

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3305-F

Appeals PA11-517 and PA11-518

Ministry of Community Safety and Correctional Services

February 6, 2014

Summary: The appellant made a request to the Ministry of Community Safety and Correctional Services (the ministry) for copies of videotapes taken of Ontario Provincial Police briefing sessions conducted in preparation for two protests. The ministry identified two videotapes and denied access to them, claiming the application of the discretionary exemption in section 14(1) (law enforcement) and the mandatory exemption in section 21(1) (personal privacy). During the inquiry, the ministry advised that it was no longer relying on section 21(1) to deny access to the records. In Order PO-3282-I, the adjudicator upheld the ministry's decision, in part, and ordered it to disclose two portions of one of the videotapes to the appellant. In addition, the adjudicator did not uphold the ministry's exercise of discretion, as the ministry did not provide representations on that issue, and ordered it to exercise its discretion under section 14(1) and to provide the adjudicator with representations on that issue. This is the final order, disposing of the remaining issue in the appeal, which is the ministry's exercise of discretion, which is upheld.

OVERVIEW:

[1] This is the final order in these appeals. It addresses the exercise of discretion by the Ministry of Community Safety and Correctional Services (the ministry), disposing of the final issue raised in response to a request for copies of videotapes taken of Ontario Provincial Police briefing sessions conducted in preparation for two protests.

[2] The ministry denied access to two videotapes, in their entirety, citing the discretionary exemption in section 14(1) (law enforcement) and the mandatory exemption in section 21(1) (personal privacy).

[3] On December 4, 2013, I issued Order PO-3282-I, upholding the ministry's decision in part. I ordered them to disclose portions of one of the videotapes to the appellant. In that order, I commented as follows on the ministry's exercise of discretion:

Unfortunately, I am unable to determine whether the ministry exercised its discretion properly, as I have not been provided with any evidence from the ministry on this issue despite my specific request for its representations in appeal PA11-518.

The exemption in section 14(1) is discretionary and, as such, the ministry must turn its mind to whether or not to disclose information and must articulate this to the appellant and this office, explaining the factors used in exercising its discretion, so that this office can be sure the ministry considered relevant factors and did not consider unfair or irrelevant factors.

I will, therefore, order the ministry to exercise its discretion, and provide the appellant and this office with written representations on how it did so. I remain seized of this matter pending the resolution of the issue outlined in order provision two.

[4] Accordingly, I included Order Provision 2, which contained the following term related to the exercise of discretion:

I order the ministry to exercise its discretion under section 14(1) in accordance with the analysis set out above and to advise the appellant and this office of the result of this exercise of discretion, in writing. If the ministry continues to withhold all or part of the records, I also order it to provide the appellant with an explanation of the basis for exercising its discretion to do so and to provide a copy of that explanation to me. The ministry is required to send the results of its exercise, and its explanation to the appellant, with the copy to this office no later than **January 6, 2014**. If the appellant wishes to respond to the ministry's exercise of discretion, and/or its explanation for exercising its discretion to withhold information, he must do so within **21 days** of the date of the ministry's correspondence by providing me with written representations.

[5] The ministry complied with Order Provision 2 by providing me with representations on the results of its exercise of discretion. The appellant submitted representations to this office in response to the ministry's representations on its exercise of discretion.

DISCUSSION:

Did the ministry properly exercise its discretion under section 14(1) of the *Act*?

[6] The section 14(1) exemption is discretionary. Therefore, once it is determined that a record qualifies for exemption under this section, the ministry must exercise its discretion in deciding whether or not to disclose it.

[7] Under section 14(1), the exercise of discretion involves a weighing of the appellant's right of access against the ministry's ability to control crime.

[8] 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.

[9] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹

- 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;

¹ Orders P-344 and MO-1573.

- whether the requester is an individual or an organization;
- the relationship between the requester and any affected persons;
- 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; and
- the historic practice of the institution with respect to similar information.

[10] The ministry submits that it exercised its discretion in accordance with its usual practices and determined that the videotapes should not be disclosed, taking into account the following considerations:

- it believes in protecting investigative techniques and procedures that would be revealed if the videotapes are disclosed;
- it wishes to protect detailed and sensitive law enforcement intelligence information respecting an organization and certain individuals; and
- it is important to exercise caution in relation to the disclosure of sensitive law enforcement records.

[11] The ministry goes on to argue that it has reviewed the reasons advanced by the appellant as to why he should be granted access to the videotapes, and has concluded that his reasons do not override the law enforcement exemption and the ministry's concerns described above.

[12] The appellant disagrees that the ministry properly exercised its discretion for the following reasons:

- the reasons provided by the ministry are "curt," general and amount to little more than a paraphrasing of sections 14(1)(c) and 14(1)(g);
- the issue in the appeals is not "sensitive law enforcement records" in general as claimed by the ministry, but rather the issues are investigative techniques and law enforcement intelligence information;

- the *Act* is not concerned with the ministry's "beliefs" or "desires." The appropriate threshold is whether the disclosure of the videos could reasonably be expected to cause harm in the particular circumstances of the access requests;
- the ministry's "wholesale" application of the exemptions to the entirety of the remaining portions of the videos is unreasonable and reveals a "disturbing" insensitivity to the principle of police accountability;
- the ministry did not provide any information concerning the weight given to its concerns about disclosure of investigative procedures and techniques against law enforcement intelligence information;
- the ministry failed to consider the public interest in the disclosure of the videos even though it must be taken into consideration when an institution exercises its discretion when applying the exemption in section 14(1);²
- the ministry failed to take into consideration the cost of the policing of the protests, the appellant's research objectives, or the passage of time since the briefing sessions; and
- the ministry may have taken into consideration irrelevant factors in exercising its discretion, such as potential embarrassment to the OPP, if officers were instructed in the videos that the OPP's *Framework for Police Preparedness for Aboriginal Critical Incidents* no longer applied or if it was not discussed.

[13] Although it is the appellant's position that the ministry's representations regarding its exercise of discretion are not sufficiently detailed, I find that the ministry took into account relevant factors in weighing the relevant factors both for and against the disclosure of the information at issue and did not take into account irrelevant considerations. In my view, the ministry's representations reveal that it considered the appellant's position and circumstances, balanced against its mandate to engage in law enforcement and the prevention and control of crime, in exercising its discretion not to disclose the information at issue.

[14] Under all the circumstances, therefore, I am satisfied that the ministry has appropriately exercised its discretion under section 14(1).

² The appellant cited *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* to support his position;

ORDER:

I uphold the ministry's exercise of discretion to apply the exemption in section 14(1) to the withheld information that I did not order disclosed in Order PO-3282-I.

Original signed by: _____
Cathy Hamilton
Adjudicator

_____ February 6, 2014