Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3117

Appeal PA08-345

Ministry of Community Safety and Correctional Services

October 10, 2012

Summary: The appellant is seeking access to records relating to her son's murder at a federal prison in 1999. These records are held by the OPP, the Office of the Chief Coroner and the Centre of Forensic Sciences. The Ministry of Community Safety and Correctional Services provided her with access to some Coroner's office records but denied access to most of the records under various exemptions in the *Freedom of Information and Protection of Privacy Act*. In this order, the adjudicator finds that most of the records qualify for exemption under section 14(1)(b) because disclosing them could reasonably be expected to interfere with the OPP's murder investigation. However, he finds that a small number of Coroner's office records do not qualify for exemption and orders them disclosed to the appellant. In addition, he finds that the ministry has conducted a reasonable search for a transcript of the Coroner's inquest.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1) (definitions of "personal information" and "close relative"), 2(2), 2(3), 14(1)(a), 14(1)(b), 14(1)(c), 14(1)(d), 14(1)(f), 14(1)(h), 14(1)(j), 14(1)(k), 14(1)(l), 14(2)(a), 14(2)(b), 14(2)(d), 15(b), 19, 24, 49(a) and 49(b).

Orders and Investigation Reports Considered: Orders P-1117, MO-1171, MO-2443, MO-2237 and MO-2245.

Cases Considered: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815; *M. v. Canada (Attorney General)*, 2012 ONSC 409.

OVERVIEW:

Background

[1] The appellant is the mother of an inmate who was murdered in 1999 at a federal prison. In this appeal, it must be determined whether she has the right to access records relating to her son's murder that the Ministry of Community Safety and Correctional Services (the ministry) has decided to withhold under various exemptions in the *Freedom of Information and Protection of Privacy Act* (*FIPPA*). There are several issues that must be resolved in this appeal, but the key issue is whether disclosing these records could reasonably be expected to interfere with the Ontario Provincial Police's (OPP's) long-standing criminal investigation into the murder of the appellant's son.

[2] A recently published decision of the Ontario Superior Court,[1] which relates to a lawsuit that the appellant brought against Correctional Services Canada (CSC), provides significant background information about her son's murder and the events that subsequently unfolded. In my view, it is useful to provide some excerpts from this decision, because they provide context for the access issues that must be resolved in this appeal. These excerpts state:

> On or about the evening of January 16-17, 1999, the plaintiff's 27-year-old son . . . was murdered while he was serving a five-year sentence for robbery at Collins Bay Institution ("Collins Bay"), a medium-security federal penitentiary.
>
> Correctional officers discovered his body in his cell in the early morning of January 17, 1999. Rigor mortis had already set in when [he] was pronounced dead at 6:45 a.m. There was blood spray on the cell walls as well as all over [his] face and chest.
>
> A post-mortem examination conducted on January 18, 1999 concluded the death had been due to a stab wound to the heart, and [he] had been murdered. There were a total of 26 marks of violence on his body, including two other deep stab wounds to his chest and multiple smaller wounds on the face, neck, back and right arm.
>
> The plaintiff learned of her son's death on January 18, 1999.
>
> The police immediately began to investigate the death, and the [OPP] were contacted and took over the criminal investigation.

[1] *M. v. Canada (Attorney General)*, 2012 ONSC 409.

The OPP Anti-Rackets Section also conducted a separate investigation into the correctional officers on duty in the area of [the plaintiff's son's] cell on the evening and morning of his death. The OPP found the correctional officers to have answered questions untruthfully and wanted to bring obstruction of justice charges against them; however, it was determined there was no reasonable prospect of conviction and no one was ever charged.

. . . .

On February 8, 2005, the OPP notified the coroner, the Crown attorney, the CSC and the plaintiff that, although the homicide investigation was still open, it was inactive. This meant that the mandatory coroner's inquest could proceed; however it was not able to commence until more than three years later, in September 2008 (the "inquest"), due to scheduling problems in the Office of the Chief Coroner.

. . . .

In June 2008, and in preparation for the inquest, the plaintiff was provided with two volumes of the OPP brief for the inquest (the "OPP brief"). The OPP brief included significant additional information from the OPP and CSC in connection with the criminal investigation, including correctional officers' statements of the events on the day of her son's death and the subsequent examination of those correctional officers by the OPP. It was from the OPP brief that the plaintiff also first learned of the CSC Fact Finding Report that had resulted in the suspension of three correctional officers for their serious negligence in the performance of their duties around the time of [her son's] death.

The inquest was held in September 2008. The jury heard from 18 witnesses and received 32 exhibits over nine days. Inquest witnesses were cross-examined by the plaintiff.

The plaintiff received a copy of the coroner's verdict in November 2008 along with the 19 recommendations made by the jury (the "coroner's report"). The jury found that [her son's] death was a homicide, and its recommendations echoed the findings made previously and released in the [CSC Board of Inquiry] report, although the inquest proceedings and the subsequent coroner's report revealed, particularly by way of the OPP brief and evidence from the inquest witnesses, much greater detail of the circumstances of death and the subsequent investigations.

. . . .

> No one has been charged in relation to [his] death. The OPP have informed the plaintiff that no charges have been laid as it has been determined there is no reasonable prospect of conviction on the state of the evidence to date.
>
> . . . .

Access request and appeal

[3] Shortly after the Coroner's inquest, the appellant filed an access request under *FIPPA* with the ministry for all records relating to her son's murder held by the OPP, the Office of the Chief Coroner (the Coroner's office) and the Centre of Forensic Sciences (CFS).

[4] In response, the ministry located a substantial number of responsive records and then issued a decision letter to the appellant denying access to the records in full because they "concern a matter that is currently under investigation by the OPP . . . their homicide investigation into the circumstances of the death of your son is continuing and the status of the investigation is open."

[5] The decision letter stated that the ministry was withholding the records under the following exemptions in *FIPPA*:

- sections 14(1)(a), (b), (c), (d), (f), (h), (j), (k) and (l) and sections 14(2)(a), (b) and (d) (law enforcement);
- section 15(b) (relations with other governments);
- section 19 (solicitor-client privilege);
- section 49(a) (refusal of access to one's own personal information);
- section 49(b) (personal privacy), read in conjunction with the factors in sections 21(2)(f) and (h) and the presumptions in sections 21(3)(a), (b) and (d); and
- section 49(e) (refusal of access to one's own personal information/correctional records).

[6] In addition, the ministry claimed that some parts of the records are not responsive to the appellant's access request.

[7] The appellant appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (IPC). During mediation, the ministry provided both the appellant and the IPC with three indexes of records that identify the OPP, Coroner's office and CFS records that remain at issue, and the exemptions claimed for each record.

[8] In addition, the ministry consulted with the OPP and the Coroner's office and then issued a supplemental decision letter to the appellant stating that it had reconsidered its initial access decision and had decided to provide her with partial access to the requested records.

