Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3646

Appeal PA14-213

Ministry of Community Safety and Correctional Services

September 12, 2016

Summary: The access request in this appeal was for general policies, procedures and training materials concerning the seizure of material following the execution of a search warrant, and the sharing of already-seized material with other agencies. The ministry granted partial access to the records, claiming the discretionary exemptions in sections 14(1)(c) (reveal investigative techniques), 14(1)(l) (facilitate commission of an unlawful act) and 18(1)(h) (examination questions). The appellant raised the issues of the adequacy of the decision letter and the ministry's search for records. In this order, the adjudicator upholds the ministry's decision, in part. She finds that the ministry's decision letter was adequate. She also finds that many of the records are exempt under section 14(1)(c), but that portions of the records are not exempt under either section 14(1)(c), 14(1)(l) or 18(1)(h). Lastly, the adjudicator finds that the ministry's search for responsive records was not reasonable and orders it to conduct a further search for particular types of records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 14(1)(c), 14(1)(l), 18(1)(h), 24, 26 and 29.

OVERVIEW:

[1] This order disposes of the issues raised as the result of an appeal of an access decision made by the Ministry of Community Safety and Correctional Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester submitted two requests to the ministry for access to the following:

- All records in the possession and/or control of the ministry including but not limited to the Ontario Police College (the OPC), concerning policies, procedures

and training material relating to the exchange of information that has been seized by the Ontario Provincial Police (the OPP) with any other law enforcement agency, including the Canada Revenue Agency (the CRA), and including the receipt of information from the CRA to the OPP. The request included records relating to section 241(3) of the *Income Tax Act* and section 462.48 of the *Criminal Code of Canada*, and included all memoranda of understanding and other agreements, policies, memoranda and/or directives governing the receipt by the OPP of information originating from the Canada Revenue Agency. The request specified a time period for which the records were sought; and

- All records pertaining to policies, procedures and training relating to the seizure of things not specified pursuant to section 489 of the *Criminal Code of Canada* in the possession and/or control of the ministry, including but not limited to the OPC. The request specified a time period for which the records were sought.

[2] The ministry issued a decision in response to both requests, granting access to some of the records, but not to others. The ministry claimed the application of the discretionary exemptions in sections 14(1)(c) (law enforcement), 14(1)(l) (facilitate the commission of an unlawful act), 15(b) (relations with other governments), 18(1)(a), (c) (d) (economic and other interests) and 18(1)(h) (examination questions) of the *Act*.

[3] In turn, the requester (now the appellant) appealed the ministry's decision to this office. The appellant stated in the appeal letter that in addition to appealing the access decision, it believed that the ministry had not conducted a reasonable search for records, and that the decision letter itself was inadequate and did not meet the requirements of the *Act*.

[4] Mediation did not resolve the appeal and it was transferred to the inquiry stage of the appeal process. The adjudicator assigned to the appeal sought and received representations from the ministry and the appellant. In its representations, the ministry indicated that it was no longer relying on the exemptions in section 15(b), as well as section 18(1)(a), (c) and (d). As a result, these exemptions were removed from the appeal.

[5] The appeal was then transferred to me for final disposition. For the reasons that follow, I uphold the ministry's decision in part. I find that its decision letter and index of records were adequate. I find that many of the records are exempt under section 14(1)(c) either in whole or in part, but that other portions of the records are not exempt under either section 14(1) or 18(1)(h). I uphold the ministry's exercise of discretion. Lastly, I find that the ministry's search for responsive records was not reasonable. I order the ministry to conduct a further search for particular records.

RECORDS:

[6] There are 522 pages of responsive records. All of the records were withheld in their entirety under sections 14(1)(c) and 14(1)(l). In addition, the ministry claimed

section 18(1)(h) with respect to all or parts of records 3, 4, 5, 9, 10, 11, 15, 17, 18, 21 and 22. In its index of records, the ministry has listed the records as:

- 1 – Table of Contents;
- 2 – 2005 Ontario Police College Proceeds of Crime Course;
- 3 – Best Practice: Currency Seizures (course material);
- 4 – Power Point – CISO – POC Investigator's Course;
- 5 – Project ORP[1] Guidelines, Reference and Forms;
- 6 – Currency Seizures – Appendices (course material);
- 7 – Proceeds of Crime Course Final Exam;
- 8 – Power Point – Asset Forfeiture Investigations;
- 9 – Best Practice: Currency Seizures (course material);
- 10 – Proceeds of Crime Course Material;
- 11 – Criminal Code of Canada – Proceeds of Crime;
- 12 – Project ORP Guidelines, References and Forms;
- 13 – Project ORP Vehicle Search Warrant Reference Package;
- 14 – Proceeds of Crime Course Material and Final Exam;
- 15 – Power Point – Project ORP Rollout;
- 16 – Best Practices – Currency Seizures (course material);
- 17 – Proceeds of Crime Course Material and Final Exam;
- 18 – Criminal Code of Canada – Proceeds of Crime;
- 19 – Project ORP Guidelines, References and Forms;
- 20 – Asset Forfeiture Course Power Point Presentation and Final Exam; and
- 21 – Course Material and Review Questions.

