Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3126

Appeal PA11-491

Ministry of the Environment

October 25, 2012

Summary: The appellant requested records pertaining to an investigation conducted by the Ministry of the Environment's Investigation and Enforcement Branch. The ministry disclosed certain records to the appellant severing what it viewed as personal information under section 21 of the *Act*. The ministry took the position that a Closure Report was a law enforcement report and denied access to it in full under section 14(2)(a) of the *Act*. Although the appellant only appealed the ministry's decision to withhold the Closure Report, and the Mediator's Report concluded that only the Closure Report remained at issue in the appeal, in the course of its representations the appellant challenged the reasonableness of the ministry's search for, and identification of, responsive records. The ministry's decision to deny access to the Closure Report on the basis of section 14(2)(a) is upheld. The time to modify the Appeal Form and to challenge the conclusion in the Mediator's Report that the Closure Report was the only record at issue in the appeal has passed. The appellant remains free to appeal the reasonableness of the ministry's search for responsive records by filing a separate appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1), 14(2)(a), 14(4); *Safe Drinking Water Act*, 2002, S.O. 2002, c. 32, as amended and regulations 170/03 and 242/05.

Orders and Investigation Reports Considered: P-136, PO-1755, PO-1988

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

BACKGROUND:

[1] The *Safe Water Drinking Act* (*SWDA*) and its associated regulations prescribe specific standards for drinking water. This legislation applies to corporations, municipalities and individuals and contains penalties for its contravention.[1] The Ministry of the Environment's Investigation and Enforcement Branch (IEB) conducts investigations under the *SWDA*. The Ministry of the Environment (the ministry) explained in its representations that the role of an investigator with the IEB is to summarize the investigation, analyze the evidence, draw conclusions and make a recommendation with respect to further law enforcement activity.

[2] The ministry further explains that if there is a recommendation that a matter proceeds to "charges", the IEB investigator "submits a Crown Brief". If no charges are to be laid, the investigator prepares a report for "management" and in some cases, the ministry's legal services branch, outlining why charges "ought not to be laid."

[3] At issue in this appeal is a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to an identified "Closure Report", prepared by the IEB in connection with an identified Provincial Officer's Order, "as well as any and all correspondence, memorandum, reports or other records in connection with the IEB's investigation."

[4] The ministry granted partial access to the responsive records, relying on sections 14(2)(a) (law enforcement report) to deny access to the requested Closure Report and 21(1) (invasion of privacy) of the *Act* to deny access to withheld portions of the records that it was prepared to disclose to the requester.

[5] The requester (now the appellant) appealed the decision. Schedule "A" to the Appeal Form indicated that "[t]he appellant is seeking access to a closure report". There is no mention in the Appeal Form or in the attached Schedule "A" that any other records are being sought other than those that were identified by the ministry, or that the appellant was taking issue with the ministry's search for, and identification of, responsive records.

[6] During mediation, the appellant advised that access was no longer being sought to the records the ministry claimed to contain information that was subject to section 21(1) of the *Act*. As a result, those records and the application of section 21(1) are no longer at issue in the appeal. The Mediator's Report identified a two-page Closure Report as the only record remaining at issue.

[7] Mediation did not resolve the matter and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

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[1] Part IX of the *Safe Water Drinking Act* (*SWDA*).

[8] I invited representations from the ministry and the appellant. I received their representations and shared them in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction number 7*. For the very first time, in its representations the appellant asserts that the mediator incorrectly concluded in her Mediator's Report that the only record at issue in this appeal is a copy of the document entitled "Closure Report". This is addressed in more detail, below.

[9] In this decision, I uphold the decision of the ministry.

ISSUES:

A. What is the scope of the appeal?

B. Is the Closure Report a law enforcement report?

C. Does the Closure Report fall within the exception at section 14(4)?

D. Did the ministry properly exercise its discretion?

DISCUSSION:

A. What is the scope of the appeal?

[10] The appellant asserts that the mediator incorrectly concluded in her report that the only record at issue in this appeal is a copy of the document entitled "Closure Report". This was the first time in the processing of this appeal that the appellant took issue with the Mediator's Report or challenged the ministry's search for, and identification of, responsive records.

