Coordinator regarding specific training sessions relating to the training material being requested; and
- consulted with an OPP Instructional Design Specialist to determine locations of training materials.

The Ministry states in its representations that it has granted partial access to some Police Orders, but does not know what other Police Orders the appellant is seeking because it has not been provided with particulars.

In response to the Ministry's representations, the appellant reiterates his request, and emphasizes that he is seeking all regulations and orders as well as policies that pertain to the three identified areas. He points out that the Ministry did not identify four records that were clearly related to his request: Regulation 926 on "Equipment and Use of Force" under the *Police Services Act*, the Ministry's *Policing Standards Manual*, the *2004 Use of force Model* and the *Firearms Operating Procedures Manual*. He indicates that it was only after he received additional records during mediation that these records were identified. The appellant queries why the Ministry did not contact him for clarification at the outset, given its failure to identify relevant and responsive records.

The appellant acknowledges the Manager's affidavit relating to training material and accepts the search that was undertaken for these records. However, he notes that there is no similar affidavit regarding searches for OPP policies, regulations and orders. Given the failure of the Ministry to identify the above four records, the appellant submits that the Ministry has failed to establish that its search for OPP policies, regulations and orders was reasonable.

In reply to the appellant's submissions the Ministry notes that Regulation 926 is available on its public website and states that "[t]he Ministry need not, according to section 22(a) of [the *Act*], disclose a publicly available record, such as a regulation…" the Ministry states further:

> The fact that the Ministry ended up providing the Appellant with website addresses is consistent with the practice I explained above of trying to assist requesters such as the Appellant in obtaining records, even outside the [*Act*'s] process, where feasible.

The Ministry concludes that "we maintain that we have produced sufficient affidavit evidence in response to the records that are the subject of this appeal."

Analysis and findings

The appellant is satisfied with the Ministry's search for training materials, which I note, was not identified by him during mediation as being at issue. Accordingly, I will not address further the Ministry's evidence regarding this issue.

However, with respect to other records, I am persuaded that the appellant's concerns have merit. I find that the Ministry's explanation of the searches that were undertaken for OPP policies, regulations and orders is insufficient to satisfy me that it has made a reasonable effort to search for and locate responsive records. The Ministry has not indicated who conducted the search for these records, where the searches were conducted and why records identified during the mediation stage were not located during the searches that were undertaken. Although the Ministry initially felt that it was not necessary to contact the appellant to clarify his request, it is apparent that the request was not entirely clear and the Ministry still does not know exactly what the appellant is seeking. The history of the discovery of the records identified above leads me to question the reasonableness of the Ministry's search. The failure of the Ministry to provide any explanation of the steps taken in conducting the search for these records leaves me with no understanding of the Ministry's process in this regard. Moreover, the Ministry's position

regarding the application of section 22(a) undermines the Ministry's assertion that it has satisfied its obligations under the *Act*.

Section 22(a) of the *Act* states that:

> A head may refuse to disclose a record where,
>
> > the record or the information contained in the record has been published or is currently available to the public;

For this section to apply, the institution must establish that the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre [Orders P-327, P-1387].

Section 22(a) is intended to provide an institution with the option of referring a requester to a publicly available source of information where the balance of convenience favours this method of alternative access. **It is not intended to be used in order to avoid an institution's obligations under the *Act*** [Orders P-327, P-1114 and MO-2280].

In order to rely on the section 22(a) exemption, the institution must take adequate steps to ensure that the record that they allege is publicly available is the record that is responsive to the request [Order MO-2263].

Although records responsive to the appellant's request might be available to the public, in fulfilling its obligations under the *Act*, the Ministry ought to have searched all of its records holdings that might reasonably house responsive records and, if it determined that some were located on its public website, the Ministry had the option of claiming the discretionary exemption at section 22(a). I note that the Ministry referred the appellant to websites other than its own for the 2004 Use of Force Models, and that is clearly commendable. However, it is unclear to me whether the Ministry also has this information in its own record holdings, or whether it uses the information in the records by accessing it over the internet. I conclude that the Ministry's representations regarding the searches that were undertaken for OPP policies, regulations and orders are deficient in identifying what records are responsive and, as I noted above, where they are located.