[7] The ministry provided background information regarding the records at issue. The ministry states that the request yielded numerous responsive records, all of which originated with training programs offered by or through the Ontario Police College

[1] ORP stands for offence-related property.

(OPC) and the Criminal Intelligence Service of Ontario (CISO). The OPC has a statutory mandate[2] to train police officers who have been hired to work at Ontario law enforcement agencies.

[8] The ministry states that CISO records containing case-law were disclosed to the appellant, but that the records at issue were not. These records, the ministry states, relate to training courses offered by or through the OPC and CISO on the subject of organized crime. The OPC and CISO collaborate with other police services and law enforcement organizations to train police officers.

[9] The ministry goes on to state:

> The records at issue are highly specialized training materials created through important partnerships between the CISO and the Provincial Asset Forfeiture Unit (PAFU), as well as training records belonging to the OPC. CISO, which is part of the Ministry, brings together provincial and federal law enforcement agencies to combat organized crime in Ontario. It is part of a network of similar organizations that make up the Criminal Intelligence Service Canada (CISC).[3] The PAFU is a joint effort of the OPP and 20 other municipal police services to address the forfeiture of offence-related property and proceeds of crime. CISO and PAFU, in partnership, offer training programs at the OPC.

ISSUES:

A. Did the ministry's decision letter comply with the requirements of the *Act*?

B. Do the discretionary exemptions in sections 14(1)(c) and/or 14(1)(l) apply to the records?

C. Does the discretionary exemption in section 18(1)(h) apply to the records?

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

E. Did the ministry conduct a reasonable search for records?

DISCUSSION:

Issue A. Did the ministry's decision letter comply with the requirements of the *Act*?

[10] In its appeal letter, the appellant submitted that the ministry's decision letter

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[2] See section 3 of the *Police Services Act*.

[3] http://www.mcscs.jus.gov.on.ca/english/police_serv/CISO/crim_int_serv.html.

failed to provide sufficient information with respect to:

- The quantity of records exempted;
- The specific nature of each record exempted;
- The specific exemption applicable to each record; and
- The reason for claiming the exemption in relation to the specific record.

[11] The appellant argues that the deficiencies in the ministry's decision letter run contrary to the ministry's obligations under section 22(1)(b) of the *Act*, procedural fairness, and this office's Practice Direction entitled *Drafting a Letter Refusing Access to a Record*. During the mediation of the appeal, the ministry provided the appellant with an index of records, which the appellant submits is also deficient.

[12] The ministry states that the decision letter was standard and identical in format to all other decision letters the ministry issues. It states that last year it received over 5500 requests under the *Act*, and that it objects to adjusting its template for issuing decision letters in response to a complaint by a single appellant.

[13] The ministry goes on to argue that the decision letter and the index provide the appellant with an understanding of the contents of the records and that they originate with the OPC and the CISO. The ministry also submits that this information, when combined with the exemptions applied, provides the appellant with a sufficient understanding as to why the ministry applied the exemptions it did.

[14] The ministry further submits that the records at issue are highly sensitive and that providing additional information in the decision letter and index could reveal the contents of the records. In particular, regarding the index, the ministry argues that the titles contained in it are not too general, as they reflect the general nature of the records themselves. The ministry notes that the index includes a brief description of the records, the number of pages of each record and the exemptions claimed.[4]

[15] The appellant reiterates that the decision letter and index provided by the ministry in this case were inadequate and that, consequently, it has been precluded from being able to effectively participate in the appeal. More particularly, the appellant submits that some of the record titles are so general that it is impossible to know whether they are responsive to the request, or to which part of the request they respond.

[16] Further, the appellant submits that because of the broad, overarching titles of records in the index lacking detail, it is impossible for it to effectively respond to the exemptions claimed by the ministry or to challenge the ministry's assertion that it is unable to sever any material. The appellant goes on to argue that other titles, for

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[4] This type of index, it submits, was upheld in Order PO-3098 and should be upheld in this instance.

example, *Project ORP – Guidelines, Reference and Forms* provide no assistance because the ministry has not provided a description as to what Project ORP is, or what course or program it relates to.

