Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3405

Appeal PA13-170

Ministry of Community Safety and Correctional Services

September 30, 2014

Summary: This appeal arises out of a request submitted to the Ministry of Community Safety and Correctional Services by a member of the media wishing to obtain access to information about conditions in the Elgin-Middlesex Detention Centre. The requester appealed the ministry's decision to withhold information under the exemptions in sections 14(1)(i), (j) & (k) (law enforcement – security), 18(1)(f) & (g) (economic and other interests of government), 19 (solicitor-client privilege), 21(1), 21(2)(a) & (f) (personal privacy) and the exclusion in section 65(6)3 (labour relations and employment records). The appellant raised the possible application of the public interest override in section 23 of the *Act.* During the adjudication stage of the appeal, the ministry withdrew its reliance on section 19 and issued a revised decision, disclosing additional records.

In this order, the adjudicator partly upholds the ministry's decision under section 65(6)3, finding that certain portions of the records are excluded from the *Act.* The adjudicator upholds the ministry's access decision under section 21(1) only in relation to portions of page 6 because the other information withheld under the exemption does not qualify as "personal information" according to the definition in section 2(1) of the *Act.* The adjudicator also finds that sections 14 and 18 do not apply. Finally, the adjudicator finds that the public interest override in section 23 does not apply to the limited personal information withheld under section 21(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of "personal information"), 14(1)(i), (j) & (k), 18(1)(f) & (g), 21(1), 21(2)(a) & (f), 23, 65(6)3.

Orders and Investigation Reports Considered: Orders 188, P-1453, PO-2332, PO-2603, PO-2911 and PO-3291.

OVERVIEW:

[1] According to the ministry, the Elgin-Middlesex Detention Centre (EMDC) is a maximum security prison in London, Ontario that was established as part of the ministry's statutory mandate to administer correctional services under the *Ministry of Correctional Services Act.*

[2] This order addresses the issues identified in an appeal arising from the decision of the Ministry of Community Safety and Correctional Services (the ministry) in response to a request submitted by a member of the media under the *Freedom of Information and Protection of Privacy* (the *Act*) for access to the following:

> Briefing notes (including attachments) regarding the Elgin-Middlesex Detention Centre created between June 1, 2012 … [and the date of the request].

[3] The requester subsequently clarified that he sought "…access to the most recent version of all 2012 briefing/issue notes (including housebook notes) regarding the Elgin-Middlesex Detention Centre."

[4] The ministry identified 71 pages of briefing materials as responsive to the request and issued a decision to the requester providing partial access. Portions of the records were denied pursuant to the exclusion in section 65(6) (employment and labour relations), as well as the exemptions in sections 14(1)(i),(j) and (k) (law enforcement), 18(1)(f) and (g) (economic or other interests), 19 (solicitor-client privilege), and 21(1) and 21(2)(f) (personal privacy). The ministry also indicated that some information in the records was not responsive to the request. Finally, the ministry advised that the records would be provided to the requester upon payment of the fee. The requester (now the appellant) appealed the decision to this office and a mediator was appointed to explore the possibility of resolution.

[5] During mediation, the appellant removed certain information from the scope of the appeal, including information severed from the records as non-responsive to his request. The ministry declined to change its decision on any of the information remaining at issue. As the appellant argued that there is a public interest in disclosure of the information withheld from one of the pages pursuant to section 18, the possible application of section 23 of the *Act* was added as an issue.

[6] It was not possible to resolve the appeal through mediation and it was transferred to the adjudication stage, in which an adjudicator conducts an inquiry. I started my inquiry by sending a Notice of Inquiry to the ministry, seeking

representations. Those representations indicated that the ministry was withdrawing its section 19 exemption claim and that it would be issuing a revised decision. The ministry's revised decision disclosed nine additional pages, in their entirety. After the appellant had an opportunity to consider the disclosed information, he confirmed that he wished to pursue access to the remaining information.

[7] I sent the appellant a modified Notice of Inquiry, along with the non-confidential portions of the ministry's representations, inviting him to respond to the ministry's position. I received representations from the appellant that, among other things, suggested a broader application of the public interest override. Accordingly, I sent the appellant's representations to the ministry and a summary of the information withheld under exemptions to which it might apply (sections 18 and 21) to seek reply representations, which I received.

[8] In this order, I find that section 65(6)3 applies to exclude certain information from the scope of the *Act.* I also find that section 21(1) applies to several brief severances on page 6. I do not uphold the ministry's exemption claims otherwise under section 21(1), 14 or 18, and I order the remaining responsive information disclosed to the appellant.

RECORDS:

[9] The information from the briefing materials withheld from pages 6, 18, 22, 25, 26, 28-32, 36-38, 54-60 and 63 remains at issue.[1]

ISSUES:

A. Does section 65(6)3 exclude some of the responsive information from the *Act*?

B. Do the records contain "personal information" as defined in section 2(1)?

C. Does the mandatory personal privacy exemption at section 21(1) apply to the information at issue?

D. Does the discretionary law enforcement exemption at section 14(1)(i), (j) or (k) apply to the records?

E. Does the discretionary exemption for economic or other interests of government in section 18(1)(f) or (g) apply to page 22?

[1] A paragraph with identical content is severed from pages 18 and 32, with the only difference being that the ministry did not sever the introductory wording (five words) of it from page 18. A consistent exemption claim under section 14 was made respecting both instances.