[11] The appellant states that in addition to the Closure Report, its initial request was for "any and all correspondence, memorandum, reports or other records in connection with the IEB's investigation". Referring to the ministry's document entitled "Compliance Policy, Applying Abatement and Enforcement Tools", dated May 2007, the appellant submits:

> Paragraph 8 of the Compliance Policy breaks down the step-by-step procedures to be employed by Provincial Officers in the enforcement process. These procedures require that Provincial Officers evaluate incidents by classifying various case-specific considerations, in order to determine the recommended response. Paragraph 9.2.3 provides that this procedure be followed in the case of an IEB referral.

> In response to [the appellant's] request, the [ministry] has produced a copy of the draft order addressed to [the appellant] which [the appellant] already had, 7 pages of file opening notes, which do not contain the information requested; and a one-page hand-written note, apparently from the casebook of a Provincial Officer. This hand-written note is illegible. The [appellant] is entitled to a legible copy of the hand-written note, in order that the spirit of the disclosure principle under *FIPPA* be satisfied. …
>
> More importantly, [the appellant] has not received any of the documents which the Compliance Policy also suggests exist with respect to the decision whether to lay charges.

[12] The ministry takes the position that the only record at issue in this appeal is the Closure Report. It submits that:

> [I]t appears that the appellant has added other issues in [its] representations that were not identified during the mediation stage, the mediator's report and the timeframe for identifying "errors or omissions" as outlined [in the mediator's] letter dated February 1, 2012.

[13] Although the ministry takes this position, it does go on to address the appellant's concerns about the reasonableness of its search and identification of responsive records in a general way, stating:

> Section 9.2.3 [of the Compliance Policy] provides guidance to ministry staff, but does not address how those considerations should be recorded.
>
> The Closure Report, the only record at issue, addresses the factors outlined in Section 9.2.3 of the publication.
>
> The ministry's Freedom of Information Office asked that the Investigation and Enforcement Branch conduct a thorough search for all responsive records based on the scope of the request.
>
> According to [named individual], Regional Supervisor for the Investigation and Enforcement Branch, all records that relate to the investigation were provided to the Freedom of Information Office.

[14] With respect to the legibility of the handwritten note, in the course of adjudication the ministry sent the appellant a letter with a better quality copy of the hand-written note, inviting the appellant to attend at its offices to view the original, if required.

Analysis and Finding

[15] In its Appeal Form, the appellant only identified the Closure Report as being the record at issue in the appeal. There was no mention of the reasonableness of the ministry's search for, or identification of, responsive records in that document. The Mediator's Report identified the Closure Report as being the only record remaining at issue in this appeal. The appellant had thirty days to provide comments on the Mediator's Report, but none were forthcoming. At no time prior to its representations in this appeal did the appellant question the adequacy of the ministry's search for, and identification of, responsive records.

[16] In Order PO-1755, Adjudicator Laurel Cropley addressed an appellant's request to withdraw an agreement he had made during mediation. In doing so, she discussed the role of mediation in the appeal process. She wrote:

> …, the appellant takes the position that since mediation as a whole was not successful, none of the agreements made during this time are in effect. In other words, the appellant believes that I should consider nothing to have been resolved. I do not accept the appellant's position in this regard.
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> When a file is placed in mediation, the task of the mediator is to attempt to identify and clarify issues and records, and to attempt to settle all or some of them. There is a recognition, however, that in many cases an appeal will not be completely mediated but will be narrowed to fewer issues or records. The general expectation is that the parties, having agreed to participate in the mediation process, will honour or adhere to agreements reached in mediation. In the absence of clearly articulated disagreement from a party regarding the results of mediation, the appeal will proceed to inquiry on that basis.
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> In some cases, the mediator will engage in discussions with both parties in which a tentative settlement is reached dependent on one party taking a particular action. For example, an institution may agree to disclose a record to which an exemption has been applied on condition that the appellant agrees not to pursue another record. Or, an appellant may agree not to pursue certain records or issues on the condition that the institution does certain things. If the settlement dissolves because of inaction or because the other party does not agree to the offered terms, very often the fact and content of the settlement discussions are considered to be "mediation privileged" which means that any information pertaining to these discussions would not be made available to the adjudicator who will ultimately be determining the issues in the appeal.