Accordingly, I find that the Ministry's search for responsive records was not reasonable, and will order the Ministry to conduct a further search for OPP policies, regulations and orders. In order to ensure that the Ministry fully understands what the appellant is seeking, I will order the Ministry to contact the appellant to fully canvas the records or information that remain outstanding.

LABOUR RELATIONS AND EMPLOYMENT RECORDS

General Principles

Sections 65(6) and (7) state:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.
>
> This Act applies to the following records:
>
> 1. An agreement between an institution and a trade union.
>
> 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment- related matters.
>
> 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
>
> 4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*.

In the circumstances of this appeal, the exceptions listed in section 65(7) have no application.

The Ministry claims that the records at issue are exempt under section 65(6)3.

Section 65(6)3: matters in which the institution has an interest

For section 65(6)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships. [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.). See also Order PO-2157.]

The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

The type of records excluded from the *Act* by s. 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions [*Ministry of Correctional Services*, cited above].

Part 1: collected, prepared, maintained or used

The Ministry states that the records at issue, "are records of training materials prepared by experts at the Ontario Provincial Police (OPP) Academy for police officer recruits instructing them on the safe use of firearms, tasers and restraints." The Ministry notes that new members of the OPP attend the OPP Academy for the first 12 months of their employment in order to receive instruction and training, which is "a critical part of their orientation to being a police officer."

The appellant does not specifically address this part of section 65(6)3.

Based on the Ministry's submissions, I am satisfied that the records at issue were prepared and used by the Ministry.

Part 2: meetings, consultations, discussions or communications

To satisfy Part 2 of the section 65(6)3 test, the Ministry must establish that the collection, preparation, maintenance or usage of the record by an institution was in relation to meetings, consultations, discussions or communications.

The Ministry claims that the records at issue are "communications" since they are written materials that were designed for training purposes, and are thus communicated to new OPP officers, which the Ministry submits accords with the ordinary meaning of the term "communications."

The appellant argues that using such an interpretation of the term "communications," "it may be a herculean challenge for any member of the public to obtain *any* document from the Ministry under the freedom of information process."

The term "communications" must be viewed in the context of this section, not to any and all situations where information is shared. I am satisfied that the records at issue were communicated to new OPP officers as part of their training. Accordingly, I find that the second part of the section 65(6)3 test has been met.

Part 3: labour relations or employment-related matters in which the institution has an interest

The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition [Orders M-830, PO-2123]
- an employee's dismissal [Order MO-1654-I]
- a grievance under a collective agreement [Orders M-832, PO-1769]
- disciplinary proceedings under the *Police Services Act* [Order MO-1433-F]
- a "voluntary exit program" [Order M-1074]
- a review of "workload and working relationships" [Order PO-2057]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act*

> [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)* , [2003] O.J. No. 4123 (C.A.)]

The phrase "labour relations or employment-related matters" has been found *not* to apply in the context of:

- an organizational or operational review [Orders M-941, P-1369]
- litigation in which the institution may be found vicariously liable for the actions of its employee [Orders PO-1722, PO-1905]

The phrase "in which the institution has an interest" means more than a "mere curiosity or concern," and refers to matters involving the institution's own workforce [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*].

The records collected, prepared maintained or used by the Ministry … are excluded only if [the] meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees' actions. [*Ministry of Correctional Services*, cited above]

Representations

By way of background, the Ministry describes the records at issue and how they are used by the OPP:

> The responsive records…are records of training materials prepared by experts at the [OPP] Academy for police officer recruits instructing them on the safe use of firearms, tasers and restraints.
>
> The OPP Academy is where new members of the OPP spend part of the first 12 months of their employment receiving instruction and training. This instruction and training is a critical part of their orientation to being a police officer. The records that are the subject of this appeal are designed to protect OPP officers when they are protecting public safety. More particularly, the records are used to teach them how to safely use policing equipment in potentially dangerous, even life threatening situations.

The Ministry asserts that the records were created by instructors of the OPP Academy, which is part of the OPP, in its capacity "as an employer to direct OPP officers in how to perform their day-to-day duties." The Ministry notes that failure to comply with the requirements set out in the training material would subject non-compliant members to employee discipline. The Ministry submits that the records at issue "are integral to the employer-employee relationship and to managing the policing workforce."

