Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3025

Appeal PA11-13

Ministry of Community Safety and Correctional Services

December 15, 2011

Summary: A member of the media made a request for interview and interrogation records about an individual who has been convicted of several serious crimes. The request was made to the Ministry of Community Safety and Correctional Services. In this order, the ministry's decision to deny access to the records under sections 14(1)(a) (law enforcement) and 21(1) (personal privacy) is upheld. The public interest override at section 23 does not apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, 14(1)(a), 21(1), 21(3)(b), 23.

Cases Considered: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.

OVERVIEW:

This order disposes of the issues raised as a result of an access request made by the appellant, a member of the media, under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Community Safety and Correctional Services (the ministry) for the following information:

> . . .[A] copy of all audio, video and audio-visual records of interviews and interrogations of [a named individual] by officials or representatives from the Ontario Provincial Police and/or the OPP Behavioural Science Section.

The requester also sought any existing transcripts of the above interviews and advised that he was not seeking the names or addresses of any potential victims named in the interviews.

The ministry identified 11 responsive records comprised of audio and/or video recordings and denied access pursuant to the following exemptions in the *Act*: sections 14(1)(a),(b) and (c) (law enforcement), 14(1)(e) (endanger life or safety), 14(1)(h) and (i) (security), 14(1)(l) (facilitate commission of unlawful act), 15(a) and (b) (relations with other governments), 19 (solicitor-client privilege) and 21(1) (personal privacy).

The appellant filed an appeal of the ministry's decision with this office. During the course of mediation, the appellant raised the public interest override at section 23 of the *Act*. Therefore, section 23 has been added as an issue in this appeal. The parties were unable to resolve this matter through mediation, and the appeal moved to the adjudication stage of the process, where an adjudicator conducts an inquiry under the *Act*.

I sought, and received, representations from the ministry and the appellant, which were shared in accordance with the IPC's *Practice Direction 7*.

The ministry advised that it was no longer relying on sections 14(1)(e), 14(1)(i) and 14(1)(l), but that the other exemptions, detailed above, were being claimed.

For the reasons that follow, I am upholding the ministry's decision to deny access to the records at issue.

RECORDS:

There are 11 records comprised of audio and/or video recordings.

DISCUSSION:

PERSONAL PRIVACY

In order to determine whether there is a privacy interest at stake, it is necessary to decide whether the records contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as "recorded information about an identifiable individual, including … [followed by a list of examples.]".

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[1]

The ministry submits that the records contain the personal information of the individual named in the request, and of other individuals, as well. The ministry also acknowledges that the appellant's access request did not include identifying names of victims, or individual home addresses. The ministry states that the information in the records was created for the purpose of, or used as part of, an examination into the conduct of the named individual in his personal capacity.

The appellant submits that the named individual has become a "public figure" and states that they assume that much of what is defined as personal information is already known or available to the public through the Internet, and a book that was written about the individual. Although the appellant does not seek identifiable information about the other individuals contained in the records, it seeks identifiable information about the named individual.

I accept that the information contained in the interrogation tapes includes the named individual's personal information and that of other individuals. The appellant does not dispute that the records contain the personal information of the named individual. The fact that there is a significant amount of personal information about this individual in the public domain does not preclude that information from falling within the definition of "personal information" in the *Act*, although it may be relevant in determining whether disclosure would be an unjustified invasion of personal privacy under section 21(1). In addition, there may be personal information contained in the records that is not in the public domain. I therefore find that the records contain the personal information of the named individual.

Where a requester seeks personal information of another individual, as is the case in this appeal, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21. The only one of these paragraphs that could apply in this case is section 21(1)(f), which states that "[a] head shall refuse to disclose personal information to any person other than the individual to whom the information relates *except, if the disclosure does not constitute an unjustified invasion of personal privacy*." (Emphasis added.)

The *Act* goes on to set out the circumstances under which there is a presumption that the disclosure of personal information would constitute an unjustified invasion of

[1] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

privacy. In particular, if any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy.

The ministry submits that disclosure of the records would be an unjustified invasion of the named individual's personal privacy and that section 21(3)(b) applies, as the information contained in the records was compiled and is identifiable as part of an investigation into a possible violation of law.