[17] Finally, the appellant argues that the *Practice Direction* referred to above notes that a proper decision letter must provide an index, list the exemptions invoked and for each record explain why the provision applies to the record. In this instance, the appellant argues, the ministry has failed to provide an explanation as to why the exemptions apply to each specific record.

Analysis and findings

[18] Sections 26 and 29 are relevant to this issue. The salient portions read:

> 26. Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 25, the head of the institution to which it is forwarded or transferred, shall, subject to sections 27, 28 and 57 within thirty days after the request is received,
>
> > (a) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given;
> >
> > . . .
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> 29. Notice of refusal to give access to a record or a part thereof under section 26 shall set out,
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> > . . .
> >
> > (b) where there is such a record,
> >
> > > (i) the specific provision of this Act under which access is refused,
> > >
> > > (ii) the reason the provision applies to the record,
> > >
> > > . . .

[19] As set out above, section 29(1)(b) specifies that the notice of refusal to provide access, which is contained in an institution's decision letter, must include the specific section of the *Act* under which access is refused and the reason that the provision applies to the record.

[20] Past orders of this office have indicated that the aim of section 29(1)(b) is to ensure that decision letters allow requesters to make a reasonably informed decision as to whether to seek an appeal of the institution's decision.

[21] In order to assist institutions in preparing a decision letter that meets the legislative requirements of the *Act*, the Commissioner's office issued a revised *IPC Practices* publication entitled *Drafting a Letter Refusing Access to a Record*. This document, which was sent to all provincial and municipal institutions, describes the types of information an institution should include in its decision, including in part:

- An index of records;
- A document number assigned to each record and a general description of each record;
- An indication of whether access has been granted or denied for each record or part of a record;
- The specific provision of the *Act* for which access has been denied to each record or each part of a record;
- An explanation of why the provision applies to each record or part of a record;
- The name and position of the person making the decision; and
- A paragraph informing the requester that he or she can appeal the decision to this office.

[22] I have reviewed the decision letter and past orders of this office regarding this issue. I find that the decision letter in this appeal meets the requirements of section 29(1)(b). It indicates, in general terms, what the responsive records are, what exemptions were claimed, why the exemptions it applied are applicable, who made the access decision, and the appellant's right to appeal the decision to this office. In my view, the ministry's access decision is sufficient to allow a requester to determine whether or not they wish to appeal the ministry's decision to this office.

[23] Concerning the index of records that was provided by the ministry during the mediation stage of the appeal, I find that it adequately describes the records at issue, the number of pages of each record, and lists the exemptions claimed for each record. While it may have been more helpful for the appellant to have had the benefit of this index during the processing of the request, in my view, the absence of it at that stage did not preclude it from deciding to appeal the ministry's decision to this office. Further, I find that both the decision and index did not prevent the appellant from participating in the appeals process. The appeal went through the mediation and inquiry stages of the appeals process, where the appellant was provided with the opportunity to fully participate in both stages.

Issue B. Do the discretionary exemptions in sections 14(1)(c) and/or 14(1)(l) apply to the records?

[24] The ministry has claimed the application of the discretionary exemption in sections 14(1)(c) and (l) to all of the records in their entirety. These sections state:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
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> > (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
> >
> > (l) facilitate the commission of an unlawful act or hamper the control of crime.

[25] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[5]

[26] It is not enough for an institution to take the position that the harms under section 14 are self-evident from the record. 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 and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[6]

[27] Concerning section 14(1)(c), in order to meet the investigative technique or procedure test, the institution must show that disclosure of the technique or procedure could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public.[7] In addition, the techniques or procedures must be *investigative*. The exemption will not apply to *enforcement* techniques or procedures.[8]

[28] The ministry submits that these exemptions apply because the records contain training materials provided to police officers to instruct them on protecting public safety and investigating laws against organized crime. The records include checklists, forms, diagrams, frequently answered questions, course materials and examination materials.

[29] The ministry states that it is concerned that the disclosure of the records could lead to:

- The records being posted on the Internet, where they would be widely disseminated and available to be viewed by offenders and would-be offenders. This could have an adverse impact on law enforcement in Ontario, as well as other provinces which use the same techniques and procedures;
- Irreparable damage to the training, educational mandate and culture of the OPC and the CISO, which encourages the sharing of information among members of

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[5] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

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

[7] Orders P-170, P-1487, MO-2347-I and PO-2751.

[8] Orders PO-2034 and P-1340.

the law enforcement community. Training records are to be used solely for educational purposes and are not to be further disseminated;

- Harm to the ongoing efforts to combat the *scourge* of organized crime, including money laundering, which threatens Canadian society.

[30] With respect to the exemption in section 14(1)(c) in particular, the ministry submits that the records describe techniques and procedures that are associated with specific types of law enforcement investigations against organized crime. Because these records are used for the purpose of training police officers, the records contain a significant quantity of operational detail with respect to both techniques and procedures.