F. Does the public interest override in section 23 apply to the information that is exempt under section 21?

DISCUSSION:

A. Does section 65(6)3 exclude some of the responsive information from the *Act*?

[10] The ministry claims that information on pages 25, 26, 30-31, 36-38, 54, 55, and 57-60[2] is excluded from the operation of the *Act* under section 65(6)3, which states:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[11] If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*. Section 65(6) is record-specific and fact-specific. If it applies to a specific record in the circumstances of a particular appeal, and none of the exceptions listed in section 65(7) are present, then the record is excluded from the scope of the *Act.*

[12] Under this provision, the ministry was required to establish that:

1. the records were collected, prepared, maintained or used by the ministry or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the ministry has an interest.

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[2] In particular, the ministry claims that section 65(6)3 applies to: "the last paragraph on page 25, the fifth paragraph on page 26, pages 30-31, the second to last paragraph on page 36, the first and final paragraphs on page 37, all of the exempted portions of page 38, the first paragraph of page 54, the first paragraph of page 55, the bottom half of page 57, the top half of page 58, the bottom bullet on page 59 and the top bullet on page 60." According to the notes in the appeal file, the third full paragraph of page 25 was also withheld under section 65(6)3, as was the continuation – on page 26 – of the final paragraph of page 25.

[13] The type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.[3]

[14] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.[4]

[15] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.[5]

[16] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.[6]

Representations

[17] According to the ministry, the records were "created for the sole purpose of documenting labour related issues that arose at EMDC." In a later section of its representations, the ministry also submits that the records were created by ministry staff to brief senior ministry officials about security and safety incidents at EMDC.

[18] Regarding parts one and two of the three-part test for the application of the exclusion in section 65(6)3, the ministry submits that all of the records were "prepared and used by the ministry and therefore easily fall within … part 1 of the test." Further, the ministry asserts that since the records were prepared and used solely in relation to discussions and communications to brief senior ministry officials, this satisfies part two of the test.

[19] According to the ministry, the records satisfy part three of the test for exclusion under section 65(6)3 because they are about labour relations or employment-related matters in which the ministry has an interest. The subject matter of the records

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[3] *Ontario (Ministry of Correctional Services) v. Goodis*, (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).
[4] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[5] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.
[6] Order PO-2157.

demonstrates that the ministry was acting as an employer when the records were created and used. The ministry submits that, more specifically:

- The records were created to brief senior ministry officials about labour-related incidents at EMDC and the role of ministry employees in those incidents; and

- Senior ministry officials required the briefing records "in their capacity as an agent of the employer, and for the purpose of providing advice or taking action as needed to correct situations identified in the records."

[20] Finally, the ministry takes the position that its interest in the excluded records relates predominantly to the conduct of its employees, rather than operational matters.

[21] The appellant responds to the ministry's submissions by suggesting that the ministry's claim to the exclusion is overbroad and has improperly captured information of a "more general, facility-wide nature," rather than the individual or issue-specific grievances section 65(6) was intended to exclude. The appellant questions whether the information the ministry claims is excluded

> … instead substantially relates to on-the-ground personnel issues of a more general, facility-wide nature … that are substantially connected to key conditions in the jail, such as staffing shortfalls creating more situations and opportunities in which inmates may attack each other.

Analysis and findings

[22] As stated, the ministry claims that portions of pages 25, 26, 30-31, 36-38, 54, 55, and 57-60 are excluded from the *Act* under section 65(6)3.

[23] To begin, I am satisfied that all of the identified portions of the records, which are contained in the responsive briefing notes, were collected, prepared, maintained or used by the ministry, and that this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications between ministry staff regarding EMDC. Therefore, I find that parts 1 and 2 of the test under section 65(6)3 have been met.

[24] To establish part 3 of the section 65(6)3 test, the ministry is required to provide evidence to demonstrate that the consultations, discussions or communications that took place were about labour relations or employment-related matters in which the ministry has an interest.

[25] The portions of the records that the ministry claims are excluded under section 65(6)3 of the *Act* consist, variously, of single lines, paragraphs or entire pages in the briefing materials regarding EMDC. With few exceptions, I accept the ministry's submission that the content claimed to be excluded involves or describes labour relations or employment-related incidents at EMDC that touch upon employee conduct or actions directly. As noted above, the term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. I accept that the ministry has an interest in matters relating to its own workforce, which includes its employees at EMDC. For the most part, given the content of the records, I am satisfied that the meetings, consultations, discussions or communications identified in the records are about labour relations matters in which the ministry has an interest. I am also satisfied that most of the portions of the records the ministry claims are excluded reveal matters that engaged, or could reasonably be expected to engage, the ministry's interests under its collective agreement with employees at the EMDC.

[26] Accordingly, I find that part 3 of the section 65(6)3 test is met with respect to the final paragraph of page 25, the first and fifth paragraphs of page 26, pages 30-31, the penultimate paragraph of page 36, the first two lines of the first paragraph and the final paragraph of page 37, all portions of page 38 claimed, except the second full paragraph, the first paragraph of each of pages 54 and 55, the bottom half of page 57, the top half of page 58 and the first paragraph of page 60. As none of the exceptions listed in section 65(7) apply to these portions of the records, I find that they are excluded from the *Act.* I will not address the excluded portions further in this order.

