Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-3282-I

Appeals PA11-517 and PA11-518

Ministry of Community Safety and Correctional Services

December 4, 2013

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 this order, the adjudicator upholds the ministry's decision, in part, and orders the ministry to disclose two portions of one of the videotapes to the appellant. In addition, the adjudicator does not uphold the ministry's exercise of discretion and orders it to do so.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 14(1)(c), 14(1)(e), 14(1)(g) and 14(1)(l).

OVERVIEW:

[1] This order disposes of one of the issues raised as a result of two requests made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Community Safety and Correctional Services (the ministry) for information relating to Mohawk road and rail blockades, occupations and protests.

Appeal PA11-517

[2] Appeal PA11-517 relates to the request for the following information:

> Videotapes of all briefing sessions held with the OPP[1] officers to prepare them for their policing duties with respect to the National Aboriginal Day of Action events – such as Mohawk road and rail blockades - at or near the Tyendinaga Mohawk Territory on [a specified date].

[3] The ministry issued a decision letter, denying access to the requested information, claiming the application of the discretionary exemptions in sections 14(1)(c), 14(1)(g) (law enforcement) and the mandatory exemption in section 21(1)(a) (personal privacy) of the *Act*.

[4] The requester (now the appellant) appealed the ministry's decision to this office.

[5] During mediation, the ministry issued a supplementary decision to the appellant, advising that it was also raising the application of the discretionary exemptions in sections 14(1)(e) (endanger life or safety) and 14(1)(l) (facilitate commission of an unlawful act) of the *Act*.

Appeal PA11-518

[6] Appeal PA11-518 relates to the request for the following information:

> Videotapes of all briefing sessions held with the OPP officers to prepare them for their policing duties with respect to the Mohawk occupations, protests and roadblocks at or near Deseronto related the development of the "[named company] site" and the Cuthbertson Tract land claim from [specified dates].

[7] The ministry issued a decision letter, denying access to the requested information, claiming the application of the discretionary exemptions in sections 14(1)(c), 14(1)(g), 14(1)(l) and the mandatory exemption in section 21(1) of the *Act*.

[8] The requester (now the appellant) appealed the ministry's decision to this office.

[9] During mediation, the ministry issued a supplementary decision to the appellant, advising that it was also raising the application of the discretionary exemption in sections 14(1)(e) of the *Act*.

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[1] Ontario Provincial Police.

[10] The appeals were then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the ministry and the appellant, which were shared in accordance with this office's *Practice Direction 7*.

[11] The ministry advised in its representations that it was no longer relying on the mandatory exemption in section 21(1) with respect to both appeals. Therefore, this exemption is no longer at issue.

[12] As the parties and issues are the same, I decided to dispose of both appeals in a single order. For the reasons that follow, I uphold the application of the exemption in section 14(1), in part. I order the ministry to disclose portions of the video in appeal PA11-518. In both appeals, I do not uphold the ministry's exercise of discretion and I order the ministry to do so.

RECORDS:

[13] The records at issue are contained on two CD's and consist of videos of two OPP briefing sessions.[2]

ISSUES:

A: Do the discretionary exemptions at sections 14(1)(c), 14(1)(e) 14(1)(g) and 14(1)(l) apply to the records?

B: Did the ministry exercise its discretion under section 14(1)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Do the discretionary exemptions at sections 14(1)(c), 14(1)(e) 14(1)(g) and 14(1)(l) apply to the records?

[14] The ministry is claiming the application of sections 14(1)(c), 14(1)(e), 14(1)(g) and 14(1)(l) to the videos in both appeals. These sections state:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,

[2] Each briefing session is approximately 35 minutes in duration.

> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons; or
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

[15] The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

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

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

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

[18] 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.[5]

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[3] Orders M-202, PO-2085.
[4] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.) (*Fineberg*).
[5] Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

[19] In the case of section 14(1)(e), the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated.[6]

[20] 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.[7]

The ministry's representations

[21] The ministry states that the briefing sessions were conducted for and on behalf of members of the OPP to prepare them for their policing duties at the locations referred to in the requests. The briefing session recorded on the CD in appeal PA11-517 was held in preparation for the National Aboriginal Day of Action events near the Tyendinaga Mohawk Territory in 2007, while the briefing session referred to in appeal PA11-518 was held in preparation for occupations, protests and roadblocks near Deseronto in 2008.