[31] In addition, the ministry argues that the techniques and procedures described in the records reveal how police forces work to respond to, or prevent specific types of organized crimes from occurring. Many of the records relate to covert or behind-the-scenes law enforcement, which is not currently known to the public. Disclosure of this information could hinder or compromise their effective utilization, by providing would-be offenders important information about covert police operations, thus allowing these operations to be thwarted.[9]

[32] Turning to section 14(1)(l), the ministry submits that disclosure of the records could hamper the control of crime by:

- Allowing the techniques and procedures described in the records to be thwarted or evaded by offenders;

- Deterring the sharing of information with the OPC and CISO out of concern that these organizations are unable to protect it, thereby harming the statutory mandate of the OPC; and

- Diminishing the sharing of information by instructors (who are outside subject matter experts) to police officers in training because the instructors expect that the records they prepare will be treated as confidential and safeguarded. This diminished instruction to police officers will result in poorly trained officers who are less effective in combatting crime.

[33] The appellant does not dispute that the records constitute law enforcement records, but submits that the ministry has failed to meet its evidentiary burden with respect to the reasonable expectation of probable harm should the records at issue be disclosed.

[34] With respect to section 14(1)(c) in particular, the appellant submits that the subject matter of the request does not fall within the core of investigative techniques and procedures as contemplated by this exemption. In particular, the appellant states

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[9] In making this argument, the ministry relies on Order PO-2380.

that it is not requesting material concerning investigative steps such as drafting a search warrant. The request is for records concerning the sharing of information already obtained by the OPP pursuant to an investigation, and the seizure of things not specified, following the execution of a search warrant. The appellant argues that none of the records relate to covert law enforcement because the seizure and sharing of information occur after an investigation has been conducted in order to obtain a search warrant, and after the target of the search warrant has been given notice of the search.[10]

[35] The appellant further states that the core requirements regarding the seizure of things not specified and the sharing of them is clearly and publicly set out in sections 489 and 490(15) of the Criminal Code. The appellant also states that law enforcement agencies routinely publicize the seizure of items following the execution of search warrants in relation to other items, and make no secret of sharing that information with appropriate agencies after the warrants are executed. The appellant argues that it is difficult to fathom how the disclosure of the records could enable suspects to hinder investigations in other cases. The appellant states:

> Put another way, members of the public already know that if a search warrant is executed for one item (such as business records) and that police find other items not specified in the warrant (such as cash or contraband), the police will seize those items, and share them with other law enforcement agencies if merited.

[36] Concerning Order PO-2380, the appellant submits that it is distinguishable from the present appeal, as in that appeal the request was for records concerning the preparation for a specific search and seizure operation. In this case, the appellant states, the request is for general policies, procedures and training material concerning the seizure of material following the execution of a search warrant and the sharing of already-seized material with other agencies.

[37] Turning to the exemption in section 14(1)(l), the appellant argues that the ministry has simply made bare assertions as to how the disclosure of the records will facilitate the commission of an unlawful act or hamper the control of crime, not meeting its evidentiary burden. The appellant submits that information about processes that are already in the public domain or easily inferred cannot be reasonably expected to hamper crime control or facilitate the commission of a crime.

Analysis and findings

[38] Having reviewed the records, I note at the outset that there is extensive duplication of the contents of many of the records, as it is clear from the face of the records that they were used for training and educational purposes over the course of four consecutive years. As previously stated, the records consist of teaching materials, review questions and exam questions.

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[10] See section 29 of the *Criminal Code of Canada*.

[39] I find that most of the records are exempt from disclosure under section 14(1)(c) either in whole or in part, because they reveal investigative techniques and procedures used by authorities in investigating organized crime, the disclosure of which could reasonably be expected to hinder or compromise their effective utilization. These records contain extensively detailed step-by-step instructions and procedures to be followed by officers with regard to a number of issues dealt with in these types of investigations, which are not generally known in the public domain.

[40] Conversely, other records or portions thereof I find are not exempt under either section 14(1)(c) or 14(1)(l) because they consist of excerpts from statutes, list of offences under the *Criminal Code of Canada*, or contain information that is of such a general nature that it either does not reveal investigative techniques and procedures (section 14(1)(c)) or the disclosure of which would not hamper the control of crime or facilitate the commission of an unlawful act (section 14(1)(l)). I will review each record in turn.

Record 1

[41] This record is a table of contents, setting out the course curriculum over a four-year period. I find that this record is not exempt under either section 14(1)(c) or (l) because it simply sets out the general topics to be covered in the courses. Because of the general nature of this record, its disclosure would not, in my view, reveal investigative techniques or hamper the control of crime. As no other exemptions have been claimed with respect to this record, I will order its disclosure to the appellant.

