Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-3322-I

Appeals PA-980338-1 and PA-990137-1

Ministry of the Solicitor General and Correctional Services

March 19, 2014

Summary: Pursuant to the Supreme Court of Canada decision in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, the ministry's claim of section 14 to exempt an entire police brief relating to the disappearance of an audio tape and the conduct of police officers and the Crown Attorney during a murder trial was returned to the IPC for reconsideration of the ministry's exercise of discretion under that section. Interim Order PO-3231-I considered the ministry's exercise of discretion and found that the ministry's decision took into account irrelevant factors and failed to take into account relevant considerations. The ministry was ordered to re-exercise its discretion. This order considers the ministry's re-exercise of discretion and finds that the ministry's further revised decision is flawed. The ministry is ordered to re-exercise its discretion.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 14(2)(a); *Police Services Act*, Ontario Regulation 267/10, section 8.

Orders and Investigation Reports Considered: Orders PO-1779 and PO-3231-I.

Cases Considered: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23; *R v. Court* (1997), 36 O.R. (3d) 263 (Gen. Div.).

OVERVIEW:

[1] This order arises from a series of access to information requests to the Ministry of the Solicitor General and Correctional Services, now the Ministry of Community

Safety and Correctional Services (the ministry) in 1998. The requests were for information relating to an investigation into the disappearance of an audio tape and the conduct of police officers and the Crown Attorney during a double murder trial. The murder charges were eventually stayed after the court found that there had been "many instances of abusive conduct by state officials…".[1]

[2] Three responsive records were located: two documents contained legal advice and a 318 page report investigating police misconduct (the report). The ministry denied access to all three records pursuant to exemptions set out in sections 14(1)(c), (d), (e), (g) and (l), 14(2)(a), 19, 20 and 21(1) of the *Freedom of Information and Protection of Privacy Act* (the *Act*).

[3] The requesters appealed the ministry's decision to this office and three appeal files were opened: PA-980338-1, PA-990137-1 and PA-990218-1. The appellant in appeals PA-980338-1 and PA-990137-1 also raised the public interest override in section 23 of the *Act* and it was added as an issue.

[4] After conducting an inquiry, former Assistant Commissioner Tom Mitchinson issued Order PO-1779, in which he upheld the ministry's decision not to disclose the records. The Assistant Commissioner found that all three records contained personal information. He also found that the public interest in disclosure clearly outweighed the purpose of the personal privacy exemption on the facts, and would have applied the section 23 override with respect to the section 21 personal privacy exemption, subject to limited exceptions.[2] However, he ultimately upheld the ministry's decision because the other claimed exemptions (sections 14 and 19) are not included within the section 23 override. He also concluded that the omission of sections 14 and 19 from the public interest override did not constitute a breach of the appellant's *Charter* right to freedom of expression.

[5] The appellant in PA-980338-1 applied for judicial review of Order PO-1779. The Divisional Court upheld the decision not to disclose the records. In a majority decision, the Ontario Court of Appeal allowed the appellant's appeal, finding that the exemption scheme in the *Act* violated the *Charter*.

[6] In 2007, the appellant in PA-990218-1 abandoned that appeal and that file was closed.

[7] The ministry then sought, and was granted, leave to appeal the matter to the Supreme Court of Canada (the Supreme Court), who issued their decision on June 17, 2010.[3] The Supreme Court allowed the ministry's appeal and held that:

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[1] *R v. Court* (1997), 36 O.R. (3d) 263 (Gen. Div.), p. 300 cited in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23, para. 10.

[2] Order PO-1755, pp. 22-25.

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

- the Assistant Commissioner's order confirming the constitutionality of section 23 of the *Act* should be restored;
- the two records protected by section 19 of the *Act* should be exempt from disclosure; and
- the claim under section 14 should be returned to the Commissioner for reconsideration of the ministry's exercise of discretion under section 14.

[8] The matter was remitted back to this office to consider the ministry's refusal to release any part of the 318 page report investigating police misconduct that was the subject of the *discretionary* exemption in section 14 of the *Act*.

[9] Upon remittance to this office, the ministry advised that it would issue a revised decision with respect to the access request. As part of this process, the ministry notified the Ministry of the Attorney General, the Ontario Provincial Police (the OPP), the Halton Regional Police Service (the Halton police), the Hamilton Police Service (the Hamilton police) and 11 individuals who were interviewed as part of the investigation (the interviewees).

[10] In December 2011, the ministry issued a revised decision letter and disclosed portions of the report to the appellant. The appellant submitted written representations in response to the revised decision letter and the ministry submitted representations in reply.

[11] By Order PO-3231-I, dated July 11, 2013, I found that in exercising its discretion, the ministry took into account irrelevant factors and failed to take into account relevant considerations. As a result, I ordered the ministry to re-exercise its discretion in accordance with my directions set out in that order.

[12] In October 2013, the ministry issued a further revised decision letter and shortly thereafter disclosed additional portions of the report to the appellant. Upon receiving the further revised decision, the appellant advised that it wished to proceed with the appeal.