[9] The ministry disclosed 103 pages of Coroner's office records to her but continued to deny access to the remaining records. The supplemental decision letter also stated that the ministry was withdrawing its claim that the section 49(e) exemption applied to the records.

[10] The appellant advised the mediator that she was continuing to pursue access to the remaining records withheld by the ministry. In addition, she stated that the ministry should have a transcript of the Coroner's inquest into her son's death.

[11] In response, the ministry contacted the Coroner's office, which stated that it does not have a transcript of the inquest. The ministry also wrote to the court reporter who recorded the inquest proceedings to determine whether she had prepared a transcript. The court reporter wrote back and stated that she had not prepared a transcript for anyone.

[12] The appellant stated that she was not satisfied with the ministry's claim that a transcript of the inquest does not exist. Consequently, whether the ministry has conducted a reasonable search for a transcript of the Coroner's inquest remains at issue in this appeal.

[13] This appeal was not resolved in mediation and was moved to adjudication for an inquiry. The initial adjudicator assigned to this file started her inquiry by seeking and receiving representations from the ministry. This appeal was then transferred to me to complete the inquiry.

[14] I sought and received representations from the appellant and reply representations from the ministry. The parties' representations were shared in accordance with the rules in IPC *Practice Direction 7.*

[15] During this inquiry, the ministry issued a second supplemental decision letter to the appellant stating that it had decided to disclose more records to her. The ministry provided her with 23 pages of additional Coroner's office records.

RECORDS:

Review of records

[16] In order to determine whether the records at issue in an appeal should be disclosed to a requester, it is necessary for an adjudicator to be familiar with the contents of these records. In the vast majority of appeals, the institution provides the IPC with a copy of the records and the adjudicator reviews these records to determine whether the *FIPPA* exemptions or exclusions claimed by the institution are applicable.

[17] In the circumstances of this appeal, however, the ministry advised me that it could not provide the IPC with copies of some records held by the CFS and OPP, such as DNA profiles and sealed warrants, because of strict legal prohibitions on the use and disclosure of such records found in the federal *DNA Identification Act* (*DNAIA*) and the *Criminal Code*. To resolve this issue, I asked the ministry to provide me with a description of such records.

[18] In response, the ministry provided me with nine pages of submissions that contain a brief description of each of these records. I reviewed these descriptions and determined that they were sufficiently detailed to enable me to decide whether each of these records qualifies for exemption under *FIPPA*.

[19] With respect to the remaining OPP, Coroner's office and CFS records, the ministry requested that this office's Commissioner or Assistant Commissioner issue a production order for these records. Assistant Commissioner Brian Beamish then issued an order that directed the ministry "to produce the records at issue in Appeal PA08-345 to the IPC forthwith, except for the limited and specific records that the ministry claims that it is prohibited from disclosing under various provisions in the *DNAIA* and the *Criminal Code*."

[20] Arrangements were then made to view the records at a ministry office. Two officers from the OPP's Penitentiary Squad, which investigates crime in the prison system, brought the records to Toronto. I went to the ministry's office and spent two days reviewing the OPP, Coroner's office and CFS records that relate to the murder of the appellant's son.

Contents of records

[21] There are a substantial number of records at issue in this appeal. The ministry provided three indexes of records to the appellant and the IPC that identify the records held by the OPP, the Coroner's office and the CFS.

[22] In its representations, the ministry provided the following description of the records:

OPP records

- Records created for communications or reporting purposes with [CSC], the Crown Attorney's Office, involved parties or witnesses, as well as internally, within the OPP and with other parts of the ministry, such as the [Coroner's office] and CFS. These records range from emails to written reports;
- Witness statements;
- Police officers' notes;
- Internal CSC reports recording daily activities at Collins Bay Institution around the time of the [appellant's son's] death;
- [CSC] internal policies, and procedures, and floor plans for Collins Bay Institution;
- Warrants, affidavits, and other records prepared for judicial purposes or for the Coroner's Inquest; and,
- Evidence collected by the OPP, including DNA analysis, photographs, phone records and inmate property.

[Coroner's office] records

- The [Coroner's office] collected most of its records from the OPP law enforcement investigation. In addition, the [Coroner's office] would have created records related to the inquest, including applications for standing at the inquest, and both internal and external correspondence.

CFS records

- Requests from the OPP for DNA and toxicology analysis;
- Evidence provided by the OPP to be analyzed as well as supporting information;
- Records documenting the tests that were conducted on the evidence; and,
- Findings and conclusions that can be drawn from analysis.

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

B. Do the records qualify for exemption under the discretionary exemptions in sections 14, 15(b) and 19 or under the discretionary exemption in section 49(a), in conjunction with sections 14, 15(b) and 19?

C. Does the mandatory exemption at section 21(1) or the discretionary exemption at section 49(b) apply to the records?

D. Did the ministry exercise its discretion under sections 14, 15(b), 19, 49(a) and 49(b)? If so, should the IPC uphold the exercise of discretion?

E. Is some information in the records not responsive to the appellant's request?

F. Did the ministry conduct a reasonable search for a transcript of the Coroner's inquest proceedings?

DISCUSSION:

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

[23] The mandatory personal privacy exemption in section 21(1) and the discretionary exemptions in sections 49(a) and (b) of *FIPPA* apply to "personal information." Consequently, it is necessary to determine whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[24] 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.[2]

[25] Sections 2(2) and (3) of *FIPPA* exclude certain information from the definition of personal information. They state:

> (2) Personal information does not include information about an individual who has been dead for more than thirty years.
>
> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[26] In addition, previous IPC orders have found that to qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[3]

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[2] Order 11.
[3] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

[27] However, previous orders have also found that even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[4]

[28] The ministry submits that the records contain "vast amounts" of personal information relating to a number of individuals, including the appellant's deceased son, witnesses and other "involved parties," such as inmates and correctional officers. The appellant's representations do not directly address whether the records contain the personal information of any individuals.

[29] Based on my review of the records, I find that they contain the personal information of numerous individuals, including the appellant's deceased son,[5] various inmates at Collins Bay Institution, and other identifiable individuals. A small number of records contain the personal information of the appellant and the father of her deceased son. The types of personal information relating to these individuals fall within paragraphs (a) to (h) of the definition in section 2(1).

[30] Some records contain the names and job titles of various correctional officers, police officers, health professionals, lawyers, public servants, a court reporter, and other individuals. This information identifies these individuals in a professional or official capacity. In accordance with the exclusion from the definition of "personal information" in section 2(3), I find that this information does not qualify as their personal information.

[31] However, some information in the records relates to the conduct of several correctional officers at Collins Bay Institution who were on duty on or around the time the appellant's son was murdered. Both CSC and the OPP have conducted investigations into the conduct of these correctional officers.