Record 2

[42] This record is duplicated in records 10 and 21 and partially duplicated in record 20. It consists of course materials for a Proceeds of Crime course. I find that pages 3-4 and 48-51, as well as the footnotes in pages 6-8 of record 2 are exempt from disclosure under section 14(1)(c) for the reasons described above. The remaining pages I find are not exempt under either section 14(1)(c) or (l) because they consist of excepts from two publicly-available statutes, as well as a list of offences under the *Criminal Code of Canada*, which is also publicly available. In addition, I find that pages 1 and 2 are not exempt under either sections 14(1)(c) or (l), as they consist of a simple cover page and a general table of contents. As no other exemptions have been claimed with respect to this record, I will order the ministry to disclose pages 1-2 and 5-47 (with the exception of the footnotes) to the appellant. My findings with respect to this record apply to the duplicated material in records 10, 20 and 21, although the ministry has claimed the application of section 18(1)(h) to part of records 10 and 21, which I will address below.

Records 3 and 4

[43] I find that these records are exempt under section 14(1)(c) because they reveal detailed instructions, techniques and procedures regarding currency seizures, the disclosure of which could reasonably be expected to hinder the effective utilization of these techniques. Record 3 is duplicated in records 9 and 16, while record 4 is also

duplicated in record 9. Consequently, my findings regarding records 3 and 4 apply equally to records 9 and 16.

Record 5

[44] I find that the majority of this record is exempt under section 14(1)(c). Disclosure of this record would reveal detailed techniques and procedures regarding the seizure of certain assets. However, I also find that pages 9 and 15-16 are not exempt under either sections 14(1)(c) or (l), as they consist of an excerpt from the *Criminal Code of Canada*, as well as a list of offences under it. This information is publicly-available and I find that its disclosure would not reveal investigative techniques or hamper the control of crime. As no other exemptions have been claimed with respect to this portion of the record, I will order the ministry to disclose pages 9, 15 and 16 to the appellant. This record is duplicated in records 12 and 19. Consequently, my findings regarding record 5 apply equally to records 12 and 19. The ministry has claimed the application of section 18(1)(h) to part of record 5, which I will examine below.

Record 6

[45] I find that this record is exempt from disclosure under section 14(1)(c). It sets out detailed techniques and procedures with respect to the seizure of currency. In my view, disclosure of these techniques would interfere with their effectiveness. This record is duplicated in records 9 and 16. Consequently, my findings regarding record 6 also apply to records 9 and 16.

Record 7

[46] This record consists of course material and the final exam for the proceeds of crime course. I find that this record is exempt under section 14(1)(c), as the disclosure of both the course material and the exam would reveal investigative techniques and procedures, the disclosure of which would interfere with their effectiveness. This record is duplicated in records 14 and 17. Accordingly, my findings regarding record 7 apply equally to records 14 and 17.

Record 8

[47] I find that the majority of this record is exempt from disclosure under section 14(1)(c) because it reveals investigative techniques and procedures regarding asset forfeiture investigations, the disclosure of which would interfere with their effectiveness. However, I also find that the lower third of page 1, as well as pages 2-4 are not exempt under either sections 14(1)(c) or (l) because they consist of excerpts from the *Criminal Code of Canada* and a particular Bill, which are both publicly-available. As no other exemptions have been claimed with respect to this record, I will order the ministry to disclose the lower third of page 1 and all of pages 2-4 to the appellant. This record is duplicated in records 15 and 20. Consequently, my findings regarding record 8 also apply to the duplication in records 15 and 20.

Record 11

[48] I find that this record is not exempt from disclosure under sections 14(1)(c) or (l). This record is a print-off from the federal Department of Justice's website of excerpts of the *Criminal Code of Canada*, all of which is in the public domain. This record is duplicated in record 18 and, therefore my findings regarding record 11 apply to record 18 as well. The ministry has claimed the application of section 18(1)(h) to records 11 and 18, which I will discuss below.

Record 13

[49] I find that this record is exempt under section 14(1)(c). This record is a detailed procedural guide regarding vehicle search warrants, the disclosure of which would reveal investigative techniques and procedures. I find that the disclosure of these techniques would interfere with their effectiveness.

Record 20

[50] Portions of this record have been dealt with, as they are duplicated in records 2 and 8. The remaining portion of this record is the Asset Forfeiture Course final exam. I find that this information is exempt under section 14(1)(c), as the examination itself reveals investigative techniques and procedures, the disclosure of which would interfere with their effectiveness.