[27] As indicated, however, I find that there are several portions of the records for which the third part of the test under section 65(6)3 is not met. First, the ministry initially claimed that the third paragraph of page 25 was excluded, but offered no submissions respecting it at the inquiry stage. The same is true for a two-word severance further down the same page. The first portion of page 25 relates to an outside request for information. In my view, this paragraph cannot be characterized as relating, or having some connection, to the labour relations matters identified elsewhere in the portions I found to be excluded from the *Act.* Similarly, I conclude that with respect to the brief severance further down page 25, two brief severances in the middle of page 37, a five line description of an incident relating to an inmate on page 38 and the severed parts of the last paragraph on page 59 relating to technical issues at the EMDC, it is not reasonable to conclude that there is some connection with any labour relations or employment-related matters in which the ministry has an interest.

[28] Therefore, I find that part 3 of the test under section 65(6)3 is not met with respect to these portions of pages 25, 37, 38 and 59 and that they fall within the ambit of the *Act.* These portions of the records are also subject to exemption claims under sections 14 and/or 21, and I will review them below. Although it is not clear that the ministry claims section 14 in relation to the first non-excluded severance on page 25, as

it did alternatively with the other non-excluded portions, for the sake of completeness, I will consider the possible application of section 14 to it as well.

B. Do the records contain "personal information" as defined in section 2(1)?

[29] The ministry claims that portions of pages 6, 37, 38 and 54-59 are exempt under the mandatory personal privacy exemption in section 21(1). Although pages 45-53 were initially included in this exemption claim, the ministry disclosed those pages in the revised decision issued during the inquiry stage. In order to determine if the information remaining at issue on pages 6, 37, 38 and 54-59 is exempt under section 21(1), I must first determine if the withheld portions contain "personal information" according to the definition in the *Act,* since section 21(1) can only apply to *personal* information.

[30] "Personal information" is defined in section 2(1) of the *Act* as "recorded information about an identifiable individual," including:

> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and

> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[31] The list of examples of personal information under section 2(1) is not exhaustive. Information that does not fall under paragraphs (a) to (h) may still qualify as personal information.

[32] Sections 2(3) and (4) also relate to the definition of personal information and state:

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[33] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[7] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[8]

Representations

[34] According to the ministry, pages 6, 37-38 and 54-59 contain "recorded information about an individual" as contemplated by the definition of the term in section 2(1). The ministry refers to the information as being about the activities of inmates' families, medical details and an assault. The ministry acknowledges that only page 6 contains names, but expresses concern that the disclosure of the other pages would "not protect the confidentiality of the affected individuals."

[35] The ministry submits that the information already disclosed to the appellant, together with extensive media coverage about EMDC and other publicly available information, could serve to identify individuals, even in the absence of a name. The ministry relies on Order P-1453 where the removal of names and other personal

[7] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[8] Orders P-1409, R-980015, PO-2225 and MO-2344.

identifiers of persons related to investigations into sexual improprieties in correctional institutions was held to be insufficient to protect the identity of those individuals.

[36] The appellant disputes the ministry's submission that the information about inmate hospitalizations or injuries sustained can be linked with identifiable individuals.

Analysis and findings

[37] As outlined above, the definition of "personal information" in section 2(1) of the *Act* includes many different possible types of information. However, for information to fit into the definition of "personal information," it must be "recorded information about an identifiable individual."

[38] The names and other details about the families of certain inmates are on page 6. This information fits within paragraph (h) of the definition in section 2(1) of the *Act.* In my view, the combination of those details and other information on the page renders the individuals identifiable. Accordingly, I find that page 6 contains personal information about identifiable individuals.

[39] However, as acknowledged by the ministry in its representations, no names are provided in the incident synopses contained elsewhere in the briefing notes. On pages 37-38 and 54-59 are very brief summaries of the incidents and medical events. While this limited degree of detail on pages 37-38 and 54-59 might fit within paragraph (b) of the definition of "personal information," I reject the ministry's submission that these individuals can be identified as a result of the details provided in the records.

[40] The ministry relies on Order P-1453 in support of the assertion that the individuals in the responsive records in this appeal may be identifiable, even without names and other personal identifiers. However, I note that Order P-1453 involved a request for the "final investigation reports" regarding cases of inmate sexual assault in correctional facilities for a specific year. There were nine such reports. On my review of the order, Inquiry Officer Cropley's conclusion that the individuals could reasonably be identified notwithstanding the severance of their "names and personal identifiers" was based on the very detailed information the reports otherwise contained. In other words, the detailed reports at issue in that appeal can be distinguished from the brief incident summaries at issue in this appeal.

[41] In the circumstances, I am not persuaded by the evidence that the information on pages 37, 38 and 54-59 can be connected with identifiable individuals. Given my conclusion that the information is not *about* identifiable individuals, I find that pages 37-38 and 54-59 do not contain "personal information" according to the definition in section 2(1) of the *Act.* Therefore, this information does not qualify for exemption under section 21(1).

[42] Only a portion of page 38 is subject to another exemption claim by the ministry, and I will review the possible application of the discretionary law enforcement exemption claims to it later in this order. First, however, I will review the application of the exemption of the personal information on page 6 under section 21(1).

