Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3561-F

Appeal PA13-232

Ministry of Community Safety and Correctional Services

December 21, 2015

Summary: This final order completes the inquiry into one appeal resulting from a multi-part request submitted by the human rights organization, Amnesty International, to the ministry under the *Freedom of Information and Protection of Privacy Act.* The requested records related to the actions of the Ontario Provincial Police in response to Mohawk protest and occupation activities that took place in 2007 and 2008. The final remaining issue in Appeal PA13-232 was the adequacy of the ministry's search for two audio/video recordings of an identified individual's cell at two OPP detachments in the area. In Interim Order PO-3487-I, I found that the ministry's evidence did not establish that its search for the responsive records had been reasonable, and I ordered the ministry to conduct additional searches. In this final order, I conclude that there is no useful purpose to be served by ordering additional searches, and I dismiss this appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 24.

Orders and Investigation Reports Considered: Orders PO-3487-I and PO-3500.

OVERVIEW:

[1] I am issuing this final order to conclude Appeal PA13-232. It follows Interim Order PO-3487-I, which I issued on April 30, 2015 to address the searches conducted by the Ministry of Community Safety and Correctional Services (the ministry) for records requested under the *Freedom of Information and Protection of Privacy Act* (the *Act*) by Amnesty International (Amnesty, or the appellant). Through the 49-part request filed in

December 2008, Amnesty sought records relating to the actions of the Ontario Provincial Police (OPP) in response to Mohawk protest and occupation activities that occurred in June 2007 and April 2008 on Tyendinaga Mohawk Territory.[1]

[2] The appeal's history was outlined in greater detail in Interim Order PO-3487-I, and I adopt that recounting of it for the purpose of this final order. For context here, a brief summary of the appeal remains necessary. Specifically, this appeal stemmed from Part 45 of Amnesty's original request, which sought:

> Any videos of the cells, booking area and interview areas at the Odessa OPP detachment[2] on April 25 and 26, 2008 and the Napanee OPP detachment on April 26 and 27, 2008 with respect to [a named individual].[3]

[3] Initially, in March 2009, the ministry denied access to the requested information due to the ongoing prosecution of the named individual.[4] Following Amnesty's appeal of that decision, this office put the matter on hold until January 2011 to allow for completion of the prosecution. Upon re-activation of the appeal, the ministry issued a revised decision on April 15, 2013 denying access to the responsive records on the basis of the discretionary law enforcement exemption in section 14 of the *Act*.[5]

[4] After Amnesty appealed the ministry's revised decision to this office, a mediator was appointed to explore resolution of the appeal. During mediation, the appellant narrowed the scope of the appeal to video footage of the cells and the interview area. It took an additional search to locate the recording of the named individual's interview, but once it was found, a copy was provided to this office. The issue of reasonable search was added to the appeal at this point because Amnesty was not convinced that the ministry's searches had located all responsive records. A mediated resolution of the appeal was not possible and the appeal moved to the adjudication stage for an inquiry.

[5] The ministry issued a supplementary access decision on June 17, 2014, withdrawing its exemption claim under section 14 and granting partial access to the records, with severance under the mandatory personal privacy exemption in section 21(1). After reviewing the disclosed recordings, Amnesty sought to continue the appeal based on the belief that the following recordings ought to exist:

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[1] As acknowledged in the interim order, Tyendinaga Mohawk Territory (Mohawks of the Bay of Quinte) is located near Deseronto, Ontario.

[2] The Odessa OPP Detachment is also known as the Loyalist Detachment.

[3] As noted in the interim order, this individual's written consent to the disclosure of his personal information to Amnesty was obtained and its validity affirmed by this office in a written decision issued by Adjudicator Colin Bhattacharjee in May 2012.

[4] Section 65(5.2) provides that "This Act does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed."

[5] There was some back-and-forth between this office and the ministry respecting the issuing of a decision and, eventually, this office issued an order requiring the ministry to issue an access decision.

- A recording of the named individual in cell #3 at the Odessa OPP Detachment from 5:08 p.m. on April 25, 2008 until 7:25 a.m. on April 26, 2008; and

- A recording of the named individual in cell #3 at the Napanee OPP Detachment from 8:02 a.m. until 12:20 p.m. on April 26, 2008.[6]

[6] The adjudicator formerly assigned to this appeal continued her inquiry by seeking representations from the ministry first, and then providing them to Amnesty to seek its submissions. Amnesty subsequently decided not to pursue access to the information severed by the ministry under section 21(1), thus removing the exemption from the scope of the appeal. Amnesty did, however, take a strong position on alleged inadequacies with the ministry's search for the specified cell recordings.

