Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4127

Appeal PA18-00703

Ministry of the Solicitor General

March 26, 2021

Summary: The appellant made an access request under the *Act* to the ministry for records of communication between the OPP and the Town of Amherstburg about Amerherstburg's efforts to find alternative policing services.

The ministry granted partial access to the responsive records, claiming a variety of discretionary and mandatory exemptions. During mediation and the inquiry process, a number of issues were resolved.

In this order, the adjudicator considers the only remaining issues in dispute – the possible application of the law enforcement exemption at section 14(1) to an email exchange. The adjudicator finds that the section 14(1) exemption does not apply and orders that the email exchange be disclosed in full to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 14(1), (a), (c), (e), (i), (j), (k), and (l).

Orders Considered: Orders MO-2539, M-371, MO-3964, and M-320.

Cases Considered: *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.), and *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.

OVERVIEW:

[1] In 2017, the Town of Amherstburg (the town) issued a request for proposal to a limited number of police services to invite proposals to provide policing services to the

town. The Ontario Provincial Police (the OPP) were invited to submit a proposal. The town eventually selected the Windsor Police Services Board (the Windsor police) to provide policing services, which it has done since January 1, 2019.

[2] Against this backdrop, the appellant submitted an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) with the Ministry of the Solicitor General (the ministry) for:

> ... all records of communications to and from the ministry, the OPP [Ontario Provincial Police] and the Municipality of Amherstburg regarding the town's request for an OPP costing and the town's Request for Proposal [for] Police Services.
>
> This request for records includes, but is not limited to, letters, emails, telephone call logs, and notes.

[3] The ministry[1] issued an access decision to the appellant granting partial access to the records. The ministry stated that it withheld portions of the records under the discretionary exemptions in sections 14(1)(a) (law enforcement matter) and (l) (facilitate commission of an unlawful act), 15(b) (relations with other governments) and 18(1)(d) (economic and other interests) of the *Act*. The ministry also applied the personal privacy exemption in section 21(1) to withhold portions of the records. Finally, the ministry withheld certain information as non-responsive to the request.

[4] The appellant appealed the ministry's decision.

[5] During mediation, the issues under appeal were narrowed and clarified. The appellant advised that she did not wish to pursue access to the information withheld under section 18(1)(d) or on the basis that it is not responsive to the request. The ministry also raised the possible application of section 17(1) as the information at issue related to the town.

[6] Mediation did not resolve all of the issues and the appeal transferred to the adjudication stage of the appeal process, where the adjudicator initially assigned to the appeal decided to conduct an inquiry.

[7] The adjudicator invited representations from the ministry and an affected party, the town. Representations were shared between the parties in accordance with this office's *Code of Procedure* and *Practice Direction 7.*

[8] During the inquiry the issues were substantially narrowed. The ministry advised that it no longer relied on sections 15(b) and 17(1)[2] and it issued a revised access decision to the appellant, disclosing additional portions of the records, with the town's consent.

[9] More significantly, the appellant advised that pursuant to another process outside

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[1] The ministry is responsible for responding to access requests regarding the OPP; see Order PO-2568.
[2] The ministry's position about section 17(1) was supported by the town in its representations.

of the present appeal the town had already provided her with complete copies of several pages of the records and that therefore access to these pages was no longer at issue.

[10] The file was transferred to me to conclude the inquiry and I clarified with the appellant that the only remaining information at issue in the appeal was the withheld information on pages 97, 98, 142, and 143, which require consideration of the ministry's claims under section 14(1) only.

[11] I added the Windsor police as an affected party and invited representations on these pages. The Windsor police provided representations about pages 142 and 143, which I shared with the appellant. The appellant made representations in response.

[12] For the reasons set out at Issue A, below, I decided that pages 142 and 143 are no longer at issue and I will not adjudicate on them.

[13] As a result, only pages 97 and 98 are at issue in this appeal. For the reasons that follow, I find that section 14(1) does not apply to the withheld information on those pages and I order the ministry to disclose that information to the appellant.

RECORDS:

[14] The information at issue is found on pages 97 and 98, which are portions of an email exchange between the OPP and the town (referred to as "the emails" in this order).

[15] Page 98 includes some information withheld on the basis of section 18(1)(d) and because the appellant does not wish to pursue this information, it is not at issue and should not be disclosed.

ISSUES:

A. Are pages 142 and 143 at issue in this appeal?

B. Does the discretionary law enforcement exemption at section 14(1) apply to the emails or the floor plans?

DISCUSSION:

Issue A: Are pages 142 and 143 at issue in this appeal?