[32] Previous IPC orders have found that information that involves an examination of an employee's performance, or an investigation into his or her conduct, reveals something personal about them, and it therefore qualifies as their "personal information."[6] Although the information in the records is about these correctional officers in their professional capacity, it relates to investigations into their job performance and possible criminal conduct by these individuals. Consequently, I find that this information "crosses the line" from the purely professional to the personal realm, and it therefore qualifies as their personal information.

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[4] Orders P-1409, R-980015, PO-2225 and MO-2344.
[5] The information relating to the appellant's deceased son is not excluded from the definition of personal information under section 2(2) because he has been dead for less than 30 years.
[6] e.g., Orders MO-2477, PO-2570, PO-2271 and P-1180.

[33] Before assessing whether the records have been properly withheld under the exemptions claimed by the ministry, I note that the legislative scheme established by *FIPPA* contains different procedures for addressing the application of exemptions to records. Requests for general records (including those containing the personal information of individuals other than the requester) must be addressed under Part II of *FIPPA*, which includes the discretionary exemptions in sections 14, 15(b) and 19 and the mandatory exemption in section 21(1). Requests for one's own personal information must be addressed under Part III of *FIPPA*, which includes the exemptions in sections 49(a) and (b).

[34] As noted above, most of the OPP, Coroner's office and CFS records are general records that do not contain the appellant's personal information, although many include the personal information of other individuals. For those records, it must be determined whether they qualify for exemption under sections 14, 15(b), 19 or 21(1). However, a small number of records contain the appellant's personal information. For those records, it must be determined whether they qualify for exemption under sections 49(a) or (b).

Issue B: Do the records qualify for exemption under the discretionary exemptions in sections 14, 15(b) and 19 or under the discretionary exemption in section 49(a), in conjunction with sections 14, 15(b) and 19?

[35] Most of the records do not contain the appellant's personal information. The ministry has withheld these records under the discretionary exemptions in sections 14, 15(b) and 19 of *FIPPA*.

[36] However, a small number of records contain the appellant's personal information. For those records, it must be determined whether they qualify for exemption under section 49(a), in conjunction with sections 14, 15(b) and 19. Section 49(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, 13, **14**, 14.1, 14.2, **15**, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that personal information. (Emphasis added.)

[37] Section 49(a) of *FIPPA* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[7]

[7] Order M-352.

Section 14 – Law enforcement

[38] The ministry has withheld the records under the law enforcement exemptions in sections 14(1)(a), (b), (c), (d), (f), (h), (j), (k) and (l) and sections 14(2)(a), (b) and (d). These provisions state:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
>
> . . . .
>
> (f) deprive a person of the right to a fair trial or impartial adjudication;
>
> . . . .
>
> (h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;
>
> . . . .
>
> (j) facilitate the escape from custody of a person who is under lawful detention;
>
> (k) jeopardize the security of a centre for lawful detention; or
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

> (2) A head may refuse to disclose a record,
>
> (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;
>
> (b) that is a law enforcement record if the disclosure would constitute an offence under an Act of Parliament;
>
> . . . .
>
> (d) that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority.

[39] Generally, the law enforcement exemptions must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[8]

[40] 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.[9]

[41] 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.[10]

Definition of "law enforcement"

[42] The term "law enforcement" appears in several exemptions claimed by the ministry, including sections 14(1)(a), (b), (c) and (d), and sections 14(2)(a) and (b). These exemptions can only apply to records that were created in circumstances that fall within the meaning of this term, which is defined in section 2(1) as follows:

> "law enforcement" means,

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

[9] 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.).

[10] Order PO-2040; *Ontario (Attorney General) v. Fineberg*, *supra* note 8.

> (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)

[43] The ministry submits that because the records were created as a result of an ongoing OPP investigation into the murder of the appellant's son, all of them qualify as "law enforcement" records. Although the appellant has provided representations on the section 14 exemptions, she does not specifically address whether the records at issue were created in circumstances that fall within the definition of "law enforcement" in section 2(1).

[44] The records are held by three bodies overseen by the ministry: the OPP, the Coroner's office and the CFS. In my view, most but not all of these records were created in circumstances that fall within the definition of "law enforcement."

[45] The OPP records were created as a result of its investigation into the murder of the appellant's son and its obstruction of justice investigation into specific correctional officers at Collins Bay Institution. The IPC has found in previous orders that the term "law enforcement" applies to a police investigation into a possible violation of the *Criminal Code*. Consequently, I find that the OPP records at issue in this appeal relate to "policing" and fall within paragraph (a) of the definition of "law enforcement" in section 2(1).

[46] The Coroner's office records relate to the 2008 inquest in which a jury heard evidence about the death of the appellant's son. The purpose of an inquest includes determining how the individual died, and the jury may make recommendations about avoiding a death in similar circumstances or about any other matter that arises at the inquest.[11] In Order P-1117, Senior Adjudicator John Higgins found that because section 31(2) of the *Coroner's Act* states that "[t]he jury shall not make any finding of legal responsibility or express any conclusion of law ...", it is clear that an inquest does not satisfy the definition of "law enforcement" in section 2(1) of *FIPPA*.

[47] I agree with Senior Adjudicator Higgins and find that the records created as a result of the Coroner's inquest into the death of the appellant's son do not fall within the definition of "law enforcement" in section 2(1). These records include correspondence with the parties to the inquest, internal correspondence between staff,

[11] See section 31 of the *Coroner's Act*.

and other records. Accordingly, the exemptions in sections 14 that use the term "law enforcement" cannot apply to such records.[12]

[48] I would note, however, that the OPP submitted records to the Coroner relating to its criminal investigations. These records make up a substantial portion of the two-volume Coroner's brief. In my view, the term "law enforcement" continues to apply to the OPP's investigation records, which do not lose their "law enforcement" status simply because they have been provided to the Coroner during the course of his inquest.

[49] The CFS provides independent scientific laboratory services to the police and other investigative agencies. As part of its investigation into the murder of the appellant's son, the OPP collected evidence which it sent to the CFS for DNA and toxicology analysis. This analysis generated a large number of records.

[50] Although the CFS does not engage in "policing," the scientific laboratory services that it provides to the police are part of the criminal investigation process, which could lead to charges under the *Criminal Code* and proceedings in court where a penalty or sanction, such as imprisonment, could be imposed. As a result, I find that the CFS records at issue in this appeal fall within paragraph (b) of the definition of "law enforcement" in section 2(1).

[51] I will now proceed with determining whether the law enforcement exemptions in section 14 apply to the records at issue in this appeal.

Section 14(1)(b): law enforcement investigation

[52] I will begin my analysis by reviewing whether the records qualify for exemption under section 14(1)(b). Under this exemption, the ministry has the discretion to refuse disclosure of a record if doing so could reasonably be expected to "interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result."

[53] The OPP, Coroner's office and CFS records all relate, either directly or indirectly, to the murder of the appellant's son. Consequently, a key issue in this appeal is whether disclosing these records could reasonably be expected to interfere with the OPP's long-standing criminal investigation into the murder.