[7] The appeal was then transferred to me for disposition. Upon consideration of the evidence, I issued Interim Order PO-3487-I to address the sole remaining issue of search. In the discussion below, I elaborate on my findings regarding the ministry's evidence leading up to the interim order, as well as the ministry's response to it.

[8] In this final order, I conclude that although some gaps in the ministry's search narrative persist, no useful purpose would be served by ordering further searches for the records in the circumstances. I dismiss this appeal accordingly.

DISCUSSION:

Did the ministry conduct a "reasonable" search?

[9] Throughout the course of this inquiry, the appellant articulated cogent concerns about the adequacy of the searches conducted by the ministry for records responsive to the request. Although the parties in this appeal are well aware of the obligations placed on institutions and requesters under section 24 of the *Act*, I will set them out once again because these principles and this office's approach to the issue of reasonable search, as exemplified by past orders, provide the underpinning to my final conclusion.

[10] Section 24(1)(b) of the *Act* requires a requester to "provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record." As I noted in Interim Order PO-3487-I, the *Act* does not require the ministry to prove with absolute certainty that records do not exist. However, the interim order in this appeal – and many before it – have emphasized that once a requester provides a reasonable basis for concluding that additional records might exist, the institution whose search efforts are being challenged must respond by providing

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[6] Referred to in Interim Order PO-3487-I and this order as the "Odessa recording" or the "Napanee recording." It should also be noted that there were very minor variations in the times stated for the start and end times for the recordings.

sufficient evidence to show that a reasonable effort to identify and locate responsive records has been made.[7]

[11] If satisfied by the evidence that the search carried out was reasonable in the circumstances, the matter may then be concluded. However, as long as the reasonableness of the searches conducted by an institution is in dispute, based on concerns fairly raised by the evidence, further searches may be ordered. In this appeal, I found it necessary to issue an interim order requiring additional searches and affidavit evidence because the evidence provided by the ministry did not establish that its search for the responsive records was reasonable.

Interim Order PO-3487-I

[12] In deciding to issue an interim order requiring additional searches by the ministry for specific records related to the named individual's detention at two OPP detachments in April 2008, I relied on Amnesty's evidence. The relevant evidence that persuaded me that there was a reasonable basis for Amnesty's belief that the Odessa and Napanee recordings may exist is outlined below.

[13] First, however, to provide context for the interim order, I summarized Amnesty's stated motivation in seeking the requested information, as follows:

> [24] Amnesty describes its "community-based" Tyendinaga Research Project and explains why it is in the public interest to determine whether or not OPP officers mistreated the named individual. Amnesty submits that given the possible corroboration of the named individual's allegations that is suggested by the information disclosed through other appeals:
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> > … it is clearly in the public interest for the ministry and the OPP to avoid any perception of a cover-up by clearly demonstrating a thorough and credible effort to locate and release these records. In our view, failure to do so risks bringing the administration of justice into disrepute, especially among Mohawk land rights activists.
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> [25] In this context, Amnesty challenges perceived gaps or lack of clarity in the evidence provided, stating that even after reviewing the ministry's search affidavit, it is still not clear whether the ministry itself believes that the disclosed records "represent all the video recordings that were made **or** those that still exist **or** those that it has been able to locate through what it considers reasonable efforts [emphasis added]." The appellant questions why the incompleteness of the recordings of the

[7] Orders P-624, PO-2559 and MO-2877-I.

named individual's time spent in a cell on April 25 and 26, 2008 is not addressed by the ministry.

[14] Next, I summarized Amnesty's concerns with the ministry's search evidence and failure to clarify a number of important related matters. I stated:

> [28] The appellant points out that the ministry did not answer the records management questions posed in the Notice of Inquiry or provide evidence of its policies and practices. In this context, Amnesty submits that it is impossible to determine if the Odessa and Napanee recordings may have been destroyed in accordance with records retention or maintenance policies and practices. The appellant adds that no information was provided about "the OPP policy with respect to the filing, storage, retention and destruction of cell video records as distinct from police interview video records." Amnesty notes that it conveyed concern about records retention and destruction in discussions with the IPC in September 2013 because it was troubled by the prospect that "the records which we have been seeking since 2008 … may have already been destroyed or will have been destroyed by the time that we obtain the overdue decision letters and resolve the various appeals."