[22] The ministry submits that the records were created strictly for law enforcement purposes, and that policing operations were established in these instances to preserve the peace, protect public safety and to enforce the law, all of which are core policing duties. In addition, the ministry states that the records were created to capture the preparations OPP members received at the briefing, in order to plan as much as possible for every foreseeable eventuality.

[23] The ministry further submits that although the records were created approximately five years ago, the type of disputes that took place at that time remain ongoing and as "contentious and volatile" as ever. For example, the ministry states that in December 2012 and January 2013, there were more rail blockades in the area, as well as renewed threats of violence by protestors. The ministry argues that the leader of the protesters is on the record as stating to the Canadian Press that the protesters had guns in the camp. In addition, the ministry provided media articles, quoting one protestor as stating that "[t]his protest is peaceful. The next one won't be," and another article stating that if the police had enforced a court order to remove the barricades and tried to make arrests, there would have been a fight.[8]

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[6] *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.).
[7] Order PO-2040; *Ontario (Attorney General) v. Fineberg*.
[8] Warrior Publications, December 30, 2012 and APTN National News, January 7, 2013.

[24] The ministry states:

> Obviously, the OPP has been challenged by these events, as it must preserve the peace, protect public safety, and yet also minimize disruption to vital national transportation infrastructure, such as trains and highways. The Ministry fears that it would not take much for the anger generated by this ongoing dispute to boil over. The Ministry does not want the disclosure of the record, and the visceral impact it could have, to play any part in triggering further illegal activities.
>
> The Ministry is of the view that the exemptions the Ministry has claimed in section 14 [of the *Act*] ought to be interpreted in light of the reality of the situation as it existed in 2007 [and 2008] and as it still exists. Specifically, the Ministry has withheld the responsive record for the following reasons:
>
> The record[s] contains investigative techniques and procedures that members of the OPP were requested to follow as part of their policing duties during the National Day of Action;
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> The release of the video[s] could endanger the life or physical safety of law enforcement officials in attendance at the briefing given that [they] contains images that would identify law enforcement officials, including in some cases the names of those who were involved in policing the National Day of Action [and the dispute];
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> The record[s] contains law enforcement intelligence information, and the Ministry further contends that the disclosure of the record[s] would interfere with the gathering of such information;
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> The Ministry contends that the release of the record[s] would facilitate the commission of unlawful acts or hamper the control of crime by rendering public information that the Ministry contends is not currently part of the public domain, and that could be used to harm ongoing law enforcement activities; and
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> . . .

[25] The ministry provided a further reason for withholding the records. The content of this reason met the confidentiality criteria of *Practice Direction 7* and will not be described in detail in this order, although I have taken it into consideration.

[26] Moreover, the ministry submits that the decision in *Fineberg* is particularly relevant in the context of these appeals. In particular, the ministry notes that it is established jurisprudence that the law enforcement exemption must be "approached in

a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context." The ministry argues that in applying *Fineberg* to the circumstances of these appeals, it is impossible to anticipate the various ways in which individuals with criminal intent can use the records to take advantage of situations that remain challenging and volatile. The ministry goes on to argue that caution must be exercised in not disclosing these records, which could harm either law enforcement operations or endanger public safety, particularly in light of the ongoing disputes in Tyendinaga and Deseronto.

Section 14(1)(c): investigative techniques and procedures

[27] In order to meet the "investigative technique or procedure" test, the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public.[9]

[28] The techniques or procedures must be "investigative". The exemption will not apply to "enforcement" techniques or procedures.[10]

[29] The ministry submits that the records contain investigative techniques or procedures that are not widely known and that remain in current use, especially given the ongoing nature of the disputes at Tyendinaga and Deseronto. The ministry provided details of the investigative techniques and procedures in its representations, but I am unable to describe them in detail in this order, as they met the confidentiality criteria in *Practice Direction 7*. In particular, disclosure of these portions of the ministry's representations would reveal the content of the records at issue.

14(1)(e): life or physical safety

[30] A person's subjective fear, while relevant, may not be sufficient to establish the application of the exemption.[11] The term "person" is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization.[12]

[31] The ministry submits that there is established jurisprudence that there is a lesser threshold to be met with respect to the application of section 14(1)(e) than with the other exemptions in section 14. The ministry advises that the Court of Appeal has held that the "expectation of harm must be reasonable, but in need not be probable."[13]

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[9] Orders P-170, P-1487, MO-2347-I and PO-2751.
[10] Orders PO-2034, P-1340.
[11] Order PO-2003.
[12] Order PO-1817-R.
[13] See note 5.