The ministry states that the information was "compiled" and "identifiable" as part of an OPP investigation into possible and actual violations of the *Criminal Code of Canada*, including some of the serious crimes for which the named individual was later convicted. The ministry adds that the *Act* protects the personal information of all individuals regardless of whether there is information already in the public domain about that individual, or whether the individual is "notorious."

The appellant submits that most, if not all, of the personal information contained in the records is known or available to the public at large and, therefore, the ministry should release the records pursuant to section 23 of the *Act*. The appellant made no comment on the application of section 21(3)(b).

Analysis and Findings

Section 21(3)(b) states:

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

I accept the ministry's representations that the records, which consist of interrogation interviews with the named individual by the OPP, were compiled and are identifiable as part of an OPP investigation into a possible violation of the *Criminal Code*. The interviews were conducted during the investigation, and the individual was eventually convicted of a number of serious offences. Therefore, I find that the presumption in section 21(3)(b) applies to all of the personal information in the records.

The Divisional Court has stated that once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the

"public interest override" at section 23 applies.[2] I have considered the exceptions set out in section 21(4) of the *Act* and find that none of those exceptions apply.

Consequently, I find that disclosure of the personal information contained in the records would constitute an unjustified invasion of personal privacy under section 21(3)(b). Accordingly, the exception in section 21(1)(f) is not established, and the information is exempt from disclosure under section 21(1), subject to my discussion of the public interest override, below.

LAW ENFORCEMENT

The ministry has also withheld the records pursuant to the law enforcement exemptions found in sections 14(1)(a),(b),(c) and (h), which state:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
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> (a) interfere with a law enforcement matter;
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> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
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> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement; or
>
> . . .
>
> (h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation.

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

[2] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.) (*John Doe*).

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

The term "law enforcement" has been found to apply to a police investigation into a possible violation of the *Criminal Code*.[3]

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[4]

Under sections 14(1)(a), (b), (c) and (h), which use 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.[5]

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*].

Section 14(1)(a): Interfere with a law enforcement matter

For section 14(1)(a) to apply, the matter in question must be ongoing or in existence [Order PO-2657]. The exemption does not apply where the matter is completed, or where the alleged interference is with "potential" law enforcement matters [Orders PO-2085, MO-1578].

"Matter" may extend beyond a specific investigation or proceeding.[6] The institution holding the records need not be the institution conducting the law enforcement matter for the exemption to apply [Order PO-2085].

The ministry submits that the named individual is serving a 25 year sentence in federal prison, having pled guilty to multiple crimes. The Ministry submits that the records contain 40 hours of interviews of the named individual, where he confessed to Ontario Provincial Police (OPP) detectives to crimes he committed, and provided the OPP detectives interrogating him with information to assist in their investigations. The

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[3] Orders M-202, PO-2085.

[4] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

[5] 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.).

[6] *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.).

Ministry does not believe that the contents of the records have been released to the public, except for those used as exhibits during the individual's judicial proceedings.

The ministry states that it has claimed this exemption since the OPP is still investigating or working with other police services who are investigating unsolved crimes (cold cases) concerning offences that the individual may have committed or with which he may have been involved. The investigations are ongoing and they have been assigned to OPP detectives and to police detectives in other jurisdictions. These investigations involve searching through thousands of records seized from the named individual with a view to resolving unsolved crimes. In addition, the police are tracing the steps of the named individual to determine whether he committed offences that have, thus far, eluded detection. Further, the named individual created "meticulous" records of the crimes that he committed. The OPP continues to search through documents that were seized from him and, in some cases, the victims of suspected crimes may have not yet been identified.

The ministry therefore submits that disclosure of the records could be expected to interfere with ongoing law enforcement matters. The ministry states:

> It is standard policing practice to not publicize evidence contained in records such as these that may be used in a subsequent legal proceeding, except where it is necessary to do so to solve a crime. If the [r]ecords are released, the police will have no way of knowing when an individual comes forward with information whether that individual learned of the information through the release of the [r]ecords or because of their first hand knowledge. In other words, the reliability of the information the police acquire could be compromised because of the release of the [r]ecords, which could, in turn, jeopardize ongoing investigations.

The ministry views it as likely that the evidence in the records would be compromised, as they would be widely reported and posted online, as is the case with the parts of the record that were released as part of the judicial proceedings.