Law enforcement proceeding

[54] For section 14(1)(b) to apply, a preliminary requirement is that the records must relate to an investigation undertaken with a view to a law enforcement proceeding or

[12] The ministry has released some of these records to the appellant in the more than 120 pages of Coroner's office records that it disclosed to her through its two supplemental decision letters.

from which a law enforcement proceeding is likely to result. In 1999, the OPP initiated two related criminal investigations into the murder of the appellant's son: the OPP's Penitentiary Squad conducted the main investigation into the murder itself and the OPP's Anti-Rackets Squad conducted an obstruction of justice investigation into specific correctional officers at Collins Bay Institution.

[55] In my view, both of these related OPP investigations were undertaken with a view to bringing charges under the *Criminal Code* and proceedings in court where a penalty or sanction, such as imprisonment, could be imposed against the individuals who were involved in the murder of the appellant's son. Consequently, I find that the records relate to "an investigation undertaken with a view to a law enforcement proceeding . . .", as required by section 14(1)(b).

[56] However, for this exemption to apply, two other requirements must be met. First, the law enforcement investigation in question must be a specific, ongoing investigation. The IPC has found in previous orders that the exemption does not apply where the investigation is completed, or where the alleged interference is with "potential" law enforcement investigations.[13] Second, the ministry must prove that disclosing the records could reasonably be expected to "interfere" with the investigation.

Ongoing investigation

[57] With respect to the first requirement, the ministry states that the OPP investigation into the murder of the appellant's son in 1999 is ongoing and has not been closed. It notes that there is no limitation period for filing murder charges and that the OPP does not, therefore, close murder investigations simply because of the passage of time. To support this argument, it points to the fact that the OPP has profiled this unsolved case on its website and also issued a reward notice in 2009 that offered a $50,000 reward for information leading to the arrest and conviction of the person(s) responsible for the murder.

[58] The ministry states that the passage of time may yield further information about the murder, because the "code of silence" prevailing in prisons means that inmates are reluctant to come forward and testify against fellow inmates because of a fear of retribution. It submits that once inmates leave prison, they may be more willing to come forward to the police.

[59] The ministry further states that the OPP Penitentiary Squad has a "demonstrated track record" of solving cold case murders in correctional institutions. It points out that in March, 2010, the squad arrested a former inmate at Millhaven Institution for murdering a fellow inmate in 1999. This murder took place in the same year as that of

[13] Orders PO-2085 and PO-2657.

the appellant's son and resulted in a conviction.[14] The ministry submits that this case illustrates that the passage of time does not extinguish the possibility of a successful conclusion to a murder investigation.

[60] The appellant disputes that the OPP investigation is ongoing. She provided me with a copy of a letter that she received from an OPP detective, dated February 8, 2005, which states that the investigation into her son's murder "is being moved to non-active status." She further submits that it is unreasonable for the ministry to rely on the OPP's 2009 decision to post a $50,000 reward, and to review its initial investigation into the murder, as proof that the investigation is "ongoing." She submits that the OPP only undertook these new steps after she advocated for further action on the case.

[61] In its reply representations, the ministry states that the OPP's letter to the appellant of February 8, 2005, which characterizes the investigation as "non-active," does not mean that it has ended. It submits that:

> . . . [T]he investigation being described as "inactive" does not mean it is closed, or that the OPP has stopped trying to find the killer or killers of [the appellant's son]. Inactive investigations can be switched to active status at any time. For example, in the last 15 years, new technologies, most notably DNA, have allowed police to activate and resolve previously inactive "cold cases," some of which were decades old. Emerging technologies such as biometrics may be equally transformative. Releasing records now to the appellant could interfere with the use of emerging or future crime solving technologies.

[62] In my view, the OPP investigation into the murder of the appellant's son is a specific, ongoing criminal investigation that is not closed. Although the letter of February 8, 2005 that the appellant received from the OPP states that the investigation "is being moved to non-active status," it does not state that the investigation is complete or is being closed. On the contrary, the letter states that "*at present* all investigative avenues have been exhausted", which clearly leaves the door open for further investigation if new evidence emerges.

[63] Moreover, I accept that because there is no limitation period for charging an individual with murder under the *Criminal Code*, the OPP does not close murder investigations simply because of the passage of time, and that the application of emerging technologies and the discovery of new evidence can result in "cold cases" being reactivated. The case cited by the ministry, in which a former Millhaven inmate was arrested, charged and convicted of murdering a fellow inmate more than 10 years after the crime was committed, amply demonstrates that murder investigations can be reactivated and even solved if new evidence emerges.

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[14] "Inmate guilty of fatally poisoning fellow prisoner with cyanide," *The Toronto Star*, March 29, 2011.

[64] The appellant suggests that the OPP's obstruction of justice investigation into specific correctional officers at Collins Bay should be viewed differently because it was "separate" from the murder investigation. I have considered the appellant's argument, but do not find it persuasive for two reasons.

[65] First, section 139(2) of the *Criminal Code* states that "every one who wilfully attempts . . . to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years." There is no limitation period in the *Criminal Code* for most indictable offences,[15] including section 139(2), so charges can be filed at any time in the future if new evidence emerges.

[66] Second, based on my review of the records, it is evident that although the obstruction of justice investigation was conducted by a different OPP investigative team, it is related to the ongoing murder investigation. As a result, in assessing whether the records fall within the requirements of the section 14(1)(b) exemption, I find that the two investigations cannot be viewed separately.

[67] In short, I find that although the OPP investigation into the murder of the appellant's son may be "non-active," it is an ongoing investigation, as required by section 14(1)(b).

Interference with investigation

[68] Finally, for section 14(1)(b) to apply, the ministry must prove that disclosing the records could reasonably be expected to "interfere" with the murder investigation.

[69] The IPC has found in previous orders that disclosing records relating to unsolved crimes or "cold cases," including murder cases, could reasonably be expected to interfere with an ongoing police investigation.[16] However, each appeal must be assessed on its own merits, taking into account the particular facts of the case and the nature of the records at issue.

[70] For the following reasons, I find that disclosing the records at issue in this particular appeal could reasonably be expected to "interfere" with the OPP's murder investigation.

[71] The ministry states that the records are similar to a "large jigsaw puzzle", and that the OPP investigation involves putting together the various pieces to determine who killed the appellant's son. It submits that:

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[15] "A Crime Victim's Guide to the Criminal Justice System," Department of Justice Canada, at www.justice.gc.ca/eng/pi/pcvi-cpcv/guide/sech.html.
[16] e.g., Orders MO-1171 and MO-2443.

> . . . Because the investigation is still ongoing, the OPP cannot say for certain at this point the relevance of a record to the investigation. Quite often what appears to be insignificant information during one part of the investigation can be of much greater significance when new information is received. This is why the OPP takes the position that until the killer of killers of [the appellant's son] are brought to justice . . . the release of any record can have adverse implications for the investigation and future law enforcement proceedings that are as yet unknown.