[15] In the end, because I shared "the appellant's concern about the lack of a satisfactory explanation for why the two identified recordings of the named individual's cell have not been located or may not exist," I accepted that Amnesty's evidence exposed gaps in the ministry's search narrative that prevented me from upholding the searches for the Odessa and Napanee recordings. In concluding that Amnesty had provided a "reasonable basis for its belief," I found:

- that it is standard OPP practice and procedure to make recordings of cells when individuals are being held in custody at its detachments [paragraph 31];
- that previously released officers' notes and witness statements, which were provided to me by Amnesty, support the view that the Odessa recording was made [paragraph 32];
- that recordings of the named individual and others in the same, as well as adjacent, cell at the Napanee OPP Detachment, had been made, located, and partly disclosed [paragraph 33];
- that relevant individuals (members of the OPP) "who would be expected to have direct knowledge of the missing cell recordings were not consulted" [paragraph 34];
- that the ministry's submissions respecting its records management practices (filing, storage, retention, destruction), and the possible fate of the recordings as a result, lacked sufficient detail [paragraph 35]; and

- that the ministry had not provided any explanation for not locating the two records, "such as whether they may have been accidentally destroyed by being erased or recorded over" [paragraph 36].

[16] In Interim Order PO-3487-I, I required the ministry to conduct further searches for the Odessa and Napanee recordings and imposed the following requirements:

> 2. … I order the ministry to consult with the seven OPP officers and/or guards identified in the correspondence accompanying this order,[8]
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> … I order the ministry to provide me with affidavits sworn by the individuals who conduct the searches. At a minimum, the affidavit should include information relating to the following:
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> > d) information about the knowledge of the affiant (or individual consulted) regarding the Odessa recording or the Napanee recording, as described above, and as relevant to that individual, including (but not limited to): their knowledge of whether such a recording was made; where it would be expected to be found; what happened to it, if it is not where expected; and any alternate steps that might be taken to search for it; …
> >
> > f) if as a result of the further searches it appears that responsive records existed but no longer exist, details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.
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> 3. I order the ministry to review the existing VHS format recordings that were located to determine if they contain footage matching the description of the Odessa and Napanee recordings, above, that was not previously identified and/or transferred to DVD format. The details of that review are to be included in the required affidavit evidence.
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> 4. If the Odessa or Napanee recordings are located as a result of the searches referred to in Provisions 1, 2 or 3, I order the ministry to provide a decision letter to the appellant regarding access to those records in accordance with the provisions of the *Act*, considering the date of this order as the date of the request. The ministry must provide a copy of any new decision letter to me. …

[8] The names of the OPP staff were taken from Amnesty's evidence, which was based on records disclosed in other appeals. The names are not reproduced here.

Ministry's response to Interim Order PO-3487-I

[17] After Interim Order PO-3487-I was issued on April 30, 2015, the ministry decided that more time was required to respond to the order provisions. On May 29, the ministry wrote to the appellant and claimed a time extension to July 13, 2015, pursuant to section 27 of the *Act*. The ministry's time extension claim was communicated to me by email. By letter sent on June 1, I advised the ministry that a time extension under section 27 is only available to an institution when it is issuing a decision under section 26 of the *Act*. Since the ministry was responding to an order of this office and had issued no decision, I indicated that there was no basis under *FIPPA* for the ministry to unilaterally extend the timeline for complying with Interim Order PO-3487-I. Nonetheless, I granted an extension in recognition of the interim order's purpose of having the ministry conduct "a more comprehensive search for the missing Odessa and Napanee recordings."[9]

[18] Subsequently, I received the ministry's response to Interim Order PO-3487-I: a two-page letter from ministry counsel and a two-page affidavit from the individual who conducted the searches – the same constable who had provided evidence, initially.[10] I also received a copy of a decision letter sent to the appellant advising him that no records had been identified by the additional searches ordered.[11]

[19] In the affidavit evidence provided, the constable stated: his credentials and training; his familiarity with the records created by the OPP regarding the Tyendinaga protest and occupation activities in 2007 and 2008; that he had read the interim order provisions; and that he was aware which specific recordings were sought by the searches ordered. The affiant confirmed that he communicated with all but one of the seven OPP officers with whom he was to consult[12] and stated that "None of the six individuals I spoke with are aware of the existence of the records." The affiant "… also consulted with [a named] D[etective]/Inspector … who also is not aware of the existence of the records." The affiant continues:

> … I conducted a search for records by attending the Kaladar OPP Detachment. Kaladar OPP Detachment is part of the same cluster of detachments as the Odessa and Napanee Detachments. Kaladar is where any responsive OPP records would be stored. I retrieved the file box where the records would be located, if they existed. I did not identify any responsive records.

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[9] Interim Order PO-3487-I, at page 12.
[10] This individual worked at the OPP's Napanee Detachment and at the time the request was made in December 2008 was a detective constable and criminal investigator with 20 years' experience.
[11] Order Provision 4 of Interim Order PO-3487-I contemplated a new access decision only if the ministry identified additional records upon execution of the further searches ordered.
[12] The seventh individual had left the employ of the OPP and could not be located.