The ministry also submits that police services such as the OPP may rely upon the exemption in section 14(1)(a) longer than they would have, prior to the development of DNA technology, as police can now compare DNA samples contained in old evidence from a cold case crime scene with DNA samples that are added to the DNA data bank.

The appellant is prepared to acknowledge that the opening of cold case files by several law enforcement agencies are "law enforcement matters" as contemplated by the *Act*. However, the appellant argues that disclosure must "interfere" with such a matter and the ministry has not provided detailed and convincing evidence to establish a reasonable expectation of this harm.

The appellant states that the ministry argues that "the reliability of the information the police acquire could be compromised because of the release of the records which could in turn jeopardize ongoing investigations." The appellant states that it appears from its use of the word "could" that the ministry only believes there to be mere possibility of harm and not the reasonable expectation of harm as is required.

The appellant also argues that the ministry's claim that disclosure of the records would compromise the evidence in the cold case investigations, as the videos would likely be placed on the internet, is without merit. The appellant submits that the ministry has not provided detailed and convincing evidence that an individual's ability to view the records on the internet will interfere with the cold case investigations and the evidence. The appellant states:

> Merely asserting a potential for harm without further explanation and without detailed evidence of how that harm is likely to occur does not satisfy this burden, nor does drawing tenuous connections between how one views the materials and a risk of harm.

The appellant also submits that the ministry believes that records may be exempt from disclosure for a much longer period, as the national DNA database can be accessed at any time in cold cases. The appellant states that this interpretation would create a "vacuum into which records are sucked and sealed indefinitely" as one does not know when a cold case will be re-activated. This result, the appellant submits, is contrary to the purposes of the *Act* outlined in section 1.

In reply, the ministry states that it believes there to be much more than a mere possibility of harm were the records to be disclosed, which is why the records were withheld in the first place. The ministry's use of the word "could" in relation to interference with a law enforcement matter is based on the actual wording of the exemption in the *Act*. In addition, the ministry states that law enforcement must be allowed to do what it does without having to contend with the possibility that the evidence it is relying upon has been corrupted because it would now be in the public domain.

In sur-reply, the appellant submits that, under this exemption, the legislature has elevated the risk of harm from being one of mere possibility to one closer to probability. According to the appellant, the ministry has failed to provide any evidence of its reasonable expectation of how that harm would come to be, and that the speculative harm put forward by the ministry does not constitute "detailed and convincing" evidence.

For the reasons that follow and subject to my review of the ministry's exercise of discretion, I find that the records are exempt from disclosure under section 14(1)(a) of the *Act*.

The first requirement, that the records form part of a "law enforcement matter," has been met, as the records consist of interrogation interviews between the OPP and the named individual as part of an OPP investigation. The appellant does not dispute this.

The second requirement of section 14(1)(a) is that the law enforcement matter in question be ongoing or in existence.

I accept the ministry's representations, and am satisfied that the records are being used as part of ongoing law enforcement matters in relation to the named individual, bearing in mind that a law enforcement matter may extend beyond any one particular investigation. I am satisfied with the ministry's evidence that the OPP is still investigating or working with other police services who are investigating unsolved crimes concerning offences that the individual may have committed or been involved with. I am also satisfied that these matters are ongoing, and that they have been assigned to OPP detectives and to police detectives in other jurisdictions.

The third requirement of section 14(1)(a) is that the ministry must provide "detailed and convincing" evidence that disclosure of the records could reasonably be expected to interfere with a law enforcement matter. I am satisfied that the ministry has provided sufficient evidence to establish that the disclosure could reasonably be expected to interfere with law enforcement matters.

The records contain information pertaining to the named individual's activities, which are still under investigation. The ministry specifically states that it is standard policing practice to not publicize evidence contained in records that may be used in a subsequent legal proceeding, except where it is necessary to do so to solve a crime, as the reliability of the evidence could be compromised, which may jeopardize an ongoing investigation.

In my view, having regard to the nature of the records and the fact that the records relate directly to the activities of the named individual that are the subject matter of ongoing law enforcement matters, I am satisfied that the disclosure of the records could reasonably be expected to interfere with those matters.