[72] The ministry further states that disclosing the records would imperil the ongoing murder investigation, and the prospect of ever bringing the killer or killers of the appellant's son to justice in the following three ways:

> First, the OPP needs to safeguard the confidentiality of these records in order to ensure that no suspects know of the evidence that the OPP has gathered against them. The OPP does not want suspects to be aware of this evidence, or to take pre-emptive steps . . . to evade capture.
>
> Second, if the records are released, OPP investigators will have no way of knowing when an individual comes forward with information whether that individual learned of the information through the release of records or because of what they learned firsthand. In other words investigators will have no way of determining the reliability of a witness or an informant coming forward with information.
>
> Finally, the OPP is concerned as well that the release of the records and their potential publication in the media or on the Internet would make it much more difficult to find an unprejudiced jury, should the investigation eventually proceed to trial.

[73] The OPP, Coroner's office and CFS records contain reams of sensitive information about the murder investigation. Many of these records set out the specific evidence collected by the OPP, including occurrence reports relating to the murder; interviews with inmates and correctional officers; police officers' notes; and evidence gathered by forensic specialists that was sent to the CFS for DNA and toxicology analysis. In addition, the records identify potential suspects in the murder of the appellant's son. To a certain extent, the records also reveal evidentiary gaps in the investigation that must be filled to successfully move forward with criminal charges.

[74] The IPC has found in previous orders that disclosing records to a requester under the access scheme in Part II of *FIPPA* is deemed to be disclosure to the world.[17] *FIPPA* does not impose any restrictions or limits on what a requester can do with records

[17] e.g., Orders M-96, P-169, P-679, MO-1719 and MO-1721-F.

disclosed to him or her. Consequently, disclosing the OPP, Coroner's office and CFS records would move them into the public domain where they can be freely disseminated.

[75] I find that such disclosure could reasonably be expected to interfere with the murder investigation because it could make the suspects aware of the evidence that the OPP has collected against them. This awareness could lead these individuals to take steps to further cover their tracks, intimidate potential witnesses who have not yet come forward, or otherwise hinder the investigation.

[76] Similarly, I find that disclosing the records could taint the quality of new evidence that can be gathered. As the ministry points out, if an individual approaches the OPP and presents information about the murder, the investigators may have no way of knowing whether that individual learned of the information from murder investigation records that came into the public domain or if that individual had firsthand knowledge of the information. This distinction is particularly relevant given the Ontario government's 2009 decision to offer a $50,000 reward for information leading to the arrest and conviction of the person(s) responsible for the murder.

[77] As noted above, the appellant states that the OPP's obstruction of justice investigation into specific correctional officers at Collins Bay was "separate" from the murder investigation and suggests that records relating to the former investigation should therefore not be found exempt under section 14(1)(b). In my view, however, the two OPP criminal investigations are related and I find that disclosing records relating to the obstruction of justice investigation could reasonably be expected to interfere with the murder investigation.

[78] Finally, I have considered whether the limited disclosure of some OPP investigation records during the Coroner's inquest in 2008 impacts the applicability of the section 14(1)(b) exemption to the records at issue. During the inquest, the appellant and other parties were provided with a copy of the two-volume Coroner's brief, which includes some evidence gathered by the OPP during its investigation.

[79] In my view, the fact that some OPP investigation records were provided to the appellant during the Coroner's inquest does not remove the applicability of the section 14(1)(b) exemption to these and other records, because the Coroner placed limits on the access provided, presumably to protect the integrity of the murder investigation. According to the ministry's representations, the appellant was required to sign a confidentiality statement before receiving the Coroner's brief and was also asked to return it at the end of the inquest.

[80] In short, I find that the ministry has provided the detailed and convincing evidence required to prove that disclosing most of the records could reasonably be expected to interfere with the OPP's murder investigation. Consequently, with limited exceptions, I find that these records qualify for exemption under section 14(1)(b).

[81] There are a small number of OPP and Coroner's office records that have been withheld by the ministry that do not, in my view, qualify for exemption under section 14(1)(b). This is either because they were not created in circumstances that fall within the definition of "law enforcement" in section 2(1) or because they do not meet the requirements of section 14(1)(b). Those records, some of which contain the appellant's own personal information, are as follows:

Exceptions – OPP records

MCMS 050 – Miscellaneous correspondence

[82] This folder includes letters that the OPP received from the father of the murder victim and his lawyer, who are seeking information from the OPP. In my view, disclosing these records could not reasonably be expected to interfere with the OPP's murder investigation, as required by section 14(1)(b).

Exceptions – Coroner's office records

Pages 766-768 – Emails

[83] These records are emails between Coroner's office staff that discuss the appellant's address and other correspondence sent to her by a regional office of the Coroner. Given that these records contain the appellant's personal information, it must be determined whether they qualify for exemption under section 49(a), in conjunction with section 14(1)(b).

[84] In my view, these records were not created in the circumstances that fall within the definition of "law enforcement" in section 2(1) and section 14(1)(b) cannot apply to them. Consequently, I find that the ministry cannot refuse to disclose these records to the appellant under section 49(a), in conjunction with section 14(1)(b).

Pages 1070-1071 – Medical Certificate of Death

[85] These records relate to a revised Medical Certificate of Death for the appellant's son that the Registrar General issued after the Coroner's inquest.

[86] Page 1070 is a letter from the Deputy Chief Coroner to the Medical Coding Team at the Office of the Registrar General that discusses the need to issue a revised death certificate for the appellant's son. Page 1071 is a Medical Certificate of Death for the

appellant's son. It appears to be a revised certificate of death that was issued as a result of the findings of the jury in the Coroner's inquest.

[87] In my view, these records were not created in the circumstances that fall within the definition of "law enforcement" in section 2(1) and therefore cannot qualify for exemption under section 14(1)(b).

Page 1141 – Letter to appellant

[88] This is a letter from an OPP detective inspector to the appellant, dated February 8, 2005. This record contains the appellant's personal information and it must therefore be determined whether it qualifies for exemption under section 49(a), in conjunction with section 14(1)(b).

[89] Given that this letter is addressed to the appellant, disclosing it could not reasonably be expected to interfere with the OPP's murder investigation, as required by section 14(1)(b). I find, therefore, that the ministry cannot refuse to disclose this record to her under section 49(a), in conjunction with section 14(1)(b).

Page 1145 – Letter from court reporter to Chief Coroner

[90] This record is a letter, dated October 9, 2008, from the court reporter who recorded the inquest proceedings to the Chief Coroner regarding the appellant's request for a transcript of the proceedings. This record contains the appellant's personal information and it must therefore be determined whether it qualifies for exemption under section 49(a), in conjunction with section 14(1)(b).