> In other cases, a party may wish to provide some information to a mediator strictly in confidence in order to facilitate or advance the mediation process. However, there is a clear intention on the part of the individual providing the information that it not be made available to any other individual, including the adjudicator. Again, this information is "mediation privileged".
>
> In the circumstances of this appeal, the appellant agreed to narrow the issues and records in this appeal during mediation. There is no indication in the file that he considered his agreements to be contingent on full settlement of the appeal. Further, had any of his discussions been mediation privileged, they would not have been forwarded on to me. It is important to note that the appellant was notified that the Mediator's Report will go to the Adjudicator. In reading the appellant's correspondence relating to the Mediator's Report, I find that it does not indicate that he considered any information to be privileged in the sense referred to above. Although he stated that he disagreed with the contents of the Report, he did not provide particulars of his disagreement even though he was clearly requested to do so.
>
> The appellant has essentially stated to me that he withdraws any agreements he made during mediation. In my view, it is too late to make such a claim at this stage in the process, particularly in light of the steps taken by the Mediator to clarify his concerns. In so finding, I am not saying that a party may not change his or her mind and back away from an agreement made in mediation, but that a decision must be made in a timely fashion and within the procedures which have been established by this office and which have been clearly communicated to the parties. To find otherwise would not only delay the inquiry process in that I would be required to essentially start the inquiry over again in order to introduce the new issues, but it would compromise the integrity of the appeals process itself by allowing a party to unilaterally frustrate the timely and orderly resolution of the appeal.

[17] Although her discussion relates to an appellant reneging on an agreement made at mediation, the approach taken by Adjudicator Cropley is applicable to the appeal before me. In my view the time to modify the Appeal Form and to challenge the conclusion in the Mediator's Report has passed. Reopening the appeal at this late stage would require a further exchange of representations specifically addressing the steps the ministry took to search for responsive records,[2] and thereby result in inevitable delay. I would be required to essentially start the inquiry over again in order to introduce the search issue. I find that doing so at this late stage would compromise the

[2] See Orders P-85, P-221 and PO-1954-I.

integrity of the appeals process itself by allowing a party to unilaterally frustrate the timely and orderly resolution of the appeal.

[18] The appellant is not prejudiced in any way by this determination as it remains free to challenge the adequacy of the ministry's search for responsive records by filing a separate appeal alleging that the institution did not conduct a reasonable search for responsive records.

[19] I will now turn to the main issues in the appeal.

B. Is the Closure Report a law enforcement report?

Section 14(2)(a)

[20] The ministry submits that the Closure Report qualifies for exemption under section 14(2)(a) of the *Act*, which reads:

> A head may refuse to disclose a record
>
> > that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law.

[21] Section 14(4) provides an exception to section 14(2)(a). It reads:

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

[22] The term "law enforcement" is defined in section 2(1) of the *Act* as follows:

> "law enforcement" means,
>
> > (a) policing,
> >
> > (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
> >
> > (c) the conduct of proceedings referred to in clause (b)

[23] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[3]

[24] In order for a record to qualify for exemption under section 14(2)(a) of the *Act*, the institution must satisfy each part of the following three-part test:

1. the record must be a report; and

2. the report must have been prepared in the course of law enforcement, inspections or investigations; and

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.[4]

[25] The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact.[5]

[26] The title of a document is not determinative of whether it is a report, although it may be relevant to the issue.[6]

[27] Section 14(2)(a) exempts "a report prepared in the course of law enforcement *by an agency which has the function of enforcing and regulating compliance with a law*" (emphasis added), rather than simply exempting a "law enforcement report." This wording is not seen elsewhere in the *Act* and supports a strict reading of the exemption.[7] An overly broad interpretation of the word "report" could create an absurdity. If "report" means "a statement made by a person" or "something that gives information", all information prepared by a law enforcement agency would be exempt, rendering sections 14(1) and 14(2)(b) through (d) superfluous.[8]

[28] The ministry submits that the investigation was commenced as a result of a referral by one of its Environmental Officers for an investigation into possible non-compliance with a Provincial Officer's Order[9] issued under the provisions of the *Safe Drinking Water Act* and *Ontario Regulation 170/03*.

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[3] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[4] Orders P-200 and P-324.
[5] Orders P-200, MO-1238 and MO-1337-I.
[6] Orders MO-1238 and MO-1337-I.
[7] Order PO-2751.
[8] Order MO-1238.
[9] The Order, which was partially disclosed to the appellant, required the recipients to bring their drinking water system into compliance with the requirements of the *Safe Water Drinking Act* and *Ontario Regulation 170/03*.

[29] The ministry submits that the IEB investigator:

> … interviewed individuals and employees, recorded the results and copied pages of documents from the ministry's District Office file.

[30] The ministry submits that the IEB investigator then prepared the subject Closure Report which summarized the investigation, drew conclusions and recommended that no charges be laid.