The Ministry submits further that the OPP has an interest in the records at issue because "they are critical in ensuring that the OPP can discharge its statutory mandate as a police agency."

The appellant submits that training materials have no reasonable connection to labour relations or employment-related matters. The appellant contends that the Ministry is taking a very broad interpretation of these terms that is not consistent with IPC jurisprudence.

Citing examples of situations where labour relations and employment-related matters have been found to apply in previous orders (set out above), the appellant notes that training materials and police orders have not been cited as falling under section 65(6).

Referring to Order MO-1954, the appellant notes that the issue of "generic" training materials has been addressed and found not to fall within the exclusion. Similarly, in Order MO-1729 (referred to in Order MO-1954), adjudicator Shirley Senoff found that two chapters of the *London Police Service Procedure Manual* relating to "Use of Force" and "Power of Search and Seizure" were not about labour relations or employment-related matters. She found that "any connection they might have to workforce-related issues is merely incidental."

The appellant also submits that the Ministry's position regarding the records at issue is inconsistent because it decided to release some of the other training records and *Firearms Standard Operating Procedure Manual* during mediation. He states: "[e]ither training records are excluded from the scope of the *Act* under section 65(6) or they are not."

Finally, the appellant expresses concern about too broad an interpretation of this exclusion, noting that many records, such as police orders, regulations and policies "are also integral to 'managing the policing workforce'." He queries that if any record relating to the managing of the workforce could be excluded, "what public oversight or public interest research would be possible."

In reply, the Ministry, correctly points out it can choose to disclose records that fall outside the jurisdiction of the *Act* at any time, and that such disclosure is not illogical or inconsistent with its application of section 65(6) to other portions of the records.

In response to the Orders cited above by the appellant, the Ministry states:

> I note that IPC Orders, such as MO-1954, which is relied on by the Appellant, are not binding. In addition, I contend that MO-1954 is not as determinative as the Appellant suggests. For example, in Order P-1483, the IPC found that a training program for engineers "is clearly an 'employment–related matter' for the purposes of section 65(6)3." In Order PO-2234, the IPC found that records involving training in an employee personnel file are "employment-related matters."

Analysis and Findings

The Ministry is correct in noting that the decisions of this office are not binding, as each case must be decided on its own facts. However, in my view, the Ministry's position fails to recognize the importance of consistency in decisions rendered by this office, which tend to rely on the principles and rationale of prior decisions regarding exemptions and exclusions claimed for similar records and fact situations.

In the case of Order PO-2234, cited by the Ministry, for example, I find that the facts in that case are distinguishable from those in the current appeal. In Order PO-2234, the records at issue were contained in a particular police officer's personnel file. They reflected a myriad of employment-related records, including training records that would be found in an individual officer's personnel file. In my view, such a record is specific to the individual and are, or would likely be contained in a police officer's personnel file, whereas the records at issue in the current appeal are not specifically connected to a particular officer's performance or employment qualifications.

Other orders of this office have consistently applied this approach with respect to similar fact situations. For example, in Order MO-2017, records that proved that certain named police officers had taken their annual requalification reviews as calibration technicians to operate a specific breath alcohol testing device were found to be about employment-related matters. Similarly, in Order PO-2263, the record at issue was the training certificate of a specified police officer, and was found to be "about employment-related matters," as it was used to determine or to establish whether that particular police officer was qualified to use a speed laser device in the context of his or her employment.

These orders can be contrasted with another line of orders that have found that the *Act* applies to generic training materials. In Order MO-1729, a request was made for policies of police conduct, police arrest, police use of force and police community relations. The records at issue were two sections of the *London Police Service Procedure Manual* relating to use of force and power of search and seizure. In finding that the *Act* applied to the records at issue, adjudicator Shirley Senoff stated:

> [T]he two chapters in the Manual at issue in this appeal ("Use of Force" and "Power of Search and Seizure") set out various procedures governing how the Police carry out some of their duties. They are not "about labour relations or employment-related matters;" any connection they might have to workforce-related issues is merely incidental (see also Order PO-2093-I).