C. Does the mandatory personal privacy exemption at section 21(1) apply to the information at issue?

[43] Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. The exceptions in sections 21(1)(a) to (e) are relatively straightforward. The exception in section 21(1)(f) (where "disclosure does not constitute an unjustified invasion of personal privacy"), is more complex and requires a consideration of additional parts of section 21.

[44] Sections 21(2) to (4) provide guidance in determining if disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Finally, section 21(4) identifies information whose disclosure is not an unjustified invasion of personal privacy.

[45] If none of the presumptions in section 21(3) apply, the institution must consider the application of the factors listed in section 21(2), as well as other considerations that are relevant in the circumstances of the case. If a presumption listed in section 21(3) has been established, it cannot be rebutted by either one or a combination of the factors set out in section 21(2). A presumption can, however, be overcome if the personal information is found to fall under section 21(4) of the *Act* or if a finding is made under section 23 of the *Act* that a compelling public interest exists in the disclosure of the record that clearly outweighs the purpose of the section 21 exemption.[9]

Representations

[46] The ministry relies on the factor favouring privacy protection in section 21(2)(f) in support of its position that disclosure of the information would constitute an unjustified invasion of personal privacy. The ministry submits that the disclosure of the personal information in the records is "unauthorized" by the *Act.* The ministry states that it has withheld the personal information of other individuals, "some of it quite sensitive," based on its consideration of the factor in section 21(2)(f). The ministry

[9] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

refers to past orders of this office that have held that the factor will apply when the disclosure of personal information could reasonably be expected to result in significant personal distress. The ministry's other representations on the relevance of this factor relate to the information about inmates that I found above did not qualify as personal information, in the absence of identifiability.

[47] As set out under the previous issue, the appellant's representations are also directed at the inmate incident summaries, rather than the personal information about the families of inmates on page 6.

Analysis and findings

[48] As I noted above, the mandatory personal privacy exemption in the *Act* prohibits the ministry from disclosing personal information unless one of the exceptions in section 21(1) applies. In this appeal, the only possibly applicable exception is section 21(1)(f), which permits disclosure of personal information if it would not result in an unjustified invasion of personal privacy for the person to whom the information relates. An examination of the presumptions and factors in sections 21(3) and 21(2) are required for this determination.

[49] To begin, I agree with the ministry that none of the presumptions against disclosure in section 21(3) apply to the personal information on page 6. With regard to the factor favouring non-disclosure in section 21(2)(f) (highly sensitive), I accept that it applies to this information. In particular, I accept that the prospect of disclosure of the information meets the requisite threshold: that is, an expectation of "significant" personal distress with its disclosure. I find that the privacy-protecting factor in section 21(2)(f) applies to the information at issue on page 6, and that it weighs moderately against disclosure.

[50] Although the appellant's representations allude to the information fitting within section 21(2)(a), I am not satisfied that the disclosure of the withheld personal information about inmates' families is desirable for the purpose of subjecting the activities of the government and its agencies to public scrutiny. I accept that there has been significant public interest in the operations of EMDC; however, I am not persuaded that there is a sufficient connection between the limited personal information at issue on page 6 and the need to subject the ministry or the operations of EMDC to public scrutiny. Rather, in my view, that there has already been disclosure of information related to this purpose, both through the ministry's access decisions and the provisions of this order.[10] Accordingly, I find that the factor weighing in favour of disclosure in section 21(2)(a) does not apply.

[10] Orders PO-2789 and P-673.

[51] The parties did not argue that other factors in section 21(2) apply, and I conclude that none do. In this context, I conclude that only the factor favouring non-disclosure in section 21(2)(f) applies in this appeal. Accordingly, I find that the personal information contained in the last sentence of each of the final two paragraphs of page 6 is exempt under section 21(1) of the *Act.*

D. Does the discretionary law enforcement exemption at section 14(1)(i), (j) or (k) apply to the records?

[52] The ministry relies on sections 14(1)(i), 14(1)(j) and 14(1)(k) in denying access to information on pages 18, 25, 26, 28, 29, 32, 36-38, 54-60 and 63.

[53] The relevant parts of section 14(1) state:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
>
> (j) facilitate the escape from custody of a person who is under lawful detention;
>
> (k) jeopardize the security of a centre for lawful detention; or …

[54] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[11] Furthermore, although section 14(1)(i) is found in a section of the *Act* dealing specifically with law enforcement matters, it is not restricted to law enforcement situations and can cover any building, vehicle or system which requires protection.[12]

[55] It is not enough for an institution to take the position that the harms under section 14 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.[13] The institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much

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[11] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[12] Orders P-900 and PO-2461.
[13] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[14]

Representations

[56] The ministry's overview of this appeal includes a description of its statutory correctional services mandate and the various reasons that individuals are incarcerated at EMDC, which is a maximum security facility. The ministry submits that many inmates at the EMDC pose a safety risk to staff, other inmates and to the community.