> I have reviewed the existing VHS format recordings that were located, and … they do not contain footage matching the records.
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> I do not believe that the record related to the Odessa OPP Detachment was ever created. I have spoken with [a named] System Coordinator at the Orillia General Headquarters of the OPP … who advised me that video recording was only introduced in the Odessa OPP Detachment in 2009.
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> I do not believe that any record related to the Napanee OPP Detachment still exists. I know that video records were stored on tapes, which were written over shortly after they were created. I therefore believe that this record was written over long ago, and no longer exist [sic].

[20] In closing, the ministry submitted that its search "meets or exceeds the requirements of the [Act] and jurisprudence, including Order PO-3500, issued on June 16, 2015, which upheld a search for related OPP records as being reasonable."

Amnesty's representations

[21] Next, I offered the appellant an opportunity to comment on the ministry's response to Interim Order PO-3487-I. I provided a copy of the ministry's submissions, along with a Notice of Inquiry. The appellant provided representations that communicated the following reservations about the ministry's post-interim order evidence:[13]

> 1. Under-inclusive searches, consultations and related affidavit evidence: no affidavit evidence was provided by any of the seven individuals identified for the ministry; and, in the sole affidavit provided by [the named constable], effectively no information [is provided] about the [current] knowledge of the six individuals consulted regarding the Odessa or Napanee recordings, as stipulated by Interim Order PO-3487-I, Provision 2(d).[14]
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> 2. Effectively no evidence supporting the ministry's (OPP's) records maintenance or retention policies or practices, particularly as regards the Napanee recording, as required by Interim Order PO-3487-I, Provision 2(f), discussed in paragraphs 35 and 36 of the interim order, and requested in previous inquiry documentation (i.e., the Notice of Inquiry). Reference [is] paragraph 8 of [the ministry's July 2015] affidavit and appellant's concerns about the Napanee recording.

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[13] This numbered list represents the summary I later provided to the ministry to direct its attention to the appellant's concerns about the post-interim order evidence. In this final order, the list is interspersed with excerpts from the appellant's complete submissions that elaborate on those points.

[14] Paragraph 2.d) of the order provision is set out on page 6, above.

[22] Amnesty points out in its representations that clarification might have been afforded by record maintenance policies and practices, which have been sought numerous times but not provided by the ministry. Specifically, the appellant questions what the ministry's affiant means when he says that cell audio/video records at the Napanee OPP Detachment "were stored on tapes" and "were written over shortly after they were created." Amnesty states that in the absence of record maintenance policies, including retention schedules, there is no way to determine what "shortly" means.

[23] The appellant notes that in the related Appeal PA13-231, a number of audio/video recordings involving other individuals "were presumably retained in January of 2009 as responsive records with respect to Amnesty's FOI access request… and were partially released to Amnesty on June 17, 2014 with all of the audio redacted."[15] Furthermore, Amnesty refers to the recording of the named individual (featured in the Odessa and Napanee recordings) being held in cell #3 at the Napanee OPP Detachment from 15:27 to 17:54 on April 25, 2008 that was already disclosed with the audio severed.

> In other words, more than 35 hours of audio/video recordings pertaining to the detention of various Mohawk individuals in the cells at the Napanee OPP Detachment on April 25 and 26, 2008 were *not* written over and thereby destroyed. These audio/video recordings were protected and retained by the OPP and the Ministry once Amnesty's FOI access request was received in late December of 2008. In the case of the audio/video recording related to [the named individual's] detention at the Napanee OPP Detachment on the late afternoon of April 25, 2008, this 2½ hour audio/video recording – which was not even responsive to our FOI access request – somehow escaped being written over and thereby destroyed.
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> Accordingly, we have difficulty accepting at face value … the assertion that a similar audio/video recording for cell #3 at the Napanee OPP Detachment where [the named individual] was in detention from about 8:00 a.m. until 12:20 p.m. on April 26, 2008 – a period of approximately 4 hours and 20 minutes – was "written over long ago, and no longer exist[s]". …
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> It was during this period of detention at the Napanee OPP Detachment that [the named individual] claims in his sworn Affidavit that while in cell #3, the isolation cell at Napanee, waiting to be remanded by a Justice of the Peace, the police officers there [are alleged to have engaged in specified inappropriate behaviour.]

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[15] Audio/video recordings of: Cell #3 Napanee from 18:28 to 21:12 and from 23:36 to 23:45 on April 25, 2008; Cell #2 Napanee from 18:26 on April 25, 2008 to 14:19 on April 26; and Cell #1 Napanee from 20:04 on April 25, 2008 to 9:10 on April 26.