In Order MO-1954, the request sought access to policy/training manuals relating to a number of specific activities. The records at issue were prepared by the Toronto Transit Commission's Corporate Security Department to use in training special constables. In finding that the records fall within the *Act*, adjudicator Donald Hale relied on the findings in Order MO-1729, and stated:

> While the records address in a generic way how TTC Special Constables are to carry out a portion of their duties, they are "about" an employment-related matter only peripherally as they address a Commission-wide procedure for the Special

> Constables to follow. In addition, I find that the records are clearly not "about" labour relations as that term has been defined in previous decisions [Order PO-2157].

The Ministry also relies on the findings in Order P-1483 to support its position that the records fall outside the jurisdiction of the *Act*. In that case the request was for the Engineering Development Program [EDP] Audit Report which was prepared for the Workplace Discrimination & Harassment Prevention Program. The Ministry in that case submitted that the records at issue were prepared in response to allegations raised by a number of individuals, including Ministry employees, of discrimination and harassment in the selection criteria of the successful candidates for the EDP. In discussing the issue, adjudicator Donald Hale found that these records related to a training program operated by the Ministry which amounted to an "employment-related matter" under section 65(6)3.

In my view, this decision must be read in context and as a whole. Adjudicator Hale's comments in this regard were made in response to the appellant's argument that:

> [T]he interviews conducted by the consultant in preparing the Audit Report were not about "employment-related matters". Rather, they were in regard to a training program available to engineers who may or may not be employees of the Ministry. For this reason, the appellant argues that the training program which is the subject of the records cannot be "seen as an integral part of employment".

When viewed as a whole, the records in Order P-1483 pertain to an audit that was conducted of a Ministry-operated training program in response to complaints. In essence, adjudicator Hale accepted that the records pertained to the results of the investigation into allegations of discrimination and harassment, and ultimately found that they related to "fair hiring practices." These conclusions were at the heart of adjudicator Hale's findings that the records were excluded under section 65(6)3. In this context, I find that the circumstances and conclusions in Order P-1483 are quite distinguishable from those at issue in the current appeal (see also: Order MO-2409).

In my view, the primary distinguishing feature of the two main lines of orders rests with the nature of circumstances in which the particular record is used. In the first line of orders, the records were prepared or used in relation to communications about the training or qualifications of a particular individual and are thus about the employment of the individual by the institution. In these cases, the records were clearly about employment-related matters in which the institution had an interest as they related to matters in which the institutions were acting as employers and the terms and conditions of the employment of specifically identified individuals were at issue. In those cases, the records were excluded under section 65(6)3 (or its municipal *Act* equivalent: section 52(3)3).

In the second line of orders, and as evidenced in this case, the records relate to the institution's operations in the sense that the records are communications about operational procedures to be followed by police officers. [See Order MO-2226 for additional discussions of this distinction]

I agree with the line of cases that have found that section 65(6)3 is not directed at records of this nature. Similar to the records at issue in the second line of orders, the records at issue in the current appeal are OPP-wide procedures used to establish consistency in, and adequacy of training. As well, they are tools for ensuring that the OPP as an organization meets its statutory mandate as a police agency, as noted by the Ministry. In addition, although not determinative of the issue, I would suggest that the establishment of training standards is one facet of holding the police accountable to the public with respect to the overall performance and behaviour of its officers, and particularly with respect to the use of force, including the use of firearms, tasers and restraints.

Previous orders have found that where records are prepared in the course of routine procedures, such as police officers' notes or occurrence reports, they would not typically fall under the exclusion in section 65(6). However, when allegations of misconduct are made, the records subsequently retrieved from the case file for the purposes of the investigation have been excluded from the *Act* [See, for example: Orders MO-2428 and PO-2628]. I accept that once a performance issue arises as a result of a particular police officer's actions, records that describe the training that the officer received may well engage the interests of the institution in its capacity as employer.

However, I am not persuaded that the records at issue, which consist of generic training materials, relate to matters in which the Ministry is acting as an employer **and** the terms and conditions of the employment of specifically identified individuals are at issue. For this reason, the communications represented by the records are not "about" employment-related matters" within the meaning of section 65(6)3. Accordingly, I find that the records at issue do not meet the requirements of part 3 of section 65(6)3 and they are subject to the *Act*.