[91] This letter does not contain information about the murder investigation itself, and I find that disclosing it could not reasonably be expected to interfere with the OPP's murder investigation, as required by section 14(1)(b). As a result, I find that the ministry cannot refuse to disclose this record to her under section 49(a), in conjunction with section 14(1)(b).

Other exemptions

[92] I have found that almost all of the records qualify for exemption under section 14(1)(b). However, the ministry claims that the following discretionary exemptions also apply to many of these records:

- sections 14(1)(a), (c), (d), (f), (h), (j), (k), (l) and sections 14(2)(a), (b) and (d);
- section 15(b) (relations with other governments); and

- section 19 (solicitor-client privilege)

[93] Given that I have found that most of the records qualify for exemption under section 14(1)(b), I find that it is not necessary to consider whether they can also be withheld under the other exemptions in section 14 and in sections 15(b) and 19.

[94] I have also considered whether the small number of OPP and Coroner's office records that I have found do not qualify for exemption under section 14(1)(b) can be withheld under the other exemptions in section 14 claimed by the ministry. In my view, none of the section 14 exemptions apply either because these records were not created in circumstances that fall within the definition of "law enforcement" in section 2(1) or because they do not meet the requirements of those exemptions.

[95] In addition, none of these records reveal information received in confidence from another government or its agencies by the ministry, as required by the discretionary exemption in section 15(b). There is also no evidence to suggest that they are subject to solicitor-client privilege or were prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation, as required by section 19. Consequently, I find that these records cannot qualify for exemption under sections 15(b) and 19 or under section 49(a), in conjunction with sections 15(b) and 19.

[96] I will now turn to examining whether these records qualify for exemption under the privacy protection exemptions in sections 21(1) or 49(b).

C: Does the mandatory exemption at section 21(1) or the discretionary exemption at section 49(b) apply to the records?

[97] Where a record contains the personal information of another individual but not the requester, section 21(1) prohibits an institution from disclosing this information to the requester unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

[98] Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

[99] The ministry claims that many of the records contain the personal information of individuals other than the appellant, and that disclosing this information to her would constitute an unjustified invasion of their personal privacy under section 21(1). These records include the personal information of various individuals that was gathered during the OPP's criminal investigation, including the appellant's deceased son, inmates at Collins Bay Institution, correctional officers, and many other individuals.

[100] I have already found that most such records qualify for exemption under section 14(1)(b), because disclosing them could reasonably be expected to interfere with the OPP's investigation into the murder of the appellant's son. Accordingly, it is not necessary to consider whether such records can also be withheld under the mandatory personal privacy exemption in section 21(1).

[101] However, I have also found that a small number of OPP and Coroner's office records cannot be withheld under the discretionary exemptions in sections 14, 15(b) and 19 or under section 49(a), in conjunction with those exemptions. It must be determined, therefore, whether these records qualify for exemption under the personal privacy exemptions in sections 21(1) or 49(b).

Section 21(1)

[102] There are two sets of records containing the personal information of individuals other than the appellant. Folder MCMS 050 of the OPP records, which includes correspondence from the father of the murder victim and his lawyer, contains the personal information of both the father and his deceased son. In addition, pages 1070-1071 of the Coroner's office records, which includes correspondence and a revised Medical Certificate of Death, contain the personal information of the appellant's deceased son.

[103] It must be determined whether this personal information qualifies for exemption under section 21(1), which prohibits the ministry from disclosing it to the appellant unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. In my view, the only exception that could apply in the circumstances of this appeal is paragraph (f), which allows the ministry to disclose personal information if doing so does not constitute an unjustified invasion of personal privacy.

[104] In other words, it must be determined whether disclosing the records that contain the father's and the murder victim's personal information to the appellant would constitute an unjustified invasion of their personal privacy.

[105] The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would be an unjustified invasion of personal privacy under section 21(1)(f). If any of paragraphs (a) to (d) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 21.

[106] The paragraph of section 21(4) that is relevant in the circumstances of this appeal is (d), which states:

> Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

> discloses personal information about a deceased individual to the spouse or a close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons.

[107] The IPC has found in previous orders that the application of section 21(4)(d) requires a consideration of the following questions, all of which must be answered in the affirmative in order for the section to apply:

1. Do the records contain the personal information of a deceased individual?

2. Is the requester a spouse or "close relative" of the deceased individual?

3. Is the disclosure of the personal information of the deceased individual desirable for compassionate reasons, in the circumstances of the request?[18]

[108] With respect to the first part of the section 21(4)(d) test, the ministry states that a number of records contain the personal information of the appellant's deceased son but it is mixed with the personal information of other individuals in some records. With respect to the second part of the test, the ministry acknowledges that the appellant is the mother of the deceased individual and therefore a "close relative."

[109] With respect to the third part of the test, the ministry submits that it is not satisfied, in the circumstances, that disclosing the deceased individual's personal information to the appellant is desirable for compassionate reasons, because doing so could reasonably be expected to jeopardize the OPP murder investigation and unjustifiably invade the personal privacy of other individuals. In addition, it submits that the appellant has already been provided with a "significant amount of information" with respect to the death of her son and points out that she was provided with a copy of the Coroner's brief during the 2008 inquest.

[110] In her representations on section 21(4)(d), the appellant states that she has not been provided with records that show her son in "his natural deceased state," such as the autopsy report, crime scene photos, and videotapes of the murder scene and autopsy. She submits that she is aware of the disturbing and graphic content of these records, but cites the findings of bereavement counsellors, Dr. Stephen Fleming and Dr. Leslie Balmer, who provided a statement to the IPC for its 1999 annual report that stated, in part, that "Understanding the nature and extent of the deceased injuries, how

[18] Orders MO-2237 and MO-2245.

the death occurred, and the level of consciousness and pain felt has the potential to palliate the survivor's anguish."

[111] I have considered the parties' representations on the compassionate grounds exception in section 21(4)(d). At the outset, I would point out that this exception only applies to the personal privacy exemptions in sections 21(1) and 49(b). It does not "override" or apply to other exemptions in *FIPPA*, such as the law enforcement exemptions in section 14. I have already found that most of the records qualify for exemption under section 14(1)(b), because disclosing them could reasonably be expected to interfere with the OPP's investigation into the murder of the appellant's son. Consequently, the compassionate grounds exception in section 21(4)(d) cannot apply to these records.

[112] However, I have also found that a small number of OPP and Coroner's office records that contain the personal information of the appellant's son do not qualify for exemption under sections 14, 15(b) or 19. The correspondence in folder MCMS 050 of the OPP records contains the personal information of both the father and his deceased son. In addition, pages 1070-1071 of the Coroner's office records, which includes correspondence and a revised Medical Certificate of Death, contain the personal information of the appellant's deceased son. The ministry claims these records are exempt from disclosure under section 21(1).