> The implication from this most recent Affidavit … [is that] the one responsive tape of the detention of [the named individual] … which might corroborate or dispute the truth of [his] sworn Affidavit alleging officer threats to his safety … may [have been] selected for re-use and consequent destruction.

[24] Amnesty questions the ministry's failure to provide evidence specifying the source of the information about routine destruction of cell audio and video records at the Napanee OPP Detachment. The appellant submits that since this is the "first time in the 6½ year process of Amnesty's attempts to obtain these records that the claim has been made that the records were likely routinely erased, it is important to clarify when and how [the affiant] became aware of this practice."

> 3. Allegedly contradictory evidence of ministry/OPP staff regarding the Odessa recording, as evidenced by paragraph 7 of [the July 2015] affidavit: [the OPP System Coordinator] advised the affiant that video was only introduced at Odessa Detachment in 2009 – information not previously conveyed to IPC and said to be directly contradicted by the evidence of [a named constable] in records (notes and witness statement) disclosed through Appeal PA13-231.

[25] Amnesty challenges the ministry's new explanation for why the Odessa recording cannot be located; i.e., that it was never created in the first place. In Amnesty's view, the officer's notes and witness statement disclosed through Appeal PA13-231 confirm that there was recording equipment in place at the Odessa OPP Detachment on April 25, 2008. The appellant expresses concern that the constable who provided both affidavits did not inquire into this apparent contradiction between the disclosed officer's notes and witness statement and the system coordinator's evidence. Amnesty specifically suggests that the evidence provided by that officer's contemporaneous written records is more persuasive than what may be "casual recollection seven years later of when recording equipment was installed" at the Odessa OPP Detachment.

[26] Amnesty also expresses additional concerns about inconsistencies in the ministry's (past and current) evidence in relation to the sought-after audio recordings and the lack of a satisfactory explanation from the ministry to reconcile the incongruity.[16]

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[16] Amnesty cites the ministry's July 2015 affidavit evidence about the Odessa and Napanee recordings – that they were never created and were destroyed, respectively – and asserts that it contradicts the ministry's January 2015 representations: namely, that "the audio portion of the cell video has been withheld because it could conceivably identify third party individuals" and "the audio in the records is inaudible based on the technology available to us." Amnesty also takes issue with the ministry having issued three decision letters denying access in full to these same two recordings now said to be never created and not to exist; first, based on the exclusion for prosecution-related records and, next, the law enforcement and personal privacy exemptions (March 2009, April 2013 and June 2014).

Ministry's reply

[27] To seek the ministry's reply, I sent a severed copy of the appellant's representations and a modified Notice of Inquiry, which summarized the appellant's concerns as itemized in the list contained in the section above. The Notice of Inquiry directed the ministry's attention to certain matters requiring a response.[17]

[28] In the reply I received, the ministry referred to "contradictory direction" from this office as to what evidence was required and requested that the Notice of Inquiry be "amended to reflect the correct requirements that the Ministry is required to meet." The ministry argued that "the requirement to conduct a reasonable search has now been superseded by the prescriptive direction to conduct searches according to the search requirements imposed in the Interim Order." I comment on this, below. However, the ministry still provided the additional representations requested, including supplementary documentation.

[29] In the representations provided, the ministry maintains that it has complied with the terms of the interim order. At the same time, the ministry takes issue with the appellant's submissions on the basis that they "contain criticism of alleged Ministry actions dating back to the original request for records, rather than a response to the issue of whether the Ministry complied with the Interim Order."[18] The ministry submits that Amnesty's references to past actions are:

> … a prelude to the appellant's recommendation that another interim order be issued compelling us to engage in yet another search. We cannot see the purpose of this type of recommendation. Not only does it lead to further delays in adjudicating this appeal, but it results in finite law enforcement resources being used to conduct the same search that we have already conducted. If previous searches have failed to identify records, then we contend that conducting the same search over and over again is not going to lead to desired records suddenly materializing.

[30] In support of the assertion that the search conducted was reasonable, the ministry relies on Order PO-3500 and provides the following excerpt from that decision:

> These searches were conducted by an individual at two regional OPP detachments, which are the nearest locations to where the protests took

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[17] Portions of the appellant's representations were withheld. Due to an administrative error, the Notice of Inquiry was not sent to the ministry initially. This oversight was remedied and further clarification was provided to the ministry regarding the requested response. In the Notice of Inquiry, I also invited the ministry to address (if it wished) certain other comments made by the appellant, although these matters raised concerns about past searches, decision letters and "lost mediation opportunities" that are not within my jurisdiction to remedy here.