Having reached this conclusion, I also feel it necessary to note that I reject the ministry's position that the existence of a DNA data bank has essentially extended the period of time for which an institution may rely on the section 14(1)(a) exemption. Taken to its logical end, this reasoning suggests that, even where no active investigation is taking place, or indeed is contemplated, an institution may claim this exemption simply because of the theoretical possibility that evidence from a completed investigation may at some point in time be potentially matched with a sample in the DNA bank. As noted by the appellant, this interpretation could create a "vacuum into which records are sucked and sealed indefinitely."

Having concluded that the requirements of section 14(1)(a) have been met with respect to those portions of the records that have not already been disclosed, I find that they are exempt from disclosure under the *Act*, subject to my review of the ministry's exercise of discretion. Since I have upheld the ministry's application of section 14(1)(a), it is unnecessary for me to consider whether sections 14(1)(b),(c) or (h) are also applicable.

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. The Commissioner may find that the institution erred in exercising its discretion where, for example: it did so in bad faith or for an improper purpose; it took into account irrelevant considerations; and/or it failed to take into account relevant considerations.

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*
- the wording of the exemption and the interests it seeks to protect
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the historic practice of the institution with respect to similar information.

The ministry submits that it properly exercised its discretion taking into consideration the sensitivity of the records, especially as they may be relevant to ongoing law enforcement investigations and the historic practice of the OPP to not release records of this nature.

The appellant states that the ministry failed to take other factors into consideration, including the purpose of the exemptions and the public interest in the records. The appellant states that when exercising discretion conferred by statute, the person exercising that discretion must do so in line with the purpose of the underlying legislation.[7] In this case, the "overarching" purpose of the Act, set out in section 1, is to allow access to government records and to limit exceptions to specific instances.

The appellant also submits that there are numerous purposes behind the non-disclosure exemptions in section 14, such as: the risk of possible retaliation by offenders against informants and law enforcement personnel; the risk that public access to investigative files would frustrate the conduct of investigations and would impair the ability of the prosecution to present its case; the risk of intimidation of witnesses identified before trial; and the potential of impairing an accused's right to a fair trial.[8]

The appellant submits that the named individual's incarceration satisfies each of the purposes cited above, as he is not able to retaliate against or intimidate anyone, the records and their contents are known to the named individual, and any information contained in the records that has not been disclosed is unlikely to interfere with his right to a fair trial, which, at this point, is highly unlikely.

Lastly, the appellant submits that the ministry did not take into consideration the public interest when exercising its discretion under section 14,[9] and, had it done so, likely would have made a different access decision.

In reply, the ministry states that the fact that the named individual is incarcerated is not relevant for the purpose of section 14, which is to ensure that records are not disclosed that will interfere with various types of law enforcement. In addition, the ministry states that the best way to ensure that victims of crime will see justice is if law enforcement agencies are allowed to conduct investigations as they normally would, without having to contend with the possibility that media exposure may negatively interfere with their work.

In sur-reply, the appellant states that the ministry is incorrect when it states that the named individual's incarceration is irrelevant to its exercise of discretion under section 14. The appellant states:

> [T]he purposes for the section 14 exemptions have been outlined by the courts, and can be summarized to state they exist to prevent the accused,

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[7] *Baker v. Canada (Ministry of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 53, 56 and 65.
[8] *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)*, [2004] O.J. No. 1214 (CanLii) at 94 (appealed on other grounds).
[9] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815 the Supreme Court of Canada held that a proper interpretation of section 14(1) of the *Act* requires that the head consider whether a compelling public interest in disclosure outweighs the purpose of the exemption, which is to prevent interference with law enforcement.

> or his co-accused from tampering with evidence or witnesses, or to unduly interfere with a fair trial through negative publicity. None of these factors is at issue as [the named individual] is not in a position to tamper with evidence or witnesses as a result of his incarceration, and nothing contained in the records is likely to impede a fair trial . . . By referring to these matters as "irrelevant" it is obvious the Ministry did not consider the underlying purposes of the exemption as it was required to do by the Supreme Court of Canada and has improperly invoked the exemptions in this case.

In my view, the considerations outlined by the ministry are appropriate factors consistent with a proper exercise of discretion. The ministry has weighed the possible harm that could arise from disclosing the information contained in the records against a potential public interest in the disclosure of the record and has decided against release.