The Ministry has made submissions regarding the application of section 14 to these records, and I will now review whether these exemptions apply to them.

LAW ENFORCEMENT

The Ministry submits that the discretionary exemptions at sections 14(1)(e), (i), (j) and (l) apply to exempt all of the records at issue from disclosure. These sections state:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> (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;

(j) facilitate the escape from custody of a person who is under lawful detention;

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

The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

"law enforcement" means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or

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

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.)].

Except in the case of section 14(1)(e), where section 14 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), 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*].

Representations

In responding to this issue, the Ministry provided a sworn affidavit from a manager at the OPP Academy in addition to its representations, but requested that the content of the affidavit be kept

confidential. The previous adjudicator agreed to the Ministry's request. Therefore, although I have considered the content of the affidavit in determining these issues, I will not refer to it in this order.

The Ministry submits that the records at issue are law enforcement records because they were created by the police and "instruct OPP officers in how to discharge core policing duties, involving equipment such as tasers that may be used by the police as part of their duties." The appellant did not address this issue. Based on the Ministry's description of the records and my review of them, I am satisfied that the records qualify as law enforcement records because they relate directly to "policing" in its broadest sense.

The Ministry goes on to make submissions regarding the exemptions in sections 14(1)(e), (i), (j) and (l).

Ministry's background discussion

The Ministry provides additional background material (from that provided in the previous discussion of the section 65(6) exclusion) regarding the records at issue and how they are used in police training. The Ministry states:

> Receiving adequate and appropriate training is an integral part of becoming a police officer. Police training in Ontario is required and regulated pursuant to the *Police Services Act* (PSA), and some of the regulations made pursuant to the PSA, including Regulation 926, Regulation 36/02, and Regulation 3/99. Training is used to achieve a number of key objectives including ensuring that police officers are able to properly discharge their duties, to promote public safety, and to protect police officers and members of the public.
>
> In order for training to occur, there must, in the ordinary course, be training materials. Training materials are a key resource for both instructors and the police officers who are being trained.

The Ministry also outlined a number of "important policy considerations at issue in this appeal," which the Ministry submits render the consequences of disclosure more significant today than in the past. In this regard, the Ministry submits that the records at issue contain detailed technical information, the disclosure of which could be used to impair law enforcement. With respect to the training aspect, the Ministry submits that disclosure of the records at issue would reveal current OPP practices and procedures and would harm law enforcement. Moreover, if the records were found to be not exempt under the *Act*, the Ministry submits that this could result in sensitive information being withheld from its training materials, which would defeat the purpose of training. The Ministry notes further that it has disclosed most of the records requested by the appellant, and maintains that it has properly exercised its discretion to withhold the remaining portions. The basis for this position is that the specific information at issue is not generally known to the public, and that disclosure, particularly with the advent of the internet, would permit the wide dissemination of the procedures relating to sensitive law enforcement information.

With respect to the specific exemptions claimed by the Ministry, it makes the following submissions.

Section 14(1)(e): life or physical safety

Referring to *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)*, cited above, the Ministry submits that:

> [D]isclosing the Records at Issue could "result in endangerment to safety…based on the likelihood that disclosing the Records at issue would invite countermeasures from individuals who want to thwart law enforcement, thereby limiting the use of equipment such as tasers, restraints and firearms. The Records at Issue include information such as how tasers, restraints and firearms work, how they are to be used by police, and their limitations. This last part is particularly of concern because if a criminal knows the limitations in the use of technology, he or she could be able to use it to their advantage, for an unlawful purpose.

In support of its position that its concerns are not "frivolous" or "exaggerated," the Ministry refers to two situations that arose in the United States in response to the accidental posting on line of manual information pertaining to how airport screeners are to do their jobs and a report on civilian nuclear sites and programs. The Ministry states that in both cases, the reaction was that security breaches had occurred, and submits that similar concerns should be considered "given that equipment such as tasers and firearms are weapons that in the wrong hands can cause serious damage."