[113] These records meet the first part of the section 21(4)(d) test because they contain the personal information of the deceased individual. In addition, the second part of this test is satisfied, because the appellant is the deceased individual's mother, and a parent qualifies as a "close relative."[19]

[114] With respect to the third part of the section 21(4)(d) test, I have considered whether disclosure of the personal information of the appellant's deceased son in the OPP and Coroner's office records described above is desirable for compassionate reasons, in the circumstances of the appellant's request.

[115] I am not satisfied that disclosing the deceased individual's personal information in the correspondence in folder MCMS 050 of the OPP records is desirable for compassionate reasons. These letters, which were sent by the deceased individual's father and his lawyer, contain the personal information of both the father and his deceased son. However, they do not shed any light on the murder and disclosing them would not provide the appellant with greater knowledge of the circumstances that led to her son's death.

[116] I find, therefore, that the compassionate grounds exception in section 21(4)(d) does not apply to the deceased individual's personal information in these letters. In my

[19] Section 2(1) of *FIPPA* defines a "close relative" as "a parent, child, grandparent, grandchild, brother, sister, uncle, aunt, nephew or niece, whether related by blood or adoption."

view, none of the presumptions in section 21(3) apply to the personal information in these letters. The ministry submits that the factors favouring privacy protection in sections 21(2)(f) (highly sensitive) and (h) (supplied in confidence) apply to many of the OPP records. I am not persuaded that these factors would necessarily apply to the father's correspondence, but in my view, none of the factors favouring disclosure in section 21(2) would apply either. In the circumstances, I find that these letters qualify for exemption under section 21(1) because disclosing them to the appellant would constitute an unjustified invasion of the father's personal privacy.

[117] I am satisfied, however, that disclosing the deceased individual's personal information in pages 1070-1071 of the Coroner's office records is desirable for compassionate reasons. As noted above, page 1070 is a letter from the Deputy Chief Coroner to the Medical Coding Team at the Office of the Registrar General that discusses the need to issue a revised death certificate for the appellant's son. Page 1071 is a Medical Certificate of Death and appears to be a revised version that was issued as a result of the findings of the jury in the Coroner's inquest.

[118] The letter from the Deputy Chief Coroner sheds light on the process that led to the issuance of a revised death certificate. In addition, the Medical Certificate of Death for the appellant's deceased son is a "core" document relating to his death. I recognize that the appellant may already have a copy of the latter record. In my view, however, there are strong compassionate reasons for disclosing these records to her under *FIPPA*. I find, therefore, that the compassionate grounds exception in section 21(4)(d) applies to the personal information of the appellant's deceased son in these records, and they do not qualify for exemption under section 21(1). Given that none of the other exemptions claimed by the ministry apply to these records, they must be disclosed to the appellant.

Section 49(b)

[119] The ministry has withheld several Coroner's office records that contain the appellant's personal information. As noted above, pages 766-768 are emails between Coroner's office staff that discuss the appellant's address and correspondence sent to her. Page 1141 is a letter from an OPP detective inspector to the appellant. Page 1145 is a letter from a court reporter to the Chief Coroner regarding the appellant's request for a transcript of the inquest proceedings.

[120] I have found that these records do not qualify under section 49(a), in conjunction with sections 14, 15(b) or 19. It must be determined, therefore, whether these records can be withheld under the discretionary personal privacy exemption in section 49(b), which states:

> A head may refuse to disclose to the individual to whom the information relates personal information,

> where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

[121] The above records all contain the appellant's personal information, but they do not contain the personal information of other individuals. The Coroner's office staff and court reporter are identified in these records in their professional not their personal capacity. Accordingly, the information relating to these other individuals does not qualify as their personal information.

[122] In the circumstances, I find that disclosing these records, which only contain the appellant's personal information, cannot constitute an unjustified invasion of another individual's personal privacy under section 49(b). Given that none of the other exemptions claimed by the ministry apply to these records, they must be disclosed to the appellant.

D: Did the ministry exercise its discretion under sections 14, 15(b), 19, 49(a) and 49(b)? If so, should the IPC uphold the exercise of discretion?

[123] Some exemptions in *FIPPA* are discretionary and therefore permit an institution to disclose records, despite the fact that it could withhold them. The institution must exercise its discretion. On appeal, the IPC may determine whether an institution failed to do so. In addition, the IPC may find that the institution erred in exercising its discretion where, for example,

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

[124] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[20] The IPC may not, however, substitute its own discretion for that of the institution.[21]

[125] I have found that most of the records withheld by the ministry qualify for exemption under the discretionary exemption in section 14(1)(b), because disclosing them could reasonably be expected to interfere with the OPP's investigation into the murder of the appellant's son. Given this finding, I concluded that it was not necessary to consider whether these records can also be withheld under the other discretionary exemptions in section 14 and in sections 15(b) and 19. In addition, I found that a small

[20] Order MO-1573.
[21] Section 54(2).

number of Coroner's office records that contain the appellant's personal information cannot be withheld under the discretionary exemptions in sections 49(a) or (b).

[126] It must be determined, therefore, whether the ministry exercised its discretion in withholding most of the records under section 14(1)(b) and, if so, whether I should uphold this exercise of discretion. It is not necessary to determine whether it exercised its discretion properly in applying the other exemptions cited above.

[127] The ministry submits that it exercised its discretion appropriately under section 14(1)(b). It states that there is an ongoing criminal investigation into the murder of the appellant's son and that disclosing the records could reasonably be expected to harm this investigation, which would defeat the goal of bringing the perpetrators to justice. Moreover, it submits that the manner in which it has exercised its discretion is consistent with the practices of the OPP and other law enforcement agencies with respect to records relating to ongoing investigations.

[128] The ministry further points out that the appellant received a large number of records because she was a party at the Coroner's inquest into her son's death. It submits that the records in the Coroner's brief provided her with some understanding of how her son died without interfering with the ongoing murder investigation.

[129] The appellant submits that the ministry should have exercised its discretion in favour of disclosure. She has provided me with a long list of specific records that she is seeking and submits that if the ministry's section 14(1)(b) exemption claim is upheld, "it would mean that information on unsolved murder cases is exempt from access and out of the reach of family members."

[130] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,*[22] the Supreme Court of Canada described the manner in which an institution should exercise its discretion under the law enforcement exemptions in section 14 of *FIPPA*. Although the Court was addressing the discretionary exemption in section 14(1)(a), its analysis is equally applicable to section 14(1)(b). It states:

> . . . [T]he first step the head must take is to determine whether disclosure could reasonably be expected to interfere with a law enforcement matter. If the determination is that it may, the second step is to decide whether, having regard to the significance of that risk and other relevant interests, disclosure should be made or refused. These determinations necessarily involve consideration of the public interest in open government, public debate and the proper functioning of government institutions. A finding at the first stage that disclosure may interfere with law enforcement is implicitly a finding that the public interest in law enforcement may trump

[22] 2010 SCC 23, [2010] 1 S.C.R. 815.