In particular, the ministry considered the purpose of section 14(1)(a), which is to prevent interference with law enforcement matters. The fact that the named individual is incarcerated is irrelevant to the consideration of the risk that public access to investigative files could frustrate the conduct of other investigations relating to this individual.

In the circumstances, I am satisfied that the ministry properly exercised its discretion in deciding not to disclose the records, and that it did not err in doing so by taking into account irrelevant considerations or failing to take into account relevant considerations.

In any event, I have already found the entirety of the records to be exempt under the mandatory exemption at section 21 of the *Act*.

Having found that the records at issue are exempt in their entirety under section 21 of the *Act*, and under section 14(1)(a) of the *Act*, and that the ministry properly exercised its discretion, I will consider the applicability of the public interest override at section 23 of the *Act*.

PUBLIC INTEREST OVERRIDE

The appellant has taken the position that the public interest override at section 23 of the *Act* should be applied to require the ministry to disclose the records. In this order, I have found that the records are exempt under section 14(1)(a). The public interest override does not apply to information that is exempt under this section.[10] It is therefore not necessary to consider whether section 23 is applicable to the records which I have found exempt under section 21.

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[10] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.

However, in the interests of completeness, I will consider the representations submitted by the appellant and the ministry regarding the application of section 23 to override the application of the personal privacy exemption which I have upheld.

Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

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

The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[11]

The ministry submits that there is no compelling public interest in the disclosure of the records that would outweigh the importance of the public policy enshrined in section 21 of the *Act*.

The ministry states that to the extent that there is a public interest in finding out about the named individual, it has already been met through the public court proceedings and extensive media coverage. A book that was recently released about the named individual supports the position that there is a significant body of information about him already in the public realm.

The ministry acknowledges that the crimes committed by the named individual are "unusually heinous" and have resulted in significant and ongoing public interest. However, the Ministry states that:

> [S]ection 23 states that the compelling public interest must be *in the disclosure* of the record, not in the record itself. Records that make for compelling reading do not necessarily meet the "compelling public interest" threshold in section 23. Rather, it must be shown that there is an interest in the actual disclosure of the records, and that, we submit has not been done.

[11] Order P-244.

The ministry further submits that there is a compelling public interest in not releasing the records, given that they would, once released, likely be posted on line where they could prejudice ongoing law enforcement investigations.

The appellant submits that previous orders of this office have established a test to determine whether there is a "compelling public interest" under section 23 of the *Act*. The appellant states:

> In considering whether there is a "public interest" in the disclosure of the record, the first question to ask is whether there is a relationship between the record and the Act's central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].
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> . . .
>
> The word "compelling" has been defined in previous orders as "rousing strong interest or attention."[12]

The appellant states that questions have arisen as to how the named individual was promoted to a high ranking job in a federal service while at the same time committing serious crimes without detection by either the police or his employer. The appellant believes that the records being sought are related to these questions.

The appellant adds that the ministry has conceded that the records may relate to the named individual's involvement in other similar crimes for which he has not been charged or convicted. The appellant states that:

> [T]he public certainly has an interest in knowing whether victims of such crimes will see justice, and whether the perpetrator of such acts will be punished. Keeping the records secret has the risk of undermining one's faith in the justice system.

Lastly, the appellant submits that the ministry should have released the records, weighing the facts that the named individual is a public figure and much of the information is known or available to the public against the questions arousing public interest that are assumed to be addressed in the records.

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[12] Order P-984 and *Ontario Community Safety and Correctional Services (re)*, 2009 CanLii 38483 (ON IPC).

In reply, the ministry submits that the appellant has erroneously taken the position that, as a media organization, its interest in seeing and reporting on the records is synonymous with serving the public interest, because the public want more information and the media should be able to respond to that demand.

In addition, the ministry also notes that the appellant has stated that there are questions about the integrity of the criminal justice system that are sufficient to trigger section 23. However, the ministry submits that the appellant has offered no evidence to suggest that the integrity of the criminal justice system is at issue in this appeal so as to warrant using section 23 to override the exemption. Citing a media article, the ministry submits that the records that were already disclosed as part of the named individual's sentencing point to a criminal justice system that "performed admirably."

The ministry also states that, in considering the public interest, it must take into account the rights of the victims of crimes committed by the named individual. The ministry believes that if the records are disclosed, they will receive widespread media exposure, which could perpetuate the victimization of individuals who are trying to rebuild their lives.