[16] I have decided that I will not adjudicate whether the ministry must disclose pages 142 and 143 to the appellant, which are copies of floor plans.

[17] Some brief background is required. Outside of this appeal, the town provided the appellant with several of the pages originally at issue in this appeal. The town was able to do this because many of the record originally at issue in this appeal were created by

the town, not the OPP or the ministry. As noted above, in her representations in this inquiry the appellant explained that the town had disclosed many of the records at issue and she therefore took the position that the pages disclosed by the town were no longer at issue in the appeal.

[18] As also noted above, I subsequently clarified with the appellant which pages remained at issue, which were pages 97, 98, 142 and 143.

[19] Then, I invited representations from the Windsor police which were shared with the appellant. Generally, the Windsor police objected to disclosure of pages 142 and 143 on the basis of the law enforcement harms in section 14(1) of the *Act.* Pages 142 and 143 consist of floor plans. In response, the appellant submitted, among other arguments, that the harms were not present because she already had a copy of the floor plans, which she provided to me.

[20] Based on my review of them, there is no dispute that the appellant has the very records at issue, from the very institution that originated them.

[21] The appellant submits that these pages remain at issue in the appeal because it was not until she read the representations from the Windsor police that she learned that pages 142 and 143 consisted of floor plans, pointing to the ministry's supplementary access decision. I note, however, that the ministry described these pages as floor plans in its representations in this inquiry, which were shared with the appellant.[3]

[22] Nevertheless, it is my view that the fact that the appellant already has the very pages at issue means that there is simply no issue to be adjudicated in relation to these pages. I find that the issue is moot and further, that no useful purpose would be served by my adjudicating on the moot issue.[4]

[23] I have therefore removed pages 142 and 143 from the scope of this appeal.

[24] I have reached this conclusion in consideration of the particular circumstances of this inquiry and with a view to conserving the scarce resources of this office.[5] I note that the fact that a requester already has a copy of a record is not necessarily determinative of an exemption claim under the *Act.*[6]

Issue B: Does the discretionary law enforcement exemption at section 14(1) apply to the emails?

[25] Section 14(1) permits a head to refuse to disclose a record if they can demonstrate that certain harms can reasonably be expected to flow from a variety of circumstances

[3] Paragraph 37 of the ministry's initial representations.
[4] See Orders MO-3964, P-1295 and PO-3925-I as examples of orders in which adjudicators have found issues to be moot in consideration of the test in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.
[5] Order M-371.
[6] Order M-320.

related to law enforcement.

[26] The ministry, supported by the town, relies on six different sub-sections of section 14(1), which are described further in the analysis below. The Windsor police made no representations about the emails.

[27] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[7] However, it is not enough for an institution to take the position that the harms under section 14(1) are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.[8] Establishing the exemptions in section 14(1) requires that the expectation of one of the enumerated harms coming to pass, should a record be disclosed, not be fanciful, imaginary or contrived, but rather one that is based on reason.[9] The institution must provide detailed 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.[10]

[28] When the ministry and town made their representations, many more pages and types of information were at issue. Now, only the emails remain at issue. I note this because a large part of the town's and ministry's section 14(1) representations are not relevant to the type of information contained in the emails and they will therefore not be mentioned.

[29] In the discussion that follows, I will describe the specific claims made and the parties' representations in relation to those claims. The ministry made detailed or specific representations about sections 14(1) (a), (e)[11] and (i),[12] and (l), which will be considered separately. The remaining claims, made in the town's brief representations, will be considered immediately below under one heading.

Sections 14(1) (c), (j), and (k): reveal investigative techniques and security

[30] The town asserts that sections 14(1)(c), (j) and (k) apply. The ministry did not refer to section 14(1)(c) but states that, in general, the town is best able to state the section 14(1)-based harms.

[31] Sections 14(1)(c), (j) and (k) state:

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[7] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.) ("*Fineberg*").
[8] Order PO-2040 and *Fineberg*, cited above.
[9] Orders PO-2099, MO-2986 and MO-3842.
[10] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at paras. 52-4.
[11] By referencing Order PO-2762.
[12] By referencing Order PO-3871.

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (j) facilitate the escape from custody of a person who is under lawful detention;
>
> (k) jeopardize the security of a centre for lawful detention;

[32] In general, the town argues that disclose of the information could reasonably be expected to reveal investigative procedures, facilitate the escape from custody or jeopardize the security of a centre for lawful detention but it has not provided any further explanation of how. The town's brief representations submit that the records include information about a variety of matters, none of which are relevant to the information in the emails. It says that disclosure of this kind of information would result in the harms stated in sections 14(1)(c), (j), and (k) (and others). The town provides no other information to support this assertion but it submits that it is difficult to predict future events in law enforcement.