[31] The ministry submits that:

- the record at issue is a formal summary and analysis of the detailed information and is a "collation and consideration of the information"
- the Closure Report was prepared as part of the investigation into a possible violation of the *SWDA*
- this Office has recognized that the ministry's IEB is a "law enforcement institution" for the purposes of the *Act,*[10] which has the function of enforcing and regulating compliance with a law, namely the *SWDA*

[32] The ministry submits that had charges been laid under the *SWDA* a crown brief would have been prepared, "followed by a trial". The ministry submits that all of "the actual investigation records were released to the requester, except those where there would be an unjustified invasion of personal privacy." The ministry submits that it is withholding the Closure Report, which is the formal summary of that investigation.

[33] The appellant does not challenge the ministry's position that the Closure Report satisfies the provisions of section 14(2)(a), rather it takes the position that the exception in section 14(4) applies because it was prepared in the course of a routine inspection. This is addressed below.

Analysis and Finding

[34] I have reviewed the Closure Report and considered the representations of the parties. In my view the record clearly falls within the scope of the section 14(2)(a) exemption. I find that the record is a report, related to an investigation conducted by the IEB, which qualifies as "an agency which has the function of enforcing and regulating compliance with a law", namely the *SWDA*.[11] The investigation and report are clearly part of this enforcement function.

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[10] In support of its position the ministry relies upon Orders P-306, PO-1706 and PO-2505.
[11] See in this regard Orders P-306, PO-1706, PO-2211 and PO-2505.

[35] I will now address whether the Closure Report falls within the exception at section 14(4) of *FIPPA*.

C. Does the Closure Report fall within the exception at section 14(4)?

Section 14(4): routine inspection report

[36] The appellant submits that the Closure Report falls under the exception at section 14(4) of *FIPPA*, because it was "prepared in the course of routine inspections."

[37] Section 14(4) states:

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

[38] The section 14(4) exception is designed to ensure public scrutiny of material relating to routine inspections and other similar enforcement mechanisms in such areas as health and safety legislation, fair trade practices, laws, environmental protection schemes, and many of the other regulatory schemes administered by the government.[12]

[39] Generally, "complaint driven" inspections are not "routine inspections".[13] The existence of discretion to inspect or not to inspect is an important but not necessarily determinative factor in deciding whether an inspection is "routine".[14]

[40] The appellant submits:

> The inspection in question was not a "complaint driven" inspection; rather a referral to the IEB was made by the Provincial Officer. In addition to complying with the Compliance Policy, the enforcement branch was mandated by statute to consider a number of factors as set out in Ontario Regulation 242/05 … . Since the report was prepared in the course of inspections which are routinely required by the regulations (i.e. whether the contravention is continuing and has not been resolved since the matter was referred to the enforcement branch, the known anticipated or potential health consequences of the contravention, etc.), the closure report qualifies as an exception to the exemption under section 14(2)(a) and must be disclosed by the [ministry].

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[12] Order PO-1988.
[13] Orders P-136 and PO-1988.
[14] Orders P-480, P-1120 and PO-1988.

[41] The ministry submits that the Closure Report was prepared at the conclusion of an investigation and does not relate to a routine inspection. The ministry explains:

> The referral by the Peterborough District Office Staff to the Investigation and Enforcement Branch was as a result of an April 25, 2004 Boil Water Advisory by the Haliburton Kawartha Pine Ridge District Health Unit, subsequent attempts to have the [identified system] comply with the [*SWDA*] and its regulations, and non-compliance with a Provincial Officer's Order.

[42] The ministry submits that it was the non-compliance with a Provincial Officer's Order that finally triggered the referral to the ministry's IEB.

Analysis and Finding

[43] In Order PO-1988 Senior Adjudicator Sherry Liang discussed the historical genesis and purpose of the section 14(4) exception. She wrote:

> The inclusion of section 14(4) in the *Act* followed from a recommendation in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980*, vols. 2 and 3 (Toronto: Queen's Printer, 1980) (the Williams Commission Report). The drafters of that Report recommended that information gathered for regulatory enforcement purposes be treated the same as information gathered for criminal law enforcement, for the purposes of the law enforcement exemption. However, they were concerned that such an exemption not be too broadly construed:
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> > …if the notion of material relating to civil and regulatory enforcement is too broadly construed, much that should be made accessible under a freedom of information law would be brought within the exemption. In particular, it would be inappropriate to withhold routinely from public scrutiny all material relating to routine inspections and other similar enforcement mechanisms in such areas as health and safety legislation, fair trade practices laws, environmental protection schemes, and many of the other regulatory schemes administered by the government.
> >
> > Under the U.S. act, it has been accepted that routine material of this kind not gathered for the purpose of investigating a particular offence is not exempt from the general rule of access merely because it relates to the enforcement of law.