[32] The ministry also submits that the reasoning for applying the exemption in section 14(1)(e) to these records is similar to that in Order MO-2011, in which this office upheld the application of the municipal equivalent of this exemption to many emergency planning records, on the grounds that to disclose such records would reveal vulnerabilities in emergency response.

[33] The ministry goes on to state that it has applied this exemption because it is concerned about the life and physical safety of the members of the OPP who have been preserving the peace, protecting public safety and enforcing the law since 2007 in an extremely challenging situation that will likely continue for the foreseeable future. The ministry states that "violence may be just beneath the surface of this dispute." The ministry states that it is also concerned about the safety of the public, who may be affected by rail and highway blockades and who may end up in altercations with protestors.

Section 14(1)(g): law enforcement intelligence information

[34] The term "intelligence information" means:

> Information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violations of law. It is distinct from information compiled and identifiable as part of the investigation of a specific occurrence.[14]

[35] The ministry submits that this office has held in past orders that there is no temporal limit for the application of section 14(1)(g), such that the fact that the records were created some five years ago does not prevent the ministry from continuing to apply this exemption.[15]

[36] The ministry states that the records contain law enforcement intelligence belonging to the OPP, and therefore ought to be treated as police intelligence records. The ministry then goes on to describe the intelligence information in the records, which I will not set out in detail in this order, as it meets this office's confidentiality criteria set out in *Practice Direction 7*.

Section 14(1)(l): commission of an unlawful act or control of crime

[37] The ministry submits that disclosure of these records would facilitate the commission of unlawful activity or hamper the control of crime by rendering public

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[14] Orders M-202, MO-1261, MO-1583, PO-2751; see also Order PO-2455, confirmed in *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.).
[15] Order MO-1647.

information that it contends is not currently part of the public domain and that could be used to harm ongoing law enforcement activities. In addition, the ministry argues that disclosure of the records could cause a "visceral impact," potentially triggering further illegal activities.

[38] Lastly, the ministry states that the records cannot be severed without disclosing law enforcement information.

The appellant's representations

[39] The appellant provided very comprehensive representations in these appeals, which includes extensive information about the history of the protests that are the subject matter of these appeals. The appellant states that it is conducting research into two Mohawk land rights protests in the Tyendinaga area that were policed by the OPP and that the overarching objective of the research is to determine whether the OPP preparations were consistent with Ontario public policy and international human rights standards. The appellant advises that two underlying issues have "fuelled" more than 10 protests by Mohawk activists in the Tyendinaga area from 2006 to early 2013. The appellant identifies the two issues as an unresolved but legitimate land claim, and the threat of mining and housing development within the borders of the land being claimed.

[40] With respect to the first protest, the appellant advises that The Assembly of First Nations, which represents the chiefs of all First Nations in Canada, called for a national "Aboriginal Day of Protest" on June 29, 2007 to highlight the longstanding grievances of Aboriginal communities across Canada, such as outstanding land claims. In response to this call, the appellant advises that Mohawk activists announced, weeks in advance, of possible road and rail blockades in the Tyendinaga Mohawk Territory, and that on the evening of June 28, 2007, a group of about 50 to 75 Mohawk protesters established a road and rail blockade on County Road #2. The OPP then closed down a 30 kilometre stretch of Highway 401 between Belleville and Napanee. The appellant advises that Highway 401 was re-opened the next morning and the blockage on County Road #2 was dismantled after 24 hours, as planned.

[41] With respect to the second protest, the appellant states that Mohawk activists occupied the Culbertson Tract site on the east side of Deseronto on April 21, 2008, including blocking road access to the site. According to the appellant, a development company holds title to this land, but the land is the subject of unresolved land claim negotiations with the federal government. The appellant states that the OPP set up checkpoints at the road blockades to divert local traffic and that the following morning, community members observed a massive build-up of OPP forces, including helicopters and officers of the Public Order Unit wearing full riot gear, with shields, helmets, batons and police dogs. The blockades were subsequently dismantled by the activists.

[42] The appellant goes on to state that three days later, the OPP went to a local quarry, which had been occupied by activists for more than a year. At the quarry, the appellant advises, the OPP arrested four activists and the situation began to escalate. According to the appellant, OPP officers drew their guns and assault rifles and pointed them at the protesters and by-standers. That evening, the appellant states, the activists set up a roadblock to control access to the quarry and the OPP remained in the area. The appellant states that on the morning of April 28, 2008, approximately 200 OPP officers dismantled the barricade and by the end of the day, both police and the four remaining protesters had dispersed.