[33] The ministry refers to *Fineberg*[13] and argues that this office ought to recognize the difficulty of predicting future events in a law enforcement context.

Finding

[34] I find that the town and the ministry have provided insufficient evidence to support a finding that sections 14(1)(c), (j) or (k) apply to the information in the emails.

[35] I am mindful of the principle raised by the ministry and the town and set out in *Fineberg.* However, I also find that *Fineberg* does not assist the ministry as suggested because it also endorses this office's approach of requiring more than mere speculative evidence to establish the law enforcement exemptions. In *Fineberg,* the Court upheld the part of the adjudicator's decision that found that the institution had not provided sufficient evidence to support its claims of harm. Justice Adams stated,

> The record reveals that the submissions made to the Officer [IPC Adjudicator] by the head were of the most general sort, emphasizing that the project was funded pursuant to the rarely used and secretive funding mechanism of s. 9 of the *Ministry of Treasury and Economics Act*, [...], and repeating the language of s. 14 of the [*Act*]. Clearly, sufficient information and reasoning has to be provided to the Officer in order that he or she may make an informed assessment of the reasonableness of the expectations required by s. 14. In this case, the Ministry proceeded before the Officer and this court as if the concerns detailed in s. 14 were self-evident from the

[13] Cited above.

> record, or the request of such material during an active criminal investigation constituted a *per se* fulfilment of the relevant exemptions. These positions are inconsistent with the purpose and scheme of the statute.

[36] The Court's description of the evidence in *Fineberg* could be used to describe the evidence provided by the town in this case.

Section 14(1)(a): interfere with law enforcement matter

[37] The ministry and the town rely on section 14(1)(a), which states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;

[38] As noted already, the ministry generally urges this office to approach the law enforcement exemption in a sensitive manner, referring to *Fineberg.*[14]

[39] Regarding section 14(1)(a) in particular, the ministry argues that the "law enforcement matter" at issue is "the ongoing provision of policing services to municipalities such as the town by the OPP." The ministry explains that it withheld information that it believed would pose a security risk of the town if it was disclosed, including "detailed information" about secure areas of the town's police department.

[40] The ministry also argues that the "law enforcement matter" at issue in this appeal is the practice of the OPP acquiring and collecting highly confidential and secure information belonging to other police departments due to its statutory role, which led to its participation in the town's RFP process.

[41] The ministry says that if it disclosed the information provided to the OPP by the town in the RFP process, the trust that the town has with the OPP to protect sensitive information would be harmed. It says that if towns or municipalities ceased to provide it with confidential or sensitive information ("critical and detailed operational information"), the OPP would be unable to fulfil its duties as a provincial police service.

[42] The town submits that the records "pertain to policing procedure and policy, disposition and composition, resources and allocation, security parameters and inventories," and that disclosure of this type of information would reasonably be expected to "interfere with a law enforcement matter." It elaborates that disclosure of the information would allow an individual to understand and potentially exploit the methods of policing, including (relevant to the records at issue), means of police response, operational activities, police operations, and systems related to transmission and storage of electronic information.

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[14] Cited above.

[43] In response, the appellant disputes that the "matter" at risk of harm pursuant to section 14(1) is "the ongoing provision of policing services to municipalities such as the" town because, she says, the OPP do not provide policing services to the town.[15] Regarding the town's representations, the appellant submits that the fact that the town disclosed most of most of the records to the appellant (outside of the present inquiry) undermines its position that harms from disclosure will occur.

Finding

[44] For section 14(1)(a) to apply, the "law enforcement matter" in question must be ongoing or in existence.[16] The exemption does not apply where the matter is completed, or where the alleged interference is with "potential" law enforcement matters.[17] "Matter" may extend beyond a specific investigation or proceeding.[18] The institution holding the records need not be the institution conducting the law enforcement matter for the exemption to apply.[19]

[45] Although there is no doubt that the subject matter of the information relates to policing, which is law enforcement,[20] I am unable to conclude that the ministry or the town have identified a "law enforcement matter" within the meaning of section 14(1)(a) that is at risk of harm.

[46] The preponderance of IPC orders where section 14(1)(a) has been found to apply involve discrete investigations or proceedings; however, the word "matter" is broad enough that it is not necessarily limited to a specific on-going investigation proceeding.[21] In my view, for section 14(1)(a) to apply, the records at issue must be related to a discrete law enforcement activity, whether it be an specific investigation or a broader matter like the one at issue in Order MO-2539 (a protocol between a police force and a specific children's aid society).