[51] My findings upholding the application of the law enforcement exemption in section 14(1) are subject to my findings regarding the ministry's exercise of discretion, which I consider below. The ministry has also raised the application of section 18(1)(h) to some of the records, which I also consider below.

Issue C. Does the discretionary exemption in section 18(1)(h) apply to the records?

[52] In its representations, the ministry has claimed the application of section 18(1)(h) to the following records:

- Currency seizure questions in records 4, 10 and 17;
- Proceeds of crime final exam in records 5, 15 and 18;
- Proceeds of crime review questions in records 3, 11 and 22; and
- Asset forfeiture investigations test questions and answers in records 9 and 21.

[53] I have already found records 3, 4, 9, 15 and 17 to be exempt under section 14(1)(c), so it is not necessary for me to determine whether section 18(1)(h) also applies to them. In addition, I note that the ministry has claimed this application with respect to record 22. However, given that I have an index setting out 21 records and I have only 21 records before me, I have to assume that the ministry's reference to a

record 22 is in error. Consequently, the remaining records at issue are records 5, 10, 11, 18 and 21.

[54] The ministry submits that these records contain information relating to course examinations or assignments, which were used by the CISO. In particular, it states that the records are final exams or contain test questions and answers, and that they were used for the purpose of evaluating the police officers who received training in investigative procedures and techniques used to combat organized crime.

[55] In addition, the ministry argues that the disclosure of this evaluative material could reasonably be expected to prejudice the use of the tests because the tests and materials are re-used and likely continue to be used for the foreseeable future. Further, the OPC and CISO safeguard the confidentiality of these records, which are used solely for course work and are not in the public domain. Lastly, the ministry submits that it would be costly for the CISO to generate new test materials.

[56] The appellant argues that the ministry has not provided evidence that steps have been taken by it to ensure the integrity of the testing questions, which would demonstrate that there are definite plans to re-use the testing questions in the future.[11]

[57] The appellant also raises, for the first time, the possible application of the public interest override in section 23, arguing that the public has an interest in knowing whether and how its law enforcement institutions complied with their legal obligations concerning searches and information-sharing, pursuant to statute and the *Charter of Rights and Freedoms*.

Analysis and findings

[58] For ease of reference, I shall refer to each of the records in turn for which the ministry is claiming the application of this exemption. As previously stated, this exemption is being claimed with respect to records 5, 10, 11, 18 and 21.

[59] Concerning record 5, the ministry states that it consists of the Proceeds of Crime final exam. On my review of the record, this is not the case. Record 5 is not a final exam, but consists of course material regarding the seizure of certain assets. The portions of this record that I have found not to be exempt under section 14(1) set out excerpts from the *Criminal Code of Canada*, as well as a list of offences under it. This information does not qualify as tests or testing procedures as required under section 18(1)(h) and is, therefore, not exempt from disclosure.

[60] The ministry further claims that record 10 consists of currency seizure questions. Record 10 is, in fact, material related to the Proceeds of Crime Course. There are no currency seizure questions contained in record 10. However, there are proceeds of crime review questions, which I have already found to be exempt under section 14(1)(c). The information in this record which I have found not to be exempt under

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[11] See Order PO-3081 at para. 27.

sections 14(1)(c) or (l) consists of a general table of contents, and excerpts from publicly-available statutes.[12] As was the case with record 5, I find this record does not fit within the parameters of section 18(1)(h) and is, therefore, not exempt from disclosure.

[61] Records 11 and 18 are duplicates. The ministry refers to record 11 as proceeds of crime review questions and to record 18 as the proceeds of crime final exam. On my review of these two records, neither description provided by the ministry is accurate. Both records are print-outs from the federal Department of Justice's website and set out excerpts of the *Criminal Code of Canada*, which appear to have been used in the Proceeds of Crime Course. However, information set out in publicly available statutes, I find, does not qualify as tests or testing procedures as contemplated by section 18(1)(h) and is, therefore, not exempt from disclosure.

[62] Lastly, the ministry is claiming this exemption with respect to the asset forfeiture investigations test questions and answers in record 21. I find that record 21 does not contain any test questions or answers. Record 21 is a partial duplicate of record 10, but without the test questions that are set out in records 2 and 10. The information that I found was not exempt under sections 14(1)(c) or (l) I describe above in my discussion of record 10, and my findings with respect to these portions of record 10 apply equally to record 21.

[63] In sum, I find that the information which I found not to be exempt under section 14(1)(c) or (l) is also not exempt from disclosure under section 18(1)(h). As I have found that the exemption in section 18(1)(h) does not apply to the records, it is not necessary for me to address the appellant's raising of the possible application of the public interest override in section 23.

Issue D. Did the ministry exercise its discretion under section 14(1)(c)? If so, should this office uphold the exercise of discretion?