[43] Turning to the exemption in section 14(1) claimed by the ministry, the appellant submits that the ministry's denial of any access whatsoever to the records reveals a "disturbing lack of transparency and public accountability." Further, the appellant submits that the wholesale application of section 14(1) is unreasonable. In particular, the appellant submits that it is unreasonable to suggest that the disclosure of *any* portion of the records:

- might reveal investigative techniques currently in use or likely to ; *and*
- might interfere with the gathering of or reveal law enforcement intelligence; *and*
- might endanger the life or physical safety of a law enforcement officer or any other person; *and*
- might facilitate the commission of an unlawful act or hamper the control of crime.

[appellant's emphasis]

[44] The appellant further submits that the ministry's claims that the protesters had firearms are "highly debatable." The appellant states that it has interviewed participants and witnesses and found no evidence of the presence of firearms at these or subsequent protests, nor was any evidence presented in court. In addition, the appellant states that media accounts vary, with another reporter attributing a substantially different statement between the protester's leader and the Canadian Press, in which he stated that there weren't any weapons present.[16] Moreover, the appellant argues that the ministry's reference to a media account appears to be unnecessarily alarmist.

[16] Susanna Kelley on CBC's The Current, March 26, 2008.

[45] The appellant states:

> While raising the spectre of armed violence by Mohawk protesters in June of 2007, [the ministry] does not mention the role of the OPP in its disproportionate response to the Mohawk road and rail blockades . . .

[46] In addition, the appellant raises a number of points in response to the ministry's representations as follows:

- the ministry's claim that the disclosure of the records would now have a visceral impact which might trigger further illegal activities strains credulity and the ministry has provided no evidence to support this claim;
- there is a distinction between the right of protest and illegal actions;
- the ministry ignores the fact that in 2007, 2008, 2010 and 2013, the Mohawk protests and occupations ended peacefully without threats to public safety;
- the ministry has not provided any evidence that the disclosure of the videos of the briefing sessions might endanger the physical safety of OPP officers who would then be identified;
- as a result of the protests, a number of individuals were charged. Some of the OPP officers who were present at the protests provided testimony in court and have not subsequently faced reprisals from protesters;
- previous protests had been successfully and peacefully contained by the Tyendinaga Mohawk Police Service and the escalation of road and rail blockades appears to be related to the introduction of the OPP in policing the sites; and
- the possibility that the ministry is seeking to prevent the public release of information, not out of legitimate law enforcement concerns, but out of a desire to shield the OPP and its [former] Commissioner from potentially embarrassing or discrediting revelations.

[47] Lastly, the appellant argues that the videos could be severed or edited to permit the release of information, including blurring faces of individuals present.

Analysis and findings

[48] I have carefully reviewed both the non-confidential and confidential portions of the ministry's representations, the appellant's representations and I have viewed the

briefing sessions captured on video. I am satisfied that both records meet the criteria of the definition of "law enforcement" records as set out in section (1) of the *Act*, as they relate to policing. In particular, they record OPP briefing sessions conducted prior to the policing of Mohawk protests.

[49] I am not persuaded by the ministry that the exemptions in sections 14(1)(e) and 14(1)(l) apply in the circumstances of these appeals. In my view, the ministry's submissions amount to a paraphrasing of section 14(1)(e), rather than evidence as to how or why disclosure of the records at issue could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person. Although the nature of the section 14(1)(e) exemption allows an institution to submit evidence that is less cogent than that required to satisfy the other section 14(1) exemptions, an institution must still provide some evidence beyond a mere paraphrasing of the words of the exemption. This would include some explanation as to why the reasons for resisting disclosure are not frivolous or exaggerated. In my view, the ministry's generic submissions on section 14(1)(e) do not meet this minimum threshold.

[50] The ministry has not pointed to any specific information in the records at issue, which, if disclosed to the appellant, could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person. Instead, the representations appear to be based on the premise that if the ministry puts into evidence information with respect to an individual's possible statement to the press, the section 14(1)(e) exemption automatically applies to the records at issue.

[51] I acknowledge that the OPP engage in work that is potentially dangerous, and that they undoubtedly face risks to their safety while carrying out their duties. However, I am not persuaded that disclosure of the withheld information in the specific records at issue in these appeals could reasonably be expected to lead to the harms contemplated by sections 14(1)(e) of the *Act*.

[52] I am also not persuaded that disclosing the withheld information in the records at issue could reasonably be expected to lead to the harms contemplated by section 14(1)(l) of the *Act*. In my view, the ministry's confidential submissions with respect to the application of this exemption amounts to speculation of possible harm, which is not sufficient to establish that the section 14(1)(l) exemption applies to the withheld information in the records at issue.