[47] I do not accept the ministry's argument that the OPP's general authority to provide policing services to municipalities is a "law enforcement matter" within the meaning of section 14(1)(a). In any event, neither the ministry nor the town have produced evidence sufficient to demonstrate that disclosure of the withheld information could reasonably be expected to cause the harms stated. For these reasons, I find that section 14(1)(a) has no application to the information at issue.

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[15] The appellant also disputed some of the circumstances related to the OPP's participation in the RFP process, none of which are relevant to the issues under appeal.
[16] Order PO-2657.
[17] Orders PO-2085 and MO-1578.
[18] *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.) ("*Ontario (Ministry of Community Safety and Correctional Services)*").
[19] Order PO-2085.
[20] Section 2(1) "Law enforcement."
[21] Order MO-2539, citing *Ontario (Ministry of Community Safety and Correctional Services)*, cited above.

Section 14(1)(e) and (i): endanger life or safety, security of a building

[48] The ministry and the town submit that sections 14(1)(e), (i) apply, which state,

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

[49] The ministry defers to the town with respect to its arguments under sections 14(1)(e) and (i).[22]

[50] The town's brief representations submit that the records include information about storage methods and procedures of police records, detainment of prisoners, means of storing information during investigations, storage of evidence and securing evidence areas, and security parameters of the police facility.[23] It says that disclosure of this kind of information would result in the harms stated in sections 14(1)(e) and (i) but it provides no information to support this assertion.

[51] As noted above, the ministry and the town submit that it is difficult to predict future events in law enforcement and that this office should approach the law enforcement exemptions sensitively.

Finding

[52] Regarding section 14(1)(e), I have no evidence before me to explain and it is not clear from the records themselves how the life or physical safety of any person or identifiable group is at risk by disclosure of the emails. As with all parts of section 14(1), the instittuion claiming the exemption must provide detailed evidence about the poential for the stated harm that is not speculative.[24] I find that the ministry and town and not met this burden in relation to its section 14(1)(e) claims and I find that they do not apply to the emails.

[53] Regarding section 14(1)(i) (security of a building), I find that based on the information contained in the emails there is no arguable basis to consider the application of section 14(1)(i) and I find that it does not apply to them.

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[22] The ministry made more detailed representations about the floor plans on pages 142 and 143 but because these pages are not at issue I do not summarize these arguments here.
[23] The town listed other types of information that are not included here because they are not relevant to the information remaining at issue.
[24] Orders PO-2099, MO-2986 and MO-3842.

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

[54] Lastly, the ministry relies on section 14(1)(l), which states,

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

[55] The ministry says that disclosure of the withheld information could be expected to facilitate the commission of an unlawful act or hamper the control of crime. Information about areas of the town's police department where the public does not normally have access and where sensitive law enforcement information. The ministry refers to Order PO-2332 where the adjudicator found that disclosure of a security audit could jeopardize the security of the institution at issue.

[56] The town argues that disclosure of the records would allow an individual to understand and potentially exploit the methods and procedures of policing....." It made no specific arguments about section 14(1)(l) other than that disclosure of the information would facilitate the commission of an unlawful act or hamper the control of crime.

[57] Although I have considered them, these arguments are not pertinent to the type of information contained in the emails. Without any evidence pertinent to the information at issue, I am unable to conclude that disclosure of the emails would facilitate commission. There is nothing inherent about the information that could lead to this conclusion.

[58] Based on my review of the emails and without sufficient evidence to support the ministry and town's suggestions that disclosure could reasonably be expected to facilitate the commission of crime, I find that section 14(1)(l) does not apply.

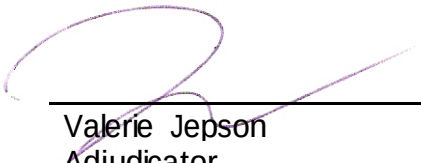
[59] With no other alternative claims to consider, I will order the ministry disclose the emails in their entirety to the appellant.

ORDER:

1. By **May 3, 2021** but not before **April 28, 2021**, I order the ministry to disclose the emails to the appellant (pages 98 and 99), except for the portion withheld on page 99 due to section 18(1)(d).

2. In order to verify compliance with order provision 1, I reserve the right to require the ministry to provide a copy of the records sent to the appellant.

3. The timelines in this order may be extended if the ministry is unable to comply in light of the current COVID-19 Pandemic. I remain seized of the appeal to address any timeline-related issues if the parties are unable to resolve them.



March 26, 2021

Valerie Jepson
Adjudicator