> public and private interests in disclosure. At the second stage, the head must weigh the public and private interests in disclosure and non-disclosure, and exercise his or her discretion accordingly.[23]

[131] I am satisfied that after the ministry concluded that disclosing the records could reasonably be expected to interfere with the OPP's murder investigation under section 14(1)(b), it weighed the public and private interests in disclosure and non-disclosure, and exercised its discretion to withhold the records. In particular, it took into account the fact that the appellant received a large number of records during the Coroner's inquest and concluded that the need to protect the integrity of the OPP's murder investigation trumps the public and private interests in further disclosure.

[132] I am not persuaded that the ministry failed to take relevant factors into account or that it considered irrelevant factors in withholding the records. I find, therefore, that it exercised its discretion under section 14(1)(b) and did so in a proper manner.

E: Is some information in the records not responsive to the appellant's request?

[133] The IPC has found in previous orders that to be considered responsive, records must "reasonably relate" to the request.[24]

[134] The ministry claims that some information in the records is not responsive to the appellant's request. Consequently, it must be determined whether this information "reasonably relates" to her request.

[135] The ministry states that parts of the Coroner's office records are not responsive to her request because they contain the personal information of staff members. In addition, it submits that parts of the CFS records are non-responsive because they include DNA evidence that belongs to individuals not connected to the murder investigation. In her representations, the appellant does not address whether the information identified by the ministry is responsive to her request.

[136] Based on my review of the records and the ministry's evidence, I accept that the information identified by the ministry does not reasonably relate to the appellant's request and has been properly withheld as non-responsive. I note that even if this information was responsive to the appellant's request, it would likely be exempt from disclosure under the mandatory personal privacy exemption in section 21(1).

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[23] *Ibid.*, at para 48.
[24] Orders P-880 and PO-2661.

F: Did the ministry conduct a reasonable search for a transcript of the Coroner's inquest proceedings?

[137] The appellant submits that the ministry should have a transcript of the Coroner's inquest, which took place in September, 2008. In response, the ministry claims that a transcript of the Coroner's inquest does not exist.

[138] 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.[25] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the ministry's decision. If I am not satisfied, I may order further searches.

[139] *FIPPA* does not require the ministry to prove with absolute certainty that further records do not exist. However, the ministry must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[26]

[140] 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.[27]

[141] The ministry states that it does not order transcripts of Coroner's inquests and does not, therefore, have one in its possession. It further states that it wrote to the court reporter who recorded the inquest proceedings to determine whether she had prepared a transcript. In a response letter, the court reporter states that "no transcripts of any portion of the inquest have been prepared in this matter for anyone." Given this evidence, the ministry submits that it is "inconceivable" that a transcript exists.

[142] The appellant submits that a transcript of the inquest proceedings must exist because the OPP provided her with a transcript of the testimony of a correctional supervisor from Collins Bay Institution. She has included a copy of this record, which is entitled "Transcript of Taped Interview," and submits that given the existence of this transcript, either the Coroner's office or the OPP would certainly have ordered a transcript of the full inquest proceedings.

[143] This transcript of the correctional officer's videotaped testimony is dated August 25, 2008, which is before the start of the formal inquest. It includes introductory remarks from the Coroner, who states that the purpose of taking evidence from the correctional supervisor is to ensure that it is presented to the jury at the inquest into

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[25] Orders P-85, P-221 and PO-1954-I.
[26] Orders P-624 and PO-2559.
[27] Order MO-2246.

the death of the appellant's son, and that a video of his testimony would be played in its entirety at the inquest the following month.

[144] Based on my review of this record, it appears the correctional supervisor was unable to testify at the inquest itself and the Coroner's office therefore decided to obtain videotaped testimony from him prior to the inquest. The ministry's representations do not explain why a transcript was prepared of this individual's videotaped testimony, but it is reasonable to assume that it may have been provided to the parties at the inquest.

[145] I am not persuaded that this transcript of the correctional supervisor's pre-inquest testimony constitutes evidence or proof that a larger transcript of the full inquest must exist. In my view, the court reporter's letter, in which she states that she did not prepare a transcript of any portion of the inquest for anyone, is sufficient evidence to show that a transcript of full inquest likely does not exist. I find, therefore, that the ministry has conducted a reasonable search for this record, as required by section 24 of *FIPPA*.

CONCLUSION

[146] In this order, I find that:

A. The records contain "personal information," as defined in section 2(1) of *FIPPA*, of numerous individuals, including the appellant, her deceased son, his father, various inmates and correctional officers at Collins Bay Institution, and other identifiable individuals.

B. Most of the records qualify for exemption under the discretionary exemption in section 14(1)(b). A small number of OPP and Coroner's office records do not qualify for exemption under the discretionary exemptions in sections 14, 15(b) and 19 or under section 49(a), in conjunction with sections 14, 15(b) and 19.

C. With respect to the small number of records that do not qualify for exemption under Issue B, the mandatory exemption in section 21(1) applies to some of these records but not others. The discretionary exemption at section 49(b) does not apply to any of these records.

D. The ministry exercised its discretion under section 14(1)(b) and did so in a proper manner.

E. Some information in the records is not responsive to the appellant's request.

F. The ministry conducted a reasonable search for a transcript of the Coroner's inquest.

[147] The appellant has presented a compelling case for disclosure and I recognize that she will be disappointed with the outcome of this order. The facts and circumstances surrounding her son's murder, including allegations that correctional officers at Collins Bay Institution obstructed the OPP investigation, are extremely disturbing and should be of concern to all Canadians. The appellant's desire to seek justice for her son's murder is complemented by a broader public interest in accountability.

[148] In my view, however, the ministry has provided the detailed and convincing evidence required to prove that disclosing most of the records could reasonably be expected to interfere with the OPP's murder investigation. At this time, the public and private interests in disclosure that exist with respect to most of the records must yield to the need to protect the integrity of the OPP investigation.

ORDER:

1. I order the ministry to disclose to the appellant the following records held by the Coroner's office which contain her own personal information: pages 766-768 (emails between Coroner's office staff), page 1141 (letter from OPP detective inspector to appellant) and page 1145 (letter from court reporter to Chief Coroner).

2. I order the ministry to disclose to the appellant the following records held by the Coroner's office which contain her deceased son's personal information: page 1070 (letter from the Deputy Chief Coroner to Registrar General) and page 1071 (Medical Certificate of Death).

3. I order the ministry to disclose the records identified in order provisions 1 and 2 to the appellant by **November 13, 2012**.

4. I uphold the ministry's decision to withhold the remaining OPP, Coroner's office and CFS records.

5. In order to verify compliance with the provisions of this order, I reserve the right to require the ministry to provide me with a copy of the records that it sends to the appellant.

Original Signed By: October 10, 2012
Colin Bhattacharjee
Adjudicator