[53] However, I am satisfied, based on my review of the records, that some of the information that is contained in both records reveals "investigative techniques and procedures." Such information does not automatically qualify for exemption under section 14(1)(c) simply because it reveals "investigative techniques or procedures." This office has found in previous orders that to meet the requirements of section 14(1)(c), the institution must show that disclosure of the investigative technique or

procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public.[17] Moreover, in Interim Order MO-2347-I, Adjudicator Colin Bhattacharjee found that disclosure of a specific investigative technique or procedure could not reasonably be expected to hinder or compromise its effective utilization if it is already accessible in publicly available records. I find that some of the information in the records would disclose the investigative techniques and procedures of the handling and management of protests, where those methods are not generally known to the public. This information, contained in both records is, therefore, exempt from disclosure under section 14(1)(c).

[54] Similarly, I am satisfied that, with two exceptions in the record in appeal PA11-518, the remainder of the information in the records meets the criteria for exemption under section 14(1)(g), as its disclosure would reveal detailed law enforcement intelligence information respecting an organization and individuals. Past orders of this office have defined intelligence information as information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violation of law, and is distinct from information which is compiled and identifiable as part of the investigation or a specific occurrence. Therefore, the fact that the briefing sessions in the records occurred approximately five years ago does not undermine the application of this exemption, because it does not contain a temporal limit. The remaining information in both records, with the two exceptions, which I discuss below, is exempt from disclosure under section 14(1)(g).

[55] Two portions of the briefing session that is the subject matter of appeal PA11-518 contain general, historical and/or factual information that is in the public domain. They neither reveal law enforcement intelligence information nor investigative techniques or procedures and are, therefore, not exempt from disclosure under section 14(1). As the ministry has not claimed any other exemptions with respect to these records, I order the ministry to disclose those portions of the record to the appellant, as set out in order provision 1.

Issue B: Did the institution exercise its discretion under section 14(1)? If so, should this office uphold the exercise of discretion?

[56] The section 14 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[17] Orders P-170 and P-1487.

[57] 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.

[58] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[18] This office may not, however, substitute its own discretion for that of the institution.[19]

[59] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[20]

- 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;
- 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

[18] Order MO-1573.
[19] Section 54(2) of the *Act*.
[20] Orders P-344 and MO-1573.

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

[60] The ministry did not provide any representations respecting the manner in which it exercised its discretion. The appellant made arguments that it is in the public interest that the records be disclosed. Although the public interest override in section 23 of the *Act* is not available to override the discretionary exemption in section 14(1), the Supreme Court of Canada held in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*[21] that the public interest must be taken into consideration when an institution exercises its discretion when applying the exemption in section 14(1). Therefore, I will consider the appellant's argument as part of my analysis of the ministry's exercise of discretion.

[61] The appellant submits that it is in the public interest to disclose the records for the following reasons:

- the high costs to the Ontario taxpayer of the OPP policing of Mohawk protests, as opposed to by the Tyendinaga Mohawk Police Service;

- one of the objectives of the appellant's research is to determine whether the recommendations arising from the Ipperwash Inquiry are being put into practice by the OPP;

- to learn as much as possible about the policing of these protests in order to take whatever steps are necessary to reduce the potential for violence and harm in future protests;

- the appellant agrees that caution must be exercised in approaching the law enforcement exemptions but it should be based on reasonable, objective grounds and should always be balanced by public interest;

- the OPP has refused to allow its officers and senior leadership to engage in interviews with the appellant, as part of the appellant's public interest research; and

- given the amount of time that has passed since the briefing sessions and that all prosecutions arising from the protests have been completed, at least some access to the videotapes in the public interest may be appropriate.

[62] As stated above, an institution must exercise its discretion. Unfortunately, I am unable to determine whether the ministry exercised its discretion properly, as I have

[21] 2010 SCC 23 (SCC).

not been provided with any evidence from the ministry on this issue despite my specific request for its representations in appeal PA11-518.

[63] 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.

[64] 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.

ORDER:

1. I order the ministry to disclose minutes 6:40 to 10:20 and 10:44 to 11:22 of the record in appeal PA11-518 to the appellant by **January 13, 2014**, but not before **January 6, 2014.**

2. 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.

3. I remain seized of these matters pending the resolution of the issue outlined in provision 2.

Original Signed By: December 4, 2013
Cathy Hamilton
Adjudicator