[64] The section 14(1) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[65] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example: it does so in bad faith or for an improper purpose; it takes into account irrelevant considerations; or it fails to take into account relevant considerations. In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[13] This office may not, however, substitute its own discretion for that of the institution.[14]

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[12] Please see my discussion of record 2 under Issue B. The portions of record 2 which I found not to be exempt are duplicated in record 10.
[13] Order MO-1573.
[14] See section 54(2).

[66] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[15]

- The purposes of the *Act*, including the principles that: information should be available to the public; individuals should have a right of access to their own personal information; exemptions from the right of access should be limited and specific; and the privacy of individuals should be protected;
- The wording of the exemption and the interests it seeks to protect;
- Whether the requester is seeking his or her own personal information;
- Whether the requester has a sympathetic or compelling need to receive the information;
- Whether the requester is an individual or an organization;
- The relationship between the requester and any affected persons;
- Whether disclosure will increase public confidence in the operation of the institution;
- The nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person; and
- The historic practice of the institution with respect to similar information.

[67] The ministry submits that it exercised its discretion appropriately, and took the following into consideration that disclosure of the records would: harm law enforcement operations against organized crime; harm the statutory mandate of the OPC to train police officers; and jeopardize public confidence in the mandate of the OPC and the CISO as a result of the first two points.

[68] The appellant submits that the ministry failed to take into account other relevant considerations including that the public has an interest in knowing whether, and how, its law enforcement institutions complied with their legal obligations concerning searches and information-sharing, pursuant to statute and the *Canadian Charter of Rights and Freedoms*, and the fact that the request is for records that are over seven years old.

[69] I have carefully considered the ministry's representations, and, based on the evidence tendered in the representations, I find that it took into account relevant factors weighing against the disclosure of the law enforcement information at issue, and did not take into account irrelevant considerations. Under all the circumstances, therefore, I am satisfied that the ministry has appropriately exercised its discretion

[15] Order P-344 and MO-1573.

under section 14(1)(c) to withhold the law enforcement information that I have found to be exempt.

Issue E. Did the ministry conduct a reasonable search for records?

[70] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.[16] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[71] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[17] To be responsive, a record must be *reasonably related* to the request.[18]

[72] A reasonable search is one in which an experience employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[19] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable efforts to identify and locate all of the responsive records within its custody or control.[20]

[73] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[21]

[74] In its representations, the ministry advised that, after receiving the request, the scope of the request was confirmed with the appellant by way of correspondence that was sent to the appellant on a specified date, and that the ministry subsequently determined that all responsive records would be located at the OPC.

[75] The ministry then provided detailed information about the search it conducted for training materials, with which the appellant does not take issue.

[76] However, the ministry also stated in its representations that it acknowledges that the request included policies and procedures and states:

> . . .[S]ince the OPC is not a police service, and does not direct police services, it was determined that none of the responsive records would include policies or procedures. As such, the responsive records were limited to training materials.

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[16] Orders P-85, P-221 and PO-1954-I.
[17] Orders P-624 and PO-2559.
[18] Order PO-2554.
[19] Orders M-909, PO-2469 and PO-2592.
[20] Order MO-2185.
[21] Order MO-2246.

[77] The appellant submits that the ministry did not conduct a reasonable search for the records as issue because it unilaterally restricted the scope of the request to training materials, despite the fact that the other records requested were also in the ministry's custody and/or control. In particular, the appellant states that the request included policies or procedures, as well as copies of all memoranda of understanding and other agreements, policies, memoranda and/or directives. Further, the request clearly states that the records being sought are in the possession and/or control of the ministry, including but not limited to, the OPC.

[78] The appellant argues that the ministry's position that the records would not include policies or procedures because the OPC is not a police service and does not direct police services is not a relevant consideration to an institution's obligations under section 10(1) of the *Act*. That section states that a person has a right to access a record in the custody or under the control of an institution unless an exemption applies or the request is frivolous or vexatious. The appellant states:

> An institution may not have a record in its custody but still have control over it; alternatively, an institution with custody of a record may not have full control over it. However, in order to fall within the jurisdiction of the *Act*, an institution need only have custody or control of a record.[22] While mere possession of a record by an institution may not constitute custody or control in all circumstances, physical possession of a record is the best evidence of custody, and only in rare cases can it be successfully argued that an institution did not have custody of a record in its actual possession.[23]

[79] The appellant reiterates that the request includes general policies, procedures and training materials concerning the seizure of material following the execution of a search warrant and the sharing of already-seized material with other agencies.

Analysis and findings

[80] As previously stated, the appellant does not take issue with the ministry's search for training materials. The issue is whether the search for policies, procedures, memoranda of understanding, other memoranda and directives at the ministry and the OPC, concerning the seizure of material following the execution of a search warrant and the sharing of already-seized material with other agencies, was reasonable.