> Consistent with the above discussion, orders interpreting section 14(4) of the *Act* have found that "complaint driven" inspections are not "routine inspections" (see, for instance, Order 136). Other orders have concluded that the existence of a discretion to inspect or not to inspect is an important factor in deciding whether an inspection is "routine" (see, for instance, Order P-480 and P-1120).
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> I agree that the existence of a discretion to inspect is a factor to be considered in deciding whether an inspection is "routine" for the purpose of section 14(4) of the *Act*. Since discretion, however, takes many forms and can be of varying levels of significance in the whole scheme of regulatory enforcement, I find that it is not always a determining factor. As was noted in Order 136 by former Commissioner Sidney B. Linden, "it is the nature of the inspection itself" which is important. I turn therefore to consider the nature of the inspections which are recorded in the area inspection reports.

[44] In Order P-136, former Commissioner Sidney B. Linden explained that:

> … it is the nature of the inspection itself which should be considered in deciding whether it falls within the scope of subsection 14(4). As far as "complaint driven" inspections (such as the one that generated the records at issue in this appeal) are concerned, the components of these types of inspections would necessarily vary depending on the nature of the information supplied by the complainant, and, in my view, they could not be said to be "routine".

[45] I have considered the parties submissions on this issue and reviewed the Closure Report, the Compliance Policy and regulation 242/05. The Closure Report resulted from the culminating investigation that originated with an alleged failure to comply with a Provincial Officer's Report. The Provincial Officer's Report arose out of an inspection that was triggered by a Boil Water advisory. Leaving aside whether the inspection of the system by the Provincial Officer, was or was not routine, the nature of the investigation that led to the Closure Report, was not predicated on an inspection, but on the potential breach of an Order. In my view, this takes it out of the realm of a report that arises out of a routine inspection. Considering the nature of the investigation underlying the creation of the Closure Report, I find that this record does not fall within the scope of the section 14(4) exclusion.

[46] I find therefore that section 14(4) does not apply in the circumstances and the Closure Report is therefore exempt under section 14(2)(a).

D. Did the ministry properly exercise its discretion?

[47] The exemption at section 14(2)(a) is discretionary and permits an institution to disclose information despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so. In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

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

[48] In any of these cases, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[15]

[49] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:

- the purposes of the *Act*, including the principles that:
    - information should be available to the public;
    - individuals should have a right of access to their own personal information;
    - exemptions from the right of access should be limited and specific; and
    - the privacy of individuals should be protected.
- the wording of the exemption and the interests it seeks to protect;
- whether the requester is seeking his or her own personal information;
- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;
- the relationship between the requester and any affected persons;

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[15] Order MO-1573.

- 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 age of the information;
- the historic practice of the institution with respect to similar information.

[50] However, pursuant to section 54(2) of the *Act*, this office may not substitute its own discretion for that of the institution.

[51] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*,[16] the Supreme Court of Canada discussed the exercise of discretion under section 14 of the *Act* as follows:

> … the "head" making a decision under ss. 14 and 19 of the *Act* has a discretion whether to order disclosure or not. This discretion is to be exercised with respect to the purpose of the exemption at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of the particular case. The decision involves two steps. First, the head must determine whether the exemption applies. If it does, the head must go on to ask whether, having regard to all relevant interests, including the public interest in disclosure, disclosure should be made.

[52] In its representations on the exercise of discretion, the ministry sets out the factors and circumstances that were considered in the exercise of discretion. As set out above, the ministry submitted that, except for the information it withheld under section 21(1) of the *Act*, it provided all of the actual investigation records to the appellant. The ministry submits that it "applied exemptions narrowly in order to provide [the appellant] with as many of the responsive records as is possible".

[53] Furthermore, the ministry submits that:

> … based on the analysis contained in the Closure Report, the delegated decision maker decided that other parties subject to the *SWDA* not be made aware of the rationale for not proceeding with charges as this

[16] 2010 SCC 23 at paragraph 66.

> information may lead to other instances of non-compliance with environmental legislation.

