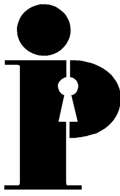
Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2455

Appeals PA-040228-1 and PA-040229-1

Ministry of Community Safety and Correctional Services

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NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from a member of the media for information contained in two firearms databases maintained by the Provincial Weapons Enforcement Unit (PWEU).

BACKGROUND

To put the request in context it is helpful to describe the origins of the PWEU and the databases it maintains.

The Ministry's representations explain that the PWEU is a "Joint Forces Unit" under the direction of the Ontario Provincial Police (OPP) and has been in operation since 1994. The PWEU presently consists of 10 Ontario police agencies, the Royal Canadian Mounted Police and the Canada Customs and Revenue Agency. In addition, the PWEU works in partnership with the United States Bureau of Alcohol, Tobacco and Firearms (ATF).

As explained by the Ministry, part of the PWEU's mandate is to identify persons involved in the illegal movement of firearms and to take enforcement action. It states that this includes the offences of smuggling, trafficking and the possession of crime guns. The Ministry states that the PWEU working definition of a "crime gun" is:

> Any firearm
> - that is used, or has been used in a criminal offence
> - that is obtained, possessed or intended to be used to facilitate criminal activity
> - that has a removed or obliterated serial number(s)
>
> And includes
> - any weapon that has been adapted for use as a firearm

The PWEU continually gathers investigative and intelligence information about firearms and firearms offences (Part III of the *Criminal Code* creates a number of offences with respect to the acquisition, possession and use of firearms). As part of this effort, it maintains two databases:

- the Project SOURCE (SOURCE) database

- the Firearms Tracing and Enforcement (FATE) database.

The Ministry states that the illicit movement of illegally imported firearms and the use of firearms in criminal activities are ongoing law enforcement and public safety issues.

The SOURCE Database

The SOURCE database contains information provided to the Ministry relating to firearms that have come into the possession of police services in Ontario since 1994, and the particular treatment or disposition of each firearm in the database. Without going into specifics, an entry in

the database contains 14 categories of information with respect to a particular firearm including, which firearms are still being retained by a police force and which have been disposed of, and the particulars of any disposition. Sources of this information include all municipal police services and the OPP.

The Ministry explains that this information is reported to it in accordance with section 134(8) of the *Police Services Act*. As set out in section 134(1) of the *Police Services Act,* this applies to firearms that are in the possession of a police force because they have been found, turned in or seized.

Section 134(8) of the *Police Services Act* provides that:

> The chief of police shall ensure that the police force keeps a register of firearms and that the following rules are followed:
>
> 1. Every firearm's description and location shall be recorded.
>
> 2. When a firearm ceases to be in the possession of the board or of a member of the police force, full particulars shall be recorded, including the name of the person who disposed of it and the date and method of disposal.
>
> 3. If the firearm is returned to its owner, his or her name, address and telephone number shall also be recorded.
>
> 4. On or before the 31st day of January in each year, a statement shall be filed with the Solicitor General listing the firearms that have come into the possession of the police force during the preceding calendar year, indicating which firearms are still being retained and which have been disposed of, and giving the particulars of disposition.

The FATE Database

The FATE database is more extensive than the SOURCE database. The Ministry explains that the FATE database is maintained in order to trace all firearms that are not registered in Canada, to record the history of each particular firearm and the crimes associated with it, and to develop investigative leads.

The FATE database contains 59 categories of information relating to a particular firearm from the date of its manufacture. This database is much more detailed than the SOURCE database. According to the Ministry, the FATE database reveals step by step methodologies and resources accessed to collect necessary law enforcement information relating to illegal firearms tracing and enforcement issues. Unlike the SOURCE database, the FATE database does not have information about which firearms are still being retained by the police force or the particulars of any disposition of a firearm that was in police custody.

The Ministry states that the information in the FATE database is used by the PWEU for the following: (1) intelligence analysis; (2) initiation of specific investigations; (3) ensuring compliance with relevant firearms legislation, and related activities. The Ministry asserts that the information in the FATE database conveys details of the procedures and investigative tools used by staff from the PWEU to collect necessary law enforcement information from information sources.

THE REQUESTS AND APPEALS

The first request (Appeal PA-040228-1) is for access to the record layout of the PWEU database or similar document. The requester also asked for the data contained in the PWEU database that records the information pertaining to all of the firearms that come into the possession of the police in Ontario.

The second request (Appeal PA-040229-1) is for access to the data contained in the PWEU database that records information pertaining to the tracing of all the firearms that came into the possession of the police in Ontario, that are not registered in Canada. The requester believes that this should include information about the firearm tracing requests by the Toronto Police Services Board and all the information gathered in response.