[18] Here, the ministry mentions the appellant's references to previous searches, decision letters and participation in mediation.

> place. As such, any responsive records would reasonably be expected to be located in these locations. Although the searches did not uncover information relating to the two named OPP officers, I am satisfied that these searches were reasonable in the circumstances.

[31] In the ministry's view, Order PO-3500 provides persuasive authority for dismissing the appellant's appeal here: both appeals relate to the actions of the OPP during protests; the same OPP constable provided an affidavit in both appeals; this constable initially conducted similar searches for both appeals by attending OPP detachments in the same area, although in the present appeal, the search requirements were "significantly expanded" by Interim Order PO-3487-I; and the constable was unable to locate responsive records. The ministry remarks that the single search conducted by the same constable was upheld as reasonable in Order PO-3500 "without him being directed to consult with anyone else;" despite no further records being identified, the adjudicator concluded that the ministry had provided sufficient evidence. Accordingly, the ministry submits that the same conclusion is warranted in this appeal.

[32] In response to the appellant's concern that no affidavit evidence was provided by any of the individuals the ministry was ordered to consult, the ministry argues that Interim Order PO-3487-I prescribed only that affidavits be provided by any individual who conducted a search; that is, the seven identified individuals that the ministry was ordered to consult were not required to carry out searches themselves. The ministry reiterates that six of the seven individuals were consulted, except for the individual no longer employed by the OPP. The ministry adds that the affiant also consulted with an additional member of the OPP, a Detective Inspector. According to the ministry, none of these seven individuals "know about the existence of the records." The ministry's remaining submissions on this point are concerned with disputing the appellant's interpretation of the requirements in the interim order.

[33] Regarding Amnesty's concern that there is "no evidence supporting the ministry's (OPP's) records maintenance or retention policies or practices," as required by provision 2(f) of Interim Order PO-3487-I,[19] the ministry explains that:

> … the reason we did not provide much information about "record maintenance policies and practices" is because our evidence is that there were none, at the time the records were created in 2008. Back then, as the attached redacted OPP Order advises, OPP lockup facilities could be, but did not have to be, monitored with video or audio monitoring equipment. Moreover, where this happened, it was up to the detachment commander to establish "local procedures" in consultation with the Crown Attorney.

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[19] See page 6, above.

> The attached OPP Order states that policies were not required, and we believe that the "local procedures" were that video tapes were re-written approximately every 30 days, unless the tapes were needed for a particular reason, such as litigation. We do not have any evidence that retention schedules were established for these video tapes, if in fact they existed.

[34] In reference to Amnesty's concern about allegedly contradictory evidence regarding the Odessa recording, the ministry acknowledges the constable's notes that were disclosed through the related appeal indicate that the Odessa Detachment did have video recording in 2008. Ministry legal counsel advises that he personally spoke with this same OPP constable to ask for her recollection of video recording capability at that detachment in 2008. The ministry submits that her response was that "she has no independent recollection of this matter, as a result of the passage of over seven years." Further, the ministry adds that:

> I also spoke with … [the system coordinator who had been consulted by the ministry's affiant] … and [a named OPP Inspector]… According to [these individuals], a corporate initiative introduced a standardized system of digital video recording (DVR) into all OPP lockups beginning in 2009, and which was not completed until 2011. [The system coordinator] believes that, to the extent that video recordings may have existed in Odessa lockup prior to 2009, it was not the same as the system that currently exists. Instead, it would have been implemented at the discretion of the local detachment commander as the attached Order authorizes, and not as part of an organization wide initiative, which is where [her] involvement stemmed from.

[35] The ministry concludes that from this evidence, if "a responsive record was ever created prior to 2009, it likely would have been in VHS format." The ministry admits that it has no evidence that the Odessa recording, if it was created, still exists. Further, the ministry submits that it also has no evidence as to when the record was destroyed although "we believe that if it was created, it was destroyed shortly afterwards, as we believe this to be the practice at the time."

Analysis and findings

[36] I begin my reasons with some clarification. In seeking a correction to the Notice of Inquiry, the ministry contended that the usual reasonable search requirements "had been superseded by the prescriptive direction to conduct searches according to the search requirements imposed in the Interim Order." However, the terms of the interim order did not affect the onus the ministry was required to meet in this matter. At paragraph 13 of Interim Order PO-3487-I, I included the following statement that is customarily included in orders from this office addressing the search issue:

> If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If an institution does not satisfactorily demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control, I may order further searches.[20]

[37] Next, I observed that to properly discharge its obligations under the *Act*, an institution is required to provide sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request. Interim Order PO-3487-I was issued because the ministry did not provide sufficient evidence. Implicit in the power to order further searches is the authority to direct an institution to take certain actions, such as looking in different places or consulting with different people, to bring the institution's search up to the level of reasonableness required by section 24 of the *Act.* In this way, "prescriptive" provisions directing specific search activities are sometimes necessary to draw out the evidence. Therefore, I see no reason to differentiate between the requirement to conduct a reasonable search and the provisions of Interim Order PO-3487-I: the latter were simply crafted to satisfy the former.