[54] The appellant submits that based on the Draft Order that was partially disclosed in response to the request, rather than lay charges against the users of a private system, the ministry is instead contemplating serving an Order on the Corporation of the City of Kawartha Lakes (the city). The appellant submits that this turns an issue involving a private system into an issue involving the expenditure of public taxpayer funds, resulting in there being a public interest in understanding "how and why this decision was reached."

[55] The appellant further submits that the ministry has not shown that it is in the public interest to refuse disclosure of the Closure Report:

> … [the ministry] submits that it exercised its discretion to not disclose the Closure Report because "the raw details of the investigation were disclosed to the requester." This is not an appropriate reason for refusing to disclose a record. In addition, … the "raw details" which the [ministry] purports to have already disclosed … contains little more than the Order in question … as well as the [ministry's] file opening information, which reveals nothing in respect of the investigation/enforcement question at hand. Neither the raw details of the investigation nor the results of the analysis required pursuant to the Compliance Policy or the Regulation have been disclosed. It is also noteworthy that the Regulation requires that the Director provides reasons if the Director decides not to investigate or that an applicant be notified of the outcome of an investigation if there is an ongoing investigation. It is clearly not contemplated by statute that this information remain public and …, it is clearly in the public interest that it be disclosed.
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> There is no evidence that the [ministry] considered the public interest when exercising its discretion not to release this information. In fact, in failing to prosecute these individuals, the [ministry] has put the public at risk of being required to respond to an order. It would be very much in the public interest for the taxpayers to therefore know why their tax dollars might be called upon to remedy a private system.
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> … the [ministry] submits that it exercised its discretion to not disclose the Closure Report so that "other parties subject to the [*SWDA*] not be made aware of the rationale for not proceeding with charges as this information may lead to other instances of non-compliance with environmental legislation." This not an appropriate reason for refusing to disclose a record under section 14(2)(a) and again the public interest in knowing

> why and when taxpayers might be called upon to remedy a private system outweighs the risk or concern expressed by the [ministry].
>
> In other areas of law enforcement, including investigations under the *Criminal Code of Canada*, accused parties are often given reduced sentences or no sentences at all. The reasons for reduced sentences are made public, regardless of the risk that this might lead to non-compliance by others. By analogy, when the [ministry] decides not to charge certain persons under the [*SWDA*], it is not reasonable for the [ministry] to refuse disclosure of its reasons simply because of a fear that this might lead to non-compliance by others.

[56] The ministry submits that in this case instead of seeking an Order from this office for a re-exercise of discretion, the appellant is instead "asking that the ministry consider another reason which is equivalent to substituting its own discretion for that of the ministry." The ministry further submits that it was appropriate for it to consider that disclosure may lead to other possible instances of non-compliance and that although it did not rely on section 14(1)(l) of the *Act*[17] which applies to exempt from disclosure a record where the disclosure could reasonably be expected to "facilitate the commission of an unlawful act", "…it would be an appropriate reason when the delegated decision maker exercised her discretion to deny access to the Closure Report."

Analysis and Finding

[57] As the submission pertaining to the relevance of section 14(1)(l) relates to an exemption that was not applied, or it appears, contemplated by the Head when exercising their discretion, I will not consider it here. Furthermore, the reasonableness of the ministry's search for, and identification of, other responsive records is not at issue in this appeal. That said, the ministry only withheld information that it determined was subject to section 21(1) from the records that were disclosed to the appellant.

[58] As set out above, this office may not substitute its own discretion for that of the institution. However, I do not believe that the appellant is suggesting a substitution of its discretion for that of the ministry, rather the appellant is challenging the ministry's exercise of discretion.

[59] Given the circumstances and nature of the information at issue, I find that only relevant and proper considerations were relied upon in making the decision to not disclose the withheld information. In that regard I note that while the public interest

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[17] Section 14(1)(l) provides that a head may refuse to disclose a record where disclosure could reasonably be expected to facilitate an unlawful act or hamper the control of crime.

override in section 23 of the *Act*[18] does not apply to section 14(2)(a), there are a number of decisions under section 23 that consider the public interest in the non-disclosure of information.[19] I am satisfied that the ministry considered the public interest in exercising its discretion. Accordingly, I uphold the exercise of discretion and will not disturb it on appeal.

ORDER:

I uphold the ministry's decision and dismiss the appeal.

Original Signed by: October 25, 2012
Steven Faughnan
Adjudicator

[18] Section 23 reads: 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.
[19] Under section 23 any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)]. See also Orders PO-2072-F and PO-2098-R.