[57] Noting that the records at issue were created by ministry staff to brief senior ministry officials about security and safety incidents at EMDC, the ministry submits that Order PO-2911 provides an appropriate starting point for considering the disclosure of "correctional records" under the *Act* because the adjudicator accepted "that even information that appears innocuous could reasonably be expected to be subject to use by some people in a manner that would jeopardize security." The ministry observes that these comments accord with the Divisional Court's ruling in *Fineberg* (cited above) that the law enforcement exemption must be approached in a sensitive manner in recognition of the difficulty of predicting future events in a law enforcement context. The ministry submits that a careful and cautious approach must be taken with respect to the disclosure of the records because:

> The records reveal the strategies that are employed by correctional institutions to maintain security at EMDC specifically and in fact in all provincial correctional institutions. The disclosure of the records could reveal vulnerabilities in the correctional system, which could lead to crimes or other disturbances.

[58] Regarding sections 14(1)(i), (j) and (k), the ministry states that these three exemptions may be considered together because they all relate to the security of a correctional institution. Further, the ministry notes that section 14(1)(i) is additionally intended to protect the security of not only a building, but any system or procedure related to it. The ministry argues that determination of the "reasonable expectation" of the section 14 harms coming to pass is dependent on the context in which the records were created. The ministry states that the fact that these records were created to brief senior ministry staff about security and safety incidents at the EMDC makes it "more reasonable to expect [that disclosure of the records will give rise to] the harms that are enumerated in clauses (i), (j) and (k)…". The ministry takes the position that the records describe the types of searches and threat level assessments that can be ordered or other security precautions, such as the location of closed circuit television, and argues that disclosure of this information "would thwart measures the Ministry has

[14] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

taken to address security concerns at EMDC and in fact in all provincial correctional institutions."

[59] The ministry also submits that:

> Briefing records are required to bring operational issues that are of concern to staff and to inmates to the attention of senior Ministry officials. Briefing records must be candid. Disclosing these records could cause those preparing briefing records to withhold important information out of legitimate concern that it would be subsequently disclosed.

[60] The ministry argues, therefore, that the effect of disclosure would be to discourage the kinds of candid communications that are required between staff and management in correctional facilities to "ensure the maintenance of safety and order."

[61] The ministry submits that the records may identify vulnerabilities in existing security measures at correctional institutions. According to the ministry, disclosure could permit the drawing of "accurate inferences about the possible absence of other security precautions, which could then be used to aid in the planning or execution of a crime or other disturbance in a correctional institution." Finally, the ministry submits that

> The disclosure of security incidents at EMDC could permit any person who was provided with access to the records to repeat such incidents, or to plan other related incidents, which could cause even greater harm.

[62] The appellant responds to the ministry's representations on section 14 by indicating that he accepts the need to withhold details directly related to specific vulnerabilities at EMDC. However, he questions whether all of the severances made under section 14 by the ministry truly "touch on security matters in the jail," such that disclosure of the information could reasonably be expected to "open the door … to acts of violence between inmates." The appellant also challenges the ministry's position that disclosure of the briefing materials could lead to self-censorship of ministry employees in addressing safety issues.

Analysis and findings

[63] To begin, I note that portions of the ministry's arguments imply that disclosure of the information withheld under section 14 would inhibit "candid communications" or the "free and frank sharing of information." These arguments allude to section 13 of the *Act* under which an institution "may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant…" The intent of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and

policy-making.[15] This exemption has not been claimed by the ministry to deny access in this appeal. Moreover, the purpose of section 13 is distinct from the purpose of the law enforcement exemption that the ministry has relied on in denying access to the briefing materials here. Section 13 concerns itself with protecting the "free flow of advice" within the public service, while section 14(1) is intended to prevent certain specified harms to personal security, rights or liabilities or the effective conduct of law enforcement activities. In particular, sections 14(1)(i), (j) and (k) are intended to prevent the identified harms to the secure custody of individuals in the province's detention facilities. These are the exemptions claimed by the ministry in this appeal and they are the exemptions I will now review.

[64] Order 188 articulated the principle that establishing one of the exemptions in section 14 of the *Act* requires that the expectation of one of the enumerated harms coming to pass, should a record be disclosed, not be fanciful, imaginary or contrived, but rather one that is based on reason.[16] This requirement that the expectation of harm must be based on reason means that there must be some logical connection between disclosure and the potential harm which the ministry seeks to avoid by applying the exemption.[17] More recently, the Supreme Court of Canada has affirmed that the evidence must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. The sufficiency of the evidence is context and consequence-dependent.[18]

[65] In this appeal, with regard for both the quality of the evidence provided and the actual content of the records, I am not persuaded that disclosure of the withheld information could reasonably be expected to endanger the security of EMDC or its systems and procedures, facilitate the escape from custody of a person who is under lawful detention or jeopardize the security of a centre for lawful detention, as contemplated by sections 14(1)(i), (j) and (k). For the following reasons, therefore, I find that the withheld information does not qualify for the law enforcement exemption.

[66] The ministry relies on Order PO-2911 regarding the disclosure of "correctional records" that are requested under the *Act*, particularly for the principle that "even information that appears innocuous could reasonably be expected to be subject to use by some people in a manner that would jeopardize security."[19] As the ministry portrays

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[15] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[16] See also Order PO-2099.
[17] Orders 188 and P-948.
[18] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above at footnote 14.
[19] The records at issue in this appeal are not "correctional records" *per se*, at least as that term has been defined under the *Act.* While "correctional records" is not a defined term under the *Act,* it is used in section 49(e), which is a discretionary exemption permitting an institution to deny an individual access to his or her own personal information if it is contained in a "correctional record" *and* its disclosure would reveal information provided in confidence. In *Ontario (Community Safety and Correctional Services) v.*

the withheld portions of the briefing materials, they consist of strategies, measures and precautions employed to maintain security at the facility, including the types of searches conducted, threat level assessments and the location of closed circuit television. In the ministry's view, disclosure of this information would lead to the harms in sections 14(1)(i), (j) and (k).