[38] Indeed, compliance with the terms of the interim order could be expected to bring the appeal to its conclusion. That is the case here. I acknowledge that this conclusion highlights the tension between satisfying the evidentiary burden for reasonable search and providing "a satisfactory explanation." Amnesty has explained "that the additional videos are being sought in an effort to corroborate allegations made by the named individual respecting mistreatment and inappropriate conduct on the part of members of the OPP during his time in-custody at the Odessa and Napanee OPP Detachments on April 25 and 26, 2008 …".[21] Before me now is evidence that meets the evidentiary burden under section 24 of the *Act*; however, it seems likely that this same evidence will not satisfy the appellant in its pursuit of records that might serve to corroborate the allegations made about OPP mistreatment of the named individual.

[39] The ministry relies on Order PO-3500, another order where the sole issue was the ministry's search for records responsive to another part of Amnesty's multi-part request. However, in the reasons immediately following the excerpt provided by the ministry, the adjudicator stated "… as the appellant did not provide representations in this inquiry, he has not provided … a reasonable basis for concluding that the ministry's search was inadequate, or that further records exist." Each appeal is decided on the basis of its facts and the evidence placed before the adjudicator. The fact that Amnesty tendered no evidence in the appeal leading to Order PO-3500 is in stark contrast to this appeal, where Amnesty provided persuasive evidence of a reasonable basis for its belief that the responsive recordings ought to exist. This formed the basis of Interim Order

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[20] Order MO-2185.
[21] As summarized in Interim Order PO-3487-I at paragraph 21.

PO-3487-I requiring the ministry to provide further evidence. On this basis, Order PO-3500 does not support the ministry's position in this appeal.

[40] I will now review the new evidence provided by the ministry consequent to Interim Order PO-3487-I and in reply to the appellant's cogently stated concerns about it. Looking first at what Interim Order PO-3487-I required of the ministry, I accept the ministry's affidavit evidence from the individual who is stationed at the Napanee OPP Detachment. Specifically, I accept that he spoke directly with the relevant, available OPP individuals in response to the direction contained in Order Provision 2, as well as an additional OPP officer, the Detective Inspector. I do agree with the appellant that the evidence provided by these individuals is scant, limited as it is to a mere indication that none of these seven individuals are aware of, or "know about the existence of the records." Paragraph (d) of provision 2 of the interim order specified that evidence was sought "as relevant to that individual, including (but not limited to): their knowledge of whether such a recording was made; where it would be expected to be found; what happened to it, if it is not where expected; and any alternate steps that might be taken to search for it." None of the individuals answered any of those questions, nor is there any indication that the questions were posed to them. All appear simply to have stated that they have no knowledge regarding the existence of the records at present.

[41] Regarding the creation of the Odessa recording, I acknowledge Amnesty's concern about the apparent contradiction between the officer's notes and witness statement (disclosed in the related appeal) and the system coordinator's evidence, but I find the ministry's explanation plausible. After ministry counsel considered Amnesty's concern on this point, he posed further questions to the system coordinator; she appears to have acknowledged that the Odessa OPP Detachment may have been making recordings of the cell areas at the relevant time in April 2008, albeit in a different format than at present. Specifically, I accept that any recording created prior to 2009 at the Odessa OPP Detachment was likely in VHS format. Equally importantly, however, I also accept the ministry's admission "that it has no evidence that the Odessa recording, if it was created, still exists."

[42] In further response to Amnesty's comments about the disclosed officer's notes and witness statement alluding to a tape being created of the named individual's cell (#3) at the Odessa OPP Detachment between approximately 5:08 p.m. on April 25, 2008 and 7:30 a.m. on April 26, I accept that this information was directly put to the relevant officer and, further, that she had no independent recollection of this situation. Amnesty's response to the system coordinator's evidence is that the evidence provided by the written record of the disclosed officer's notes and witness statement should be more persuasive than what may be "casual recollection seven years later of when recording equipment was installed" at the Odessa OPP Detachment. As a matter of evidence, it is true that contemporaneous recordings are generally considered to be more reliable. In this matter, however, the contemporaneous notes and witness statement do not get at the matter of whether the Odessa recording *currently* exists.