In sur-reply, the appellant notes that in the ministry's representations on section 14, it is noted that the OPP suspect the named individual to be involved in other similar crimes, but the ministry is unsure whether future charges will be laid either in Ontario or elsewhere. The appellant states that, given these possibly contradictory positions, the public has an interest in knowing whether "justice has been served in the determination of what charges (if any) should be laid in the future." Disclosure of the records would facilitate a full and open discussion on whether the appropriate charges have been laid against the named individual.

Similarly, the appellant states that the records may reveal aspects about the named individual's past that "should have set off alarm bells" with the police or his employer, which went undetected. The public has an interest in knowing that individuals who are trusted with national security have been properly screened.

Lastly, the appellant states that, although sympathetic to the victims of crime, this is not reason enough to prevent disclosure of the records. If that were the case, one would never be able to report on crime as there would always be a victim who is trying to recover. The ministry has failed to consider severing the records, which could address the concern regarding the victims.

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[13] Previous orders have stated that in order to find a compelling public interest in disclosure, the

[13] Orders P-984 and PO-2607.

information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[14]

A public interest does not exist where the interests being advanced are essentially private in nature.[15] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[16]

A public interest is not automatically established where the requester is a member of the media.[17]

The word "compelling" has been defined in previous orders as "rousing strong interest or attention."[18]

Any public interest in *non*-disclosure that may exist also must be considered.[19] If there is a significant public interest in the non-disclosure of the record then disclosure cannot be considered "compelling" and the override will not apply.[20]

A compelling public interest has been found to exist where, for example, the integrity of the criminal justice system has been called into question.[21]

A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391 and M-539]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568, PO-2626, PO-2472 and PO-2614].

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

In my opinion, there is a strong interest by members of the media and public in the actions taken and potential crimes committed by the named individual. There has been

[14] Orders P-984 and PO-2556.
[15] Orders P-12, P-347 and P-1439.
[16] Order MO-1564.
[17] Orders M-773 and M-1074.
[18] Order P-984.
[19] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[20] Orders PO-2072-F and PO-2098-R.
[21] Order PO-1779

extensive media coverage and public discussion of the named individual's crimes for which he has been convicted.

However, section 23 requires that the information contained in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[22]

I agree with the submissions made by the ministry that the criminal activities of the named individual have already come under a very significant amount of scrutiny. This has occurred through intensive media scrutiny, as well as a lengthy sentencing process during which portions of his interrogations were released. Given this, I find that the disclosure of the information contained in the records would not serve the purpose of informing the citizens of Ontario about the activities of their government, or providing them with additional information in which to assess government activities.

In addition, as noted earlier, the records consist of interrogations between the OPP and the named individual. There is no evidence to suggest that the records contain information about the OPP's decision-making process or the screening procedures of the named individual's employer. Consequently, I find that disclosure of the content of the interrogations would only inform the citizens of Ontario about the named individual's potential criminal activities and not about the workings or decision making processes of government.

I also note that, although information relating to the named individual's victims may be de-identified, release of the records and the subsequent publication of their contents can be expected to have a negative impact on those victims.

In addition, although there may be widespread curiosity about the contents of the records, and their release would be newsworthy, that does not automatically lead to the application of the public interest override, which must assess whether the broader public interest would actually be served by disclosure. That is the purpose of weighing a compelling public interest, where one is found to exist, against the purpose of applicable exemptions. In this instance, given the important law enforcement interests reflected in the application of section 14(1)(a), the privacy concerns addressed by applying section 21(1), and the significant public disclosure and discussion that has already taken place concerning the named individual, I would not find that the public interest in disclosure outweighs the purpose of these exemptions even if it could override section 14.

For these reasons, I find that the requirements of section 23 have not been established.

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[22] See note 12.

To summarize, I have found the records to be exempt under sections 14(1)(a) and section 21(1) of the Act. The public interest override at section 23 does not apply to information that is exempt under section 14(1) and would not have been applicable to override the application of section 21(1). As I result, I uphold the ministry's decision.

ORDER:

I uphold the ministry's decision to deny access to the records. The appeal is dismissed.

Original Signed By: December 15, 2011
Brian Beamish
Assistant Commissioner