[67] I agree with the ministry that Order PO-2911 and other similar orders, such as Orders PO-2332, PO-2603 and PO-3291, provide a good foundation for reviewing records claimed to be exempt for reasons of security under section 14. For the purposes of this appeal, I prefer the more complete context of Adjudicator John Swaigen's reasons on section 14(1)(i) in Order PO-2332. In concluding that section 14(1)(i) applied to portions of a ministry document called the Institution Operational Self-Audit Workbook (OSAW), Adjudicator Swaigen wrote:

> In my view, much of the information in the security audit would be obvious to most people. It is a matter of common sense and common knowledge that certain kinds of security measures, such as locks, fences and cameras would be present in certain locations and would be checked periodically in certain ways and that other practices and procedures described in the OSAW would be routine. However, the Ministry points out that "to a knowledgeable individual, the absence of a particular topic, identified deficiencies, or the unavailability of certain security-enhancing measures at a given correctional facility could suggest a potential security vulnerability".
>
> I accept that even information that appears innocuous could reasonably be expected to be subject to use by some people in a manner that would jeopardize security. Knowledge of the matters dealt with in the security audit could permit a person to draw accurate inferences about the possible absence of other security precautions. Such inferences could reasonably be expected to jeopardize the security of the institution by aiding in the planning or execution of an escape attempt, a hostage-taking incident, or a disturbance within the detention centre. As the Ministry states, disclosure of the contents of the security audit to a requester can result in its dissemination to other members of the public as well.

[68] Adjudicator Justine Wai adopted this reasoning recently in Order PO-3291, as did Adjudicator Diane Smith in Orders PO-2603 and PO-2911. I also adopt it in this appeal, and I have applied in it my consideration of all three of the law enforcement exemptions claimed.

Ontario (Information and Privacy Commissioner), 2011 ONCA 32 (C.A.), the Court of Appeal held that "correctional records" may include both the pre- and post-sentence records relating to an individual.

[69] Where this appeal differs from the orders cited above and those relied upon by the ministry is the nature of the information at issue. On my review of it, the information is not characterized by a level of detail sufficient to warrant the application of sections 14(1)(i), (j) or (k). Notably, the record at issue in Order PO-2332, the OSAW, "included a description of security measures at the facility and an assessment of their effectiveness." The records at issue in Order PO-2603 dealt with a review of courthouse security systems. In Order PO-2911, the video recording at issue showed the configuration of the day room and surrounding cells in a specific correctional centre, a configuration also present in other provincial correctional centres. Finally, the responsive records in Order PO-3291 included standing orders, descriptions of the ministry's databases or computer systems, and audio and video recordings specific to the facility.

[70] Conversely, I am not persuaded by the level of detail in the records in this appeal that disclosure would compromise the operational security and procedures required for the day-to-day operation of EMDC. As Adjudicator Swaigen acknowledged in Order PO-2332, "it is a matter of common sense and common knowledge that certain kinds of security measures, such as locks, fences and cameras would be present in certain locations and would be checked periodically in certain ways and that other practices and procedures … would be routine." In my view, for there to be a reasonable expectation of the security harms in sections 14(1)(i), (j) and (k) occurring, there would have to be additional details about, or description of, the measures, practices, searches and threat level assessments at EMDC that simply does not appear in these records. I find some of the withheld information related to searches and threat level assessments to be very general or, in fact, a matter of "common knowledge."[20] In this context, the evidence is not capable of demonstrating a risk of harm that is well beyond the "merely possible."[21]

[71] Similarly, I am also not persuaded that disclosure of the withheld information could reasonably be expected to lead to the drawing of accurate inferences about the measures such that the security of the EMDC, its systems or procedures would be endangered or compromised or that the escape of inmates could thereby be facilitated. The records do not, for example, provide precise locations or mapping of the closed circuit television cameras at EMDC. As suggested by the reasons from Order PO-2332, their location in certain areas that might be expected does not necessarily pose a security risk to the staff and inmates of the correctional centre. Unlike the records

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[20] For example, in a reported decision (0269-07-HS, 2012 CanLII 81181), the Ontario Labour Relations Board dealt with an application under the *Occupational Health and Safety Act* regarding events at the Hamilton Wentworth Detention Centre where all Correctional Officers (COs) and other jail employees staged a work refusal. At paragraph 9 of the decision is a description of the "Ministry's Threat Level Assessment and Weapons Search Protocol [, which] provides five search levels in response to an assessed threat which may be present in the institution."

[21] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above at footnote 14.

before Adjudicator Wai in Order PO-3291 where security practices and protocols involved with the transfer and release of inmates and community escorts were described, any references to community escorts in these records are more general in nature. Noting this, I reject the ministry's position that the fact that these records were created to brief senior ministry staff about security and safety incidents at the EMDC makes it "more reasonable to expect the harms." It is the content of the records in this appeal that is persuasive, not the audience. In my view, the limited detail provided about these matters is only what was required, in the estimation of ministry staff, to provide context for the security incidents or issues described in the chronology and other parts of the briefing materials prepared for senior ministry staff.