[81] This office has a copy of the letter the ministry refers to above where the scope of the request was clarified between the ministry and the appellant. In fact, this letter relates only to one part of the two-part request.[24] In particular, the letter states:

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[22] Order P-239.
[23] Order 120.
[24] The ministry assigned number CSCS-A-2014-00862 to this request.

> Based on the wording of your request and our teleconference held on [a specified date], this request is being processed for access to Ontario Police College (OPC) policies, procedures and training materials relating to the seizure of things not specified pursuant to section 489 of the *Criminal Code*.

[82] Based on my review of the two requests, the correspondence that was sent to the appellant by the ministry during the processing of the request referred to above, and the representations provided by the parties, I am not satisfied that the ministry's search for records was reasonable.[25]

[83] First, the clarified request relating to the *seizure of things not specified*[26] clearly includes policies and procedures. In my view, the ministry was not entitled to remove these types of records from the scope of the request after it had specifically clarified with the appellant that they were included in the request. Consequently, I find that the ministry should have conducted a search for these types of records and that the search it did conduct was not reasonable in these circumstances. I will order it to conduct a further search for these types of records.

[84] Second, the other request was for all records in the possession and/or control of the ministry including, but not limited to, the OPC concerning policies, procedures and training material relating to the exchange of information that has been seized by the OPP with any other law enforcement agency, including the CRA, and including the receipt of information from the CRA to the OPP.[27] The request included records relating to section 241(3) of the *Income Tax Act* and section 462.48 of the *Criminal Code of Canada*, and included all memoranda of understanding and other agreements, policies, memoranda and/or directives governing the receipt by the OPP of information originating from the CRA. This request clearly includes not only policies and procedures, but also memoranda of understanding, and other agreements, memoranda and directives. This request also includes records held and/or controlled by both the OPC and the ministry. I have no evidence before me from either party that would lead me to conclude that this request was narrowed or modified in any way by the appellant.

[85] There is no explanation in the ministry's representations why it excluded policies, procedures, agreements, memoranda of understanding, other memoranda and directives from the scope of the request referred to in the preceding paragraph, or why it did not search for these types of records at both the OPC and the ministry, as was requested by the appellant. I can conclude only that no search for these types of records was conducted.

[86] Consequently, I find that the ministry's search for records with respect to the

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[25] In making this finding, I am mindful of Order PO-3494, in which Senior Adjudicator Frank DeVries upheld the ministry's search for records in response to a similar access request. However, I note that the request in this appeal has aspects of it that are qualitatively different from the request in Order PO-3494.
[26] *Ibid.*
[27] The ministry assigned number CSCS-A-2014-00863 to this request.

request dealing with the exchange of information[28] was not reasonable, not only with respect to the types of records were searched, but also the location of the search. In my view, both the ministry and the OPC should have searched for the type of records described above, namely policies, procedures, agreements, memoranda of understanding, other memoranda and directives, and I will order it to conduct a search for these records.

[87] In sum, I uphold the ministry's decision in part. I find that its decision letter and index of records were adequate. I find that many of the records are exempt under section 14(1)(c) either in whole or in part, but that other portions of the records are not exempt under either section 14(1) or 18(1)(h). I uphold the ministry's exercise of discretion. Lastly, I find that the ministry's search for responsive records was not reasonable. I order the ministry to conduct a further search for particular records as set out in the order provisions.

ORDER:

1. I order the ministry to disclose Records 1 and 11 in their entirety to the appellant.

2. I order the ministry to disclose: pages 1-2 and 5-47 (with the exception of the footnotes) of Record 2; pages 9 and 15-16 of Record 5; and the lower third of page 1 and all of pages 2-4 of Record 8 to the appellant. All records referred to on order provisions 1 and 2 are to be disclosed to the appellant by **October 18, 2016** but not before **October 12, 2016**.

3. I reserve the right to require the ministry to provide me with copies of the records it discloses to the appellant.

4. I order the ministry to conduct a further search at the Ontario Police College for policies and procedures relating to request number CSCS-A-2014-00862.

5. I order the ministry to conduct a further search at the ministry and the Ontario Police College for policies, procedures, agreements, memoranda of understanding, other memoranda and directives with respect to request number CSCS-A-2014-00863.

6. If the further searches yield responsive records, I order the ministry to issue a decision letter to the appellant by **October 11, 2016**. If the further searches do not yield responsive records, I order the ministry to provide the appellant with a written explanation of the searches conducted by **October 11, 2016**.

Original signed By: September 12, 2016

Cathy Hamilton
Adjudicator

[28] *Ibid.*