[43] Amnesty's concerns about the Napanee recording are more bluntly stated, and I accept that there is some substance to them, mainly because: audio/video recordings involving the named individual and other Mohawk activists in the cells of the Napanee OPP Detachment were retained by the OPP, located by searches conducted in response to Amnesty's multi-part request, and then subsequently disclosed to Amnesty, in part.[22] Amnesty's submissions suggest the difficulty presented in accepting that "… audio/video recordings pertaining to the detention of various Mohawk individuals in the cells at the Napanee OPP Detachment on April 25 and 26, 2008 were not written over and thereby destroyed…" while the Napanee recording, which could corroborate the named individual's allegations about his mistreatment in that time frame was, according to the ministry, "written over long ago, and no longer exists."

[44] Provision 2(f) of Interim Order PO-3487-I required the ministry to provide evidence of the relevant record maintenance policies and practices in relation to the recordings sought by Amnesty. For the first time, the ministry acknowledges in reply that they have no evidence that retention schedules for this type of recording existed at the relevant time. The December 2007 OPP order titled "Prisoner Care & Control" provided by the ministry is not helpful in reconciling this evidentiary matter. It does not require that cells be "monitored with video or audio monitoring equipment," but it does indicate that where a lockup was equipped for such monitoring, the detachment commander "shall establish local procedures in consultation with the crown attorney that shall address the … retention period for recording media." The ministry's submission that "local procedures" were that video tapes were overwritten approximately every 30 days, unless the tapes were needed for a particular reason, such as litigation, is not supported by supplementary written evidence. In any event, it would not explain the apparent destruction of the Napanee recording, but not the numerous other recordings located and disclosed in response to Amnesty's larger request. Presumably, there was no basis for distinguishing between these recordings in terms of a reason, such as litigation or prosecution, to retain them.

[45] Ultimately, however, the ministry has been unable to provide evidence confirming the destruction of either recording. It would have been possible to summarize the ministry's evidence regarding the Odessa and Napanee recordings by stating that they do not currently exist. That is, the Odessa recording either never existed because audio/video recordings (DVD format) were only implemented at the Odessa OPP detachment in 2009 or the recording that may have been created using the VHS format previously in use there was destroyed. Further, the Napanee recording does not exist because it was destroyed by recording over it before the access request was received.

[46] There are clear limits to the relief this office may offer. The Commissioner does

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[22] See footnote 15. Additionally, disclosed video footage of the named individual in the same cell at the Napanee OPP Detachment from 15:27 to 17:54 on April 25, 2008.

not have unlimited remedial power under sections 54(1) and (3), but these provisions do convey legislative intent that the Commissioner should have the flexibility to fashion remedies in order to resolve issues in a fair and effective manner in accordance with the fundamental purposes of the *Act*.[23] In reviewing the search issue, one of the limits on my jurisdiction is that I have no authority to dictate record-keeping practices to an institution, neither presently nor retroactively.[24] Based on my appreciation of the facts and evidence before me, it is reasonable to conclude that both the Odessa and the Napanee recordings were likely created contemporaneously with the events at Tyendinaga on April 25 and 26, 2008. However, I also accept that there is no evidence that the Odessa and Napanee recordings still exist. In the circumstances of this appeal, therefore, I agree with the ministry's observation that "If previous searches have failed to identify records … conducting the same search over and over again is not going to lead to desired records suddenly materializing."

[47] The *Act* does not demand perfection, but it does require an institution to provide sufficient evidence to establish that a reasonable search has been conducted. Certainly, questions remain about the fate of the records, but those questions go to whether an explanation that is satisfactory to Amnesty has been provided, which is distinct from a finding that a reasonable search has not been established. In the context of this inquiry under the *Act,* I am satisfied that the Napanee and Odessa recordings, if they still existed, could reasonably be expected to have been located by the searches conducted by the ministry.

[48] In the circumstances, therefore, I am satisfied that the evidence provided by the ministry is sufficient to adequately discharge its statutory responsibility under section 24 of the *Act*. I find that no useful purpose would be served by revisiting the search issue further, and I uphold the ministry's search for records.

ORDER:

I dismiss the appeal.

Original Signed by: December 21, 2015
Daphne Loukidelis
Adjudicator

[23] See Order M-618. Under sections 54(1) and (3) of the *Act*, permissible orders are traced back to the issues raised by the seeking of access to requested records and include orders to: disclose non-exempt records; conduct further searches for responsive records where a search has been found not to be reasonable; issue an adequate decision to a requester; and waive fees. Orders that have been found not to be permissible include awarding costs and ordering disclosure of records subject to restrictions on use.
[24] See, for example, Order MO-2877-I.