[72] Moreover, some of the withheld information does not identify strategies, measures and precautions employed to *maintain* security at the facility, but rather existing means by which inmates are *breaching* an aspect of security at EMDC and the proposed resolution. In my view, this information, including the identified security vulnerability, is known among the inmate population. In the case of portions of pages 28, 29 and 63, the withheld information describes security upgrades and expansion at the EMDC, in general, including milestones that are several years in the past. Regarding this information, as with the other limited detail about security measures or systems at EMDC in the other pages, I am not satisfied that it could be used directly "to aid in the planning or execution of a crime or other disturbance in a correctional institution," as alleged, or that it could allow accurate inferences to be drawn about security vulnerabilities at the facility that could reasonably be expected to result in the harms sections 14(1)(i), (j) or (k) are intended to prevent.

[73] As I stated above, the words "could reasonably be expected to" contained in section 14(1) required the ministry to provide me with "detailed and convincing" evidence to establish a "reasonable expectation of harm" with disclosure of the withheld information. Evidence amounting to speculation of possible harm is not sufficient.[22] In this appeal, the evidence does not meet the requisite threshold. In sum, given the minimal detail provided in the withheld portions of the ministry's EMDC briefing materials, I find that disclosure could not reasonably be expected to endanger the security of EMDC's building or systems, facilitate an inmate's escape from custody at EMDC or otherwise jeopardize the security of EMDC. Accordingly, I find that the withheld information is not exempt under sections 14(1)(i), (j) or (k).

[22] 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.).

E. Does the discretionary exemption for economic or other interests of government in section 18(1)(f) or (g) apply to page 22?

[74] The ministry denied access to a single paragraph of the July 2012 briefing note on page 22 on the basis that sections 18(1)(f) and (g) apply to it. The relevant parts of section 18(1) state:

> A head may refuse to disclose a record that contains,
>
> (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;
>
> (g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

[75] The purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

[76] For section 18(1)(g) to apply, as with the section 14 exemptions, the ministry is required to demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the ministry must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[23] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 18.[24]

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[23] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[24] Orders MO-1947 and MO-2363.

Representations

[77] The ministry submits that it withheld the paragraph on page 22 because disclosing it would reveal plans relating to the administration of the EMDC that have not been put into operation or made public. The ministry argues that sections 18(1)(f) and (g), "unlike other exemptions" in the *Act,* do not "have a harms-based requirement. Instead, records are exempted because they fit within the scope of the class of records described…"

[78] More specifically, the ministry submits that the paragraph on page 22 was withheld under section 18(1)(f) because "it refers to a plan relating to … part of EMDC that has not been put into operation or made public. This paragraph describes the course of action to accomplish this …." The ministry also maintains that the paragraph contains enough information to summarize the totality of the plan and adds that "the operationalization of the plan is a pending policy decision, and that any disclosure of [it] … would therefore be premature" for the purpose of section 18(1)(g).

[79] The appellant's representations do not directly address this issue.

Analysis and findings

[80] In order for section 18(1)(f) to apply, the ministry was required to show that:

1. the record contains a plan or plans, and
2. the plan or plans relate to:
   (i) the management of personnel, or
   (ii) the administration of an institution, and
3. the plan or plans have not yet been put into operation or made public.[25]

[81] Previous orders have defined "plan" as ". . . a formulated and especially detailed method by which a thing is to be done; a design or scheme."[26] On my review of the five-line paragraph on page 22 that the ministry has severed under section 18(1)(f), I conclude that it contains nothing resembling "a formulated and especially detailed method" by which the referenced matter would be carried out. In fact, it contains no details at all about a method, design or scheme for it. As this paragraph cannot be characterized as a "plan" according to definition of the term in past orders of this office,

[25] Order PO-2071.
[26] Order P-348.

I find that it does not meet the first part of the test and does not qualify for exemption under section 18(1)(f) of the *Act*.

[82] Next, for me to uphold the application of section 18(1)(g) to the withheld information on page 22, I must be satisfied that the paragraph reveals "proposed plans, policies or projects" of the ministry *and* that disclosure of the information could reasonably be expected to result in either the premature disclosure of a pending policy decision, or undue financial benefit or loss to a person.[27] Contrary to the ministry's submission, section 18(1)(g) is, in fact, a harms-based exemption. The ministry was required to provide "detailed and convincing" evidence to establish a "reasonable expectation of harm" resulting from disclosure of proposed plans, policies or projects of an institution if it could reasonably be expected to result in either the premature disclosure of a pending policy decision or result in undue financial benefit or loss to a person.[28] Furthermore, past orders have established that the application of section 18(1)(g) requires there to be an existing policy decision by the institution.[29]

[83] Arguing for the application of section 18(1)(g) in this appeal, the ministry contends that "the operationalization of the plan" (summarized in its totality in the paragraph) is a pending policy decision. I reject this submission. Under section 18(1)(f), I rejected the ministry's position that the withheld paragraph contained anything resembling a "plan" as this office has defined it. Even if it could be said that the proposed matter amounted to a "project," the ministry has not provided any evidence to establish that it is connected to any specific policy decision by the ministry or that its disclosure could result in undue financial benefit or loss to a person. Accordingly, I find that section 18(1)(g) does not apply to the withheld portion of page 22.