[13] For the reasons that follow, I find that the ministry's further revised decision is flawed. I order it to re-exercise its discretion in accordance with my directions set out in this order.

RECORDS:

[14] One record remains at issue. Pages 1 to 24 of the report contain the history, police investigation and summary of the police investigation into the missing tape;

pages 25 to 46 consist of the “Disclosure Final Report,” and pages 47 to 318 consist of notes relating to eleven identified individuals who were interviewed.

DISCUSSION:

Did the ministry properly exercise its discretion under section 14?

[15] Section 14(2)(a) states that:

> 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

[16] The exemption is discretionary. It permits the institution to disclose information that is subject to the exemption, despite the fact that the information could be withheld under the *Act*. This means that the institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to properly do so. The onus is on the institution to demonstrate that it has properly exercised its discretion.

[17] As set out in its further revised decision, the ministry continues to exercise its discretion to withhold five categories of information contained in the report:

(a) personal information to which the public interest override did not apply in Order PO-1779;
(b) information to which a publication ban applies;
(c) information which may identify police informants;
(d) notes or summaries of interviews conducted during the investigation for which the interviewees object to the disclosure; and
(e) notes or summaries of interviews conducted during the investigation for which the interviewees did not respond to the ministry’s consultation letter.

[18] I uphold the ministry’s exercise of discretion to withhold information in categories (a), (b) and (c).

[19] I do not uphold the ministry’s re-exercise of discretion with respect to information in categories (d) and (e). Discretion must be exercised properly and based on appropriate principles. The ministry has not done so for these two categories of information.

Category (a): personal information to which the public interest override does not apply

[20] The information in category (a) includes home addresses, dates of birth and personal telephone numbers that appear in the report. In Order PO-1779, former Assistant Commissioner Mitchinson held that this information is subject to the *mandatory* exemption in section 21 of the *Act* and the public interest override does not apply to it. As a result, it is not being withheld based on the *discretionary* law enforcement exemption in section 14(2)(a) and therefore I do not need to consider the ministry's exercise of discretion over information in category (a).

Categories (b) and (c): information relating to publication bans or which may identify police informants

[21] For categories (b) and (c), I uphold the ministry's exercise of discretion to withhold the names of police informants (to the extent that such information is not already disclosed in publicly reported court decisions) and other information (the names and evidence of certain individuals) that is the subject of an ongoing publication ban. These redactions are of a limited nature, not central to the public interest surrounding the investigation, and do not extend to information that is already disclosed in public court decisions. I also accept the ministry's position that the police have obligations to protect the identity of police informants. Finally, I note that the appellant has previously indicated that it does not object to the redaction of information subject to the publication ban.

Categories (d) and (e): information from interviews conducted as part of the investigation

[22] In order to determine whether the ministry has properly exercised its discretion, one must consider the reason why this information may be exempt from public disclosure. With regard to section 14(2)(a), the Supreme Court stated as follows:

> The main purpose of this section is to protect the public interest in getting full and frank disclosure in the course of investigating and reporting on matters involving the administration of justice; an expectation of confidentiality may further the goal of getting at the truth of what really happened. At the same time, the discretion conferred by the word "may" recognizes that there may be other interests, whether public or private, that outweigh this public interest in confidentiality.[4]

[23] The Supreme Court has confirmed that this office may quash an institution's decision not to disclose and return the matter for reconsideration where: the decision

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[4] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23, para. 50.

was made in bad faith or for any improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations.[5]

[24] In my view, the ministry's re-exercise of discretion must be quashed for the following reasons. First, the interviews were with individuals who are/were members of the public service, in their capacity as Crown attorneys, police officers or court officials. As I noted previously in Order PO-3231-I, this is not a typical investigation in which evidence was gathered from members of the general public. Unlike the general public, police officers and crown attorneys may, and in many cases do, have an obligation to cooperate with internal investigations into police/crown conduct. In some situations, such as SIU investigations, police officers (who are not targets of an investigation) have a statutory obligation to answer all questions related to a SIU investigation.[6] There is no rational basis to find that disclosure of information relating to interviews with individuals who are/were members of the public service, in their capacity as Crown attorneys, police officers or court officials could have the same "chilling effect" on public cooperation with future law enforcement investigations that would result from the disclosure of information received from the general public.

[25] Second, there is no evidence before me that the interviewees were ever provided any assurance that information gathered in the interviews would remain confidential. To the contrary, the heading summarizing each interview, titled "anticipated evidence", suggests that the information elicited during these interviews could potentially be disclosed through oral testimony at a future criminal proceeding.

[26] Third, some of the information that the ministry continues to withhold are interviews with interviewees who were also witnesses in the stay application before Glithero J. Presumably some (if not all) of the information contained in these interviews has already been disclosed in a public court room.

[27] Fourth, neither the Halton police nor the Hamilton police (the two police services involved in the original murder investigation) had any law enforcement concerns with the release of this report, other than information which would identify police informants. In fact, one of the two police services suggested to the ministry that certain severances that the ministry intended to claim were no longer valid given the passage of time.