The Ministry also submits that because of the far-reaching effects of the internet, disclosure of this type of information can be readily available to anyone, anywhere in the world. The Ministry concludes:

> Since we know much less about the impact of disclosure, and in light of the additional evidence supplied in the affidavit, reason dictates, in my submission, that subsection 14(1)(e) be interpreted on the side of prudence and caution, and that this is consistent with the finding of the Ontario Court of Appeal in the *Minister of Labour* decision cited above.

The confidential affidavit provided by the manager at the OPP Academy provides additional evidence to support the Ministry's position that there exists a reasonable basis for believing that endangerment will result from disclosure.

In his submissions, the appellant reiterates his concern about the adequacy of the Ministry's decision letter, which I have addressed above, and will not consider again. With respect to the application of section 14(1)(e), the appellant submits that the Ministry's evidence amounts to speculation of harm, which is not sufficient to satisfy its burden. The appellant also submits that the Ministry's evidence of harm under section 14(1)(e) amounts to only a "potential for harm" which he argues is exaggerated. The appellant contends that the Ministry has taken the position that the harms under section 14 are self-evident from the record.

In considering this issue, I note that a person's subjective fear, while relevant, may not be sufficient to establish the application of the exemption [Order PO-2003]. Moreover, the term "person" is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization [Order PO-1817-R].

In looking at the records at issue, it is important to note that the Ministry has disclosed the vast majority of the information in the materials pertaining to firearms, tasers and restraints. The remaining portions, for the most part, pertain to certain specific details of the training the officers receive as well as specific instructions regarding the equipment on which the officers are to be trained. I find that the portions that have been withheld on Records 29, 30, 31, 32, 34, 35, 36, 42, 60, 62, 65, 66, 67, 69, 70, 71, 93, 102, 103, 109 (except the portion that the Ministry claimed was not responsive), 110, 111, 112, 113, 114, 115, 116 and small portions of Record 108 of the training materials, and pages 4, 6, 7, 8, 9, 10 and 12 of the *Firearms Standard Operating Procedure Manual* qualify for exemption under section 14(1)(e). In my view, not all portions of Records 50-57 and 76 fall within the section 14(1)(e) exemption. However, the severance of these records would result in "disconnected snippets" or "worthless" or "misleading" information. [See: Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.)]. Accordingly, I find that Records 50-57 and 76 qualify for exemption in their entirety.

I am satisfied that disclosing the information noted above could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person (section 14(1)(e)).

I find that Records 44, 45, 94, 95, 96, 99, 100 and the remaining withheld portions of Record 108 do not raise similar concerns. Record 44 simply identifies named individuals who were consulted in their professional capacity in the production of the "Course Training Standards." Record 45 is a very general agenda of the training program. The remaining portion of Record 108 contains a general statement of the purpose of the training session, but does not contain the level of detail described in the other training records. Record 100 deals with administrative matters and does not reveal any of the exempt information. Records 94, 95, 96, and 99 contain examples of situations and/or statistics relating to the use of one of the types of equipment referred to in the request. The information in these four records is brief and not detailed. I am not persuaded that the disclosure of the withheld information in these eight records could reasonably be expected to result in the harm envisioned under section 14(1)(e) of the *Act*.

Section 14(1)(i): security of a building, vehicle, system or procedure

Although this provision is found in a section of the *Act* dealing specifically with law enforcement matters, its application is not restricted to law enforcement situations but can be extended to any building, vehicle or system which reasonably requires protection [Orders P-900, PO-2461].

The Ministry's representations under this heading focus on the procedures contained in the records at issue for the protection of firearms, tasers and restraints from being wrongly used by police officers and from the hazards that would ensue if these items of equipment fell into the wrong hands.

I have upheld the Ministry's decision to withhold the type of information that the Ministry is concerned about under section 14(1)(e). I am not persuaded that the remaining information, that is, the withheld portions of Records 44, 45, 94, 95, 96, 99, 100 and a portion of Record 108 (as described above) could reasonably be expected to result in the harm anticipated under section 14(1)(i) of the *Act*.

Section 14(1)(j): escape from lawful custody

The Ministry submits that the records at issue contain technical and detailed information about police equipment, which is used to arrest and detain people. The Ministry contends that disclosure of the information about how to operate and use the equipment could be used to make the escape from custody of a person easier.