[84] As I have not upheld the ministry's decision to deny access under sections 14 or 18, it is not necessary for me to review the ministry's exercise of discretion under those exemptions.

F. Does the public interest override in section 23 apply to the information that is exempt under section 21?

[85] In this appeal, the appellant's claim that the public interest in disclosure of the records should override the application of any exemptions is limited in scope by the fact that section 23 can only apply to certain exemptions. Furthermore, of all the claimed exemptions, I have only upheld the ministry's decision under section 21 and only in relation to two lines on page 6 of the records. The public interest override has no application to records that are *excluded* from the *Act,* pursuant to section 65(6).

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[27] Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.).
[28] *Ontario (Workers' Compensation Board),* cited above.
[29] Order P-726.

[86] Section 23 states:

> 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.

[87] Section 23 could be applied to override the personal privacy exemption in section 21 if two requirements are satisfied. First, there must be a compelling public interest in disclosure of the records. However, the existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances of the appeal.

[88] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[30]

Representations

[89] The appellant explains that he is a journalist and that he is seeking the records in order to explore issues at EMDC:

> … including but not limited to violence and overcrowding, for the purpose of the public interest, namely publishing and thus bringing to the public's attention new information that could be seen to raise questions about how well the province's corrections system is operating, especially regarding conditions faced by inmates.

[90] The appellant indicates that he has already used the information initially disclosed to him to publish a report on jail conditions and he seeks the additional, undisclosed information to continue this investigation. Generally, the appellant's arguments on section 23 are directed at establishing that there is a public interest in the disclosure of information relating to "the level of violence in the facility." The appellant expresses the belief that:

> Large institutions are, in the aggregate, best held in check by bringing to public light internal issues or discrepancies that are clearly worthy of

[30] Order P-984.

> public attention, such as the treatment of and related conditions surrounding individuals under the supervision of the government.

[91] The ministry provided representations on the public interest override in relation to both sections 18 and 21, but only those submissions relating to section 21 are outlined since I did not uphold the ministry's claim under section 18. The ministry responds to the appellant's arguments on the public interest override by pointing out that a great deal of information has already been disclosed to the appellant through this process. The ministry refers to the appellant's admission that he published a report on jail conditions with that information and notes that in past orders, section 23 has been found not to apply where a significant amount of information has already been disclosed. The ministry also submits that additional disclosure would not serve to inform the public about the activities of their government because the information is primarily about inmates. Furthermore, the ministry submits that:

> While members of the media do not have any greater right to information under section 23 than anyone else does, the records that are disclosed are arguably more likely to end up publicly reported, thereby foreseeably augmenting the intrusiveness of any infringement of personal privacy that occurs.

Analysis and findings

[92] The only information under consideration at this point is the limited personal information about the families of EMDC inmates on page 6 that I found exempt under section 21(1), above. In order for me to find that section 23 of the *Act* applies to override the exemption of the information under section 21(1), I must be satisfied that there is a *compelling* public interest in the *disclosure of those particular records* that *clearly outweighs the purpose* of the personal privacy exemption.

[93] Having considered the appellant's representations, I accept that there is a public interest in the subject of the conditions in the province's correctional institutions, and particularly the issues of violence and overcrowding among inmates. I am also prepared to accept that the public interest is a compelling one in the circumstances.

[94] However, my intention in emphasizing certain words of the test for the application of section 23 in the paragraph above is to underscore the fact that my determination of this issue does not end with a finding that a compelling public interest exists. The next question to be asked is whether that compelling public interest would be served by the disclosure of the specific information that has been found exempt under section 21(1). Would disclosure of the information shed light on the government's actions or decisions with respect to this stated area of interest? Having considered the exempt parts of page 6 once again for this purpose, I conclude that disclosure of this information would not serve to illuminate, nor would it guide the

exploration of, the issue. I conclude that any compelling public interest in disclosure of these particular brief portions of page 6 would not outweigh the privacy-protective purpose of the section 21(1) exemption.

[95] As the required elements of the test for the application of the public interest override are not met, I find that section 23 does not apply in the circumstances of this appeal.

ORDER:

1. I uphold the ministry's decision with respect to the application of section 65(6)3 to:

   a. the final paragraph of page 25,
   b. the first and fifth paragraphs of page 26,
   c. pages 30-31,
   d. the penultimate paragraph of page 36,
   e. the first two lines of the first paragraph and the final paragraph of page 37,
   f. all portions of page 38 claimed, except the second full paragraph,
   g. the first paragraph of each of pages 54 and 55,
   h. the bottom half of page 57,
   i. the top half of page 58, and
   j. the first paragraph of page 60.

   None of the exceptions in section 65(7) apply to these portions of the records, and they are excluded from the *Act.*

2. I uphold the ministry's exemption claim under section 21(1) in relation to the withheld portions of page 6.

3. I do not otherwise uphold the ministry's access decision under sections 21(1), 14(1)(i), (j) or (k) or 18(1)(f) or (g), and I order the ministry to disclose the remaining responsive portions of the records to the appellant by **November 5, 2014**, but not before **October 31, 2014.**

4. I reserve the right to require the ministry to send me a copy of the records disclosed to the appellant.

Original Signed by: September 30, 2014
Daphne Loukidelis
Adjudicator