[28] Fifth, the compelling public interest in the disclosure of the interviews in the report must be accounted for. Glithero J. stayed a double murder prosecution after finding "many instances of abusive conduct by state officials" including "systematic non-disclosure, deliberate revision of materials so as to exclude useful information to the defence, the unexplained loss, or breach of the duty to preserve, of so much original

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[5] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23, para. 71.
[6] Ontario Regulation 267/10, s. 8.

evidence…”.[7] “No evidence” was the public finding of the police investigation. In its reasons, the Supreme Court acknowledged the “clear public interest in knowing why the misconduct found by Glithero J. did not merit criminal charges…”.[8] Neither the OPP nor the ministry has offered a public explanation for the disconnect between the results of the OPP investigation and the findings of Glithero J.

[29] The ministry has also offered no credible explanation as to how the interests in non-disclosure could outweigh the compelling public interest in favour of disclosure. While the ministry lists a series of factors that it says it took into account in reaching its decision, the consent of the interviewees was the determinative (if not only) factor in deciding whether to release the information. I note that in its earlier representations to this office, dated July 20, 2011, the ministry candidly stated:

> Having consulted with the eleven individuals who were interviewed by the OPP in the course of the investigation and whose statements and other personal information appear in the Report, **the Ministry has made redactions in accordance with their wishes**. In the case of the two individuals who did not respond to the Ministry's consultation letter, the Ministry has taken the position that they have not consented to the disclosure of their personal information and has therefore redacted that information. [emphasis added]

[30] In the further revised decision, this remains unchanged. The ministry continues to redact and withhold interviews “in accordance with their [the interviewees'] wishes”. From a review of the information still withheld, it appears that the presence or absence of individual consent dictated the outcome. In other words, it is apparent that the ministry's exercise of discretion was performed through the prism of the personal privacy exemption found at section 21 of the *Act* and not the law enforcement exemption as directed in my previous reconsideration order.

[31] I would like to highlight one example of the ministry's flawed exercise of discretion. One police official's interview was withheld in full, after he refused to consent to its disclosure. He explained that he would not consent to releasing his interview because the disclosure could potentially result in criticism of other police officials involved in the murder investigation. Refusing to disclose the interview, on the basis of that police official's wishes, cannot be a proper exercise of discretion.

[32] Given that this office may not substitute its own exercise of discretion for that of the institution, my only recourse is to send this matter back to the ministry to once again re-exercise its discretion. In doing so, I wish to guide the ministry in its task. To be clear, any exercise of discretion in which the ministry continues to withhold all parts

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[7] *R v. Court* (1997), 36 O.R. (3d) 263 (Gen. Div.), p. 300 cited in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23, para. 10.

[8] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23, para. 11.

of the six interviews (including the very fact that interviews were conducted with these individuals) where the interviewee either did not respond or objected to the disclosure of their interviews is improper and will not be upheld by this office. In such situations, the ministry is not exercising its discretion. Instead, the ministry is improperly delegating its discretion to third parties who may have a vested personal interest in withholding the information. The discretion is the ministry's to exercise, not the interviewees'.

ORDER:

1. I uphold the ministry's decision to withhold certain information on pages 11, 16, 20, 21 (except for the police official's name that is redacted twice in the third paragraph – this appears to have been withheld in error), 22, 48-51, 68-69, 84-85, 87, 105-120, 271-272, 274 and 293-307 of the report on the basis that this is personal information to which the public interest override did not apply in PO-1779.[9]

2. I uphold the ministry's decision to withhold certain information contained on pages 26-29 and 61-62 of the report on the basis that this information disclosed the names and evidence of individuals to whom a publication ban relates.

3. I uphold the ministry's decision to withhold certain information contained on pages 85 and 87 of the report on the basis that this information disclosed the name of a police informant.

4. I do not uphold remaining redactions made by the ministry and order it to re-exercise its discretion and to advise the appellant of the result of this further re-exercise of discretion in writing. If the ministry continues to withhold parts of the report (other than those set out in order provisions 1, 2 and 3), I also order it to provide the appellant with an explanation of how it is exercising its discretion for each part of the report that is being withheld. The ministry is required to send the results of its further re-exercise of discretion and its explanation to the appellant, with a copy to this office by no later than **April 9, 2014**. If the appellant wishes to respond to the ministry's further re-exercise of discretion and/or its explanation for exercising its discretion to withhold information, the appellant must do so within **21 days** of the date of the ministry's further decision.

[9] In its further revised decision, the ministry claims to have redacted information from pages 17, 45-46, 52-67, 70-83, 86, 88-104, 273, 275-285 as being personal information to which the public interest override did not apply in PO-1779. Except for certain information set out in order provision 2 (pages 61-62), these pages of the report have been provided in full to the appellant.

5. I remain seized of this matter pending the resolution of the issue outlined in provision 4.

Original signed by: March 19, 2014
Brian Beamish
Assistant Commissioner