Similar to my findings under section 14(1)(i), I have already withheld the type of information that the police are concerned about disclosing under section 14(1)(e). The remaining records could not reasonably be expected to result in the harm described by the Ministry for the same reasons discussed above.

Section 14(1)(l): commission of an unlawful act or control of crime

Referring to a decision of the Alberta Office of the Information and Privacy Commissioner in Order F2007-005, in which the Alberta Commissioner upheld the Edmonton police service's decision not to disclose portions of a video relating to the training of the canine units under the Alberta privacy legislation equivalent to section 14(1)(l), the Ministry notes the similarity of facts in the current case and states:

> [B]oth the video and the Records at Issue are created for the same purpose, to provide training exclusively to police officers in order so that they can use key resources, in this instance, tasers, firearms, and restraints.

Accordingly, the Ministry submits that a similar finding should be made in the current appeal.

I have already addressed the records at issue that contain the type of information that the Ministry is concerned about disclosing. For the same reasons cited above, the withheld information (as described above) could not reasonably be expected to result in the harm anticipated under section 14(1)(l) of the *Act*.

Based on the above discussions, I find that the withheld portions of Records 29, 30, 31, 32, 34, 35, 36, 42, 50-57, 60, 62, 65, 66, 67, 69, 70, 71, 76, 93, 102, 103, 109 (except the portion that the Ministry claimed was not responsive), 110, 111, 112, 113, 114, 115, 116 and small portions of Record 108 of the training materials, and pages 4, 6, 7, 8, 9, 10 and 12 of the *Firearms Standard Operating Procedure Manual* qualify for exemption under section 14(1)(e). Moreover, I find that Records 44, 45, 94, 95, 96, 99, 100 and the remaining portions that have been withheld from Record 108 are not exempt under section 14(1).

EXERCISE OF DISCRETION

The section 14 exemption is discretionary, and permits 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 submits that it has exercised its discretion appropriately in the circumstances of this case. The Ministry notes that it has disclosed most of the records to the appellant because it recognizes that the public has a right to information under the control of the Ministry. The Ministry takes the position that to disclose the withheld portions of the records could reasonably be expected to impair the continued effectiveness of law enforcement and may result in decreased public confidence in the operation of the police. The Ministry notes that the records at issue are "current, and describe present day practices and procedures."

Citing the example of Record 44 (which I have ultimately found not to be exempt), the appellant submits that withholding the type of information contained therein is an example of the unreasonableness of the Ministry's exercise of discretion. The appellant also submits that the Ministry has applied the exemptions in section 14 too broadly.

The appellant also makes submissions in which he claims that the Ministry failed to consider that he has a sympathetic or compelling need to receive the information because of the nature of the organization that the appellant is representing, its investigations into, and the ongoing public interest relating to the policing of Mohawk occupations and protests. The appellant submits that disclosure of the records at issue will enhance public confidence in the operation of the police. In this regard the appellant states that "the records are important in determining whether these actions were consistent with police policies, orders, regulations and training." The appellant submits that disclosure relates to police accountability.

The appellant submits further that the Ministry has considered irrelevant factors because it is concerned that disclosure to the appellant will result in wider dissemination of the information that it seeks to withhold, particularly in light of the far-reaching potential of the internet for distribution world-wide.

The appellant dissects the Ministry's section 14(1)(e) arguments and claims that the Ministry's position is unreasonable, primarily based on his disagreement with its application. The appellant's submissions on this issue are somewhat lengthy, and I will not refer to them in any greater detail. Suffice it to say, that I found the Ministry's section 14(1)(e) and supporting arguments sufficient to support a finding that this exemption applied.

I am not persuaded by the appellant's arguments that the Ministry has improperly exercised its discretion to withhold the records that I have found to be exempt. As I indicated earlier in this order, many of the appellant's complaints relate to his disagreement with the Ministry's decision to withhold any information. I have found that certain records are not exempt and that some of the claimed exemptions do not apply in the circumstances. However, that does not automatically result in a finding that the Ministry was unreasonable in making the exemption claim, particularly as those are the very issues to be determined on appeal.

In addition, although the appellant did not raise the application of the public interest override in section 23 of the *Act* during the processing of his appeal, his representations clearly allude to it.

Section 23 of the *Act* was not raised as an issue in the Notice of Inquiry. This section 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.

The law enforcement exemption provided by section 14 of the *Act* is not one of the sections mentioned in section 23. Accordingly, section 23 cannot apply to override this exemption. Although I recognize the value and importance of the organization with which the appellant is associated, I am not persuaded that failure to consider the work that it is involved in as a compelling reason for the Ministry to exercise its discretion to disclose the records that I have found to be exempt under section 14(1)(e). Indeed, it appears to me that the Ministry was cognizant of the ability of the organization with which the appellant is associated to disseminate the records, and this was a factor that raised concerns about the safety of police officers and other individuals should the withheld portions be disclosed.

Despite the compelling arguments put forth by the appellant, I am satisfied that the Police have properly exercised their discretion in denying access to the information that I have found to be exempt under section 14(1)(e). The Ministry has disclosed the vast majority of the records at issue. Although the appellant seeks the withheld portions in order to hold the police accountable for their actions, it is apparent from the Ministry's representations, taken as a whole, that it is concerned about the safety of police officers should the records that pertain to specific training that officers receive concerning the operation, use and storage of firearms, tasers and restraints be disclosed. In the circumstances, I am not persuaded that the Ministry's exercise of discretion was made in bad faith or for an improper purpose, that it took into account irrelevant considerations or that it failed to take into account relevant considerations.

Accordingly, I find that the withheld portions of Records 29, 30, 31, 32, 34, 35, 36, 42, 50-57, 60, 62, 65, 66, 67, 69, 70, 71, 76, 93, 102, 103, 109 (except the portion that the Ministry claimed

was not responsive), 110, 111, 112, 113, 114, 115, 116, and small portions of Record 108 of the training materials, and pages 4, 6, 7, 8, 9, 10 and 12 of the *Firearms Standard Operating Procedure Manual* are exempt under section 14(1) of the *Act*. I will attach a highlighted copy of Record 108 to the copy of this order that I will send to the Ministry. The information that has been highlighted on this page is exempt under section 14(1)(e) of the *Act*.

ORDER:

1. Records 109 and 111 are responsive to the appellant's request.

2. I order the Ministry to make an access decision regarding the portion of Record 109 that the Ministry claimed to be not responsive, in accordance with the access provisions of the *Act*.

3. I order the Ministry to conduct a further search for OPP policies, regulations and orders within 20 days of the date of this order. Before commencing its search, the Ministry is ordered to contact the appellant and clarify the records he is seeking. If, at the conclusion of the search no additional records are located, the Ministry is ordered to provide the appellant with a letter within 30 days of the date of this Order, outlining the locations searched and who conducted the search.

4. If, as a result of the further search, additional records are located, I order the Ministry to provide a decision letter to the appellant regarding access to any records located, considering the date of this order as the date of the request.

5. I do not uphold the Ministry's decision that section 65(6)3 applies.

6. I uphold the Ministry's decision that section 14(1)(e) applies to exempt Records 29, 30, 31, 32, 34, 35, 36, 42, 50-57, 60, 62, 65, 66, 67, 69, 70, 71, 76, 93, 102, 103, 109 (except the portion that the Ministry claimed was not responsive), 110, 111, 112, 113, 114, 115, 116 and the highlighted portions of Record 108 (on the copy of this page attached to the copy of this order that I am sending to the Ministry) of the training materials, and pages 4, 6, 7, 8, 9, 10 and 12 of the *Firearms Standard Operating Procedure Manual.*

7. I order the Ministry to disclose Records 44, 45, 94, 95, 96, 99, 100 and the remaining portions that have been withheld from Record 108 to the appellant, by providing him with copies of these records by **October 4, 2010.**

8. In order to verify compliance with provisions 2, 3, 4 and 7 of this order, I order the Ministry to provide me with a copy of any decision letter sent to the appellant. This should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Toronto, Ontario M4W 1A8.

Original signed by: September 14, 2010
Laurel Cropley
Adjudicator