The requester asked that the information be provided in electronic form and made it clear that she did not want access to any “personal information”.

In my view, although there is some overlap of the information in the databases, the SOURCE database is responsive to the first request and the FATE database is responsive to the second.

The Ministry denied access to all of the requested information under the exemptions from the right of access found at sections 14(1)(a),(c),(g) and (l) of the *Act* (law enforcement).

The requester (now the appellant) appealed the Ministry’s decisions.

Mediation was not possible and the matter was moved to the adjudication stage.

As there is an overlap in the responsive records and the same exemptions are claimed in both requests, the two appeals were dealt with in one Notice of Inquiry. I am also disposing of both appeals in this order.

I sent the Notice of Inquiry to the Ministry, initially, outlining the facts and issues and inviting it to make written representations. The Ministry provided representations in response. I then sent the Notice of Inquiry to the appellant, together with a copy of the Ministry's representations in full. The appellant, in turn, provided representations. As the appellant's representations raised issues to which I determined that the Ministry should be given an opportunity to reply, I sent a letter accompanied by the representations to be addressed, to the Ministry inviting their reply representations. After the scope of the request was clarified, as discussed in more detail below, the Ministry filed representations in reply.

SCOPE OF THE REQUESTS

After the receipt of the appellant's representations, but before filing a reply, the Ministry requested confirmation that, in light of certain statements made in her representations, the appellant was narrowing the scope of her requests. In response, the appellant confirmed that the scope of her request was the following:

i. A list of the SOURCE database fields;

ii. Information regarding firearms recovered by police (their make and model; month and year when the firearm was sold and recovered; whether the firearm was used in a crime, and if so, the nature of the crime).

iii. If the firearm was not registered in Canada, information regarding police 'traces' stored in the FATE database, in particular, the identity of commercial dealers and retailers who originally sold the recovered firearms. She says she does not seek information regarding individuals, confidential sources or organizations other than commercial dealers.

The appellant explains in her response that in certain instances it may be that there is no record of the firearm having been sold, in which case she seeks information with respect to the make and model, the year when the firearm was recovered, whether the firearm was used in a crime and, if so, the nature of the crime. If there is a record of when the firearm was sold, she requests that information as well. Based on the Ministry's submission, she says it appears that this information is most likely located in the SOURCE database; however, she says, the request is for information in either the SOURCE or FATE databases.

The appellant interprets "confidential sources" to mean sources whose identity is protected in order to protect police investigations; "namely confidential informants as the term is commonly understood in police operations".

I agree with and adopt the appellant's description of the scope of her appeals as stated above. In effect, the request is for a list of the SOURCE database fields and for all data in both the SOURCE and FATE databases.

RECORDS AT ISSUE:

The records at issue consist of information contained in the FATE and SOURCE databases maintained by the PWEU. The Ministry provided representative examples of the fields and data for each database.

DISCUSSION

LAW ENFORCEMENT

Introduction

In support of its decision to deny access to the information, the Ministry relies on the discretionary law enforcement exemptions in sections 14(1)(a), (c), (g) and (l) of the *Act*, which state:

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

Standard of Proof

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

The Ministry must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm" under paragraphs (a), (c), (g) and/or (l) of section 14. Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in

Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner), [2003] O.J. No. 2182 (Div. Ct.) (*Attorney General*), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The Ministry suggests that a lower standard of proof should apply. In support of this submission, the Ministry relies on a decision of the Ontario Court of Appeal in *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (*Ministry of Labour*).

The *Ministry of Labour* case stands for the proposition that, where the exemption involves a possible threat to an individual's personal safety, such as under section 14(1)(e) or 20 of the *Act*, a lower standard of proof may apply. However, in this case the Ministry has not claimed section 14(1)(e), section 20 or any other exemption that directly engages personal safety. This view is supported by a 2003 decision of the Divisional Court in the *Attorney General* case cited above, where the court upheld this office's application of the higher threshold to the exemptions under section 14(1)(a) and (f) [see also Order PO-2037].

Accordingly, the lower standard articulated in *Ministry of Labour* does not apply.

The Representations of the Ministry

The Ministry states that the databases are used by police agencies for: (1) identification of firearms-related crime trends, (2) strategic analysis of all aspects of the illicit firearms market, (3) specific investigative initiatives (such as one referenced in a news release attached to the Ministry's representations), and for related law enforcement matters. It submits that the information in both databases reveals the specific information categories deemed to be relevant with respect to the illicit movement of firearms and related criminal activities.

The Ministry submits that the databases contain intelligence information and that the gathering of this information helps police agencies to take a pro-active approach in regard to targets and criminal activities of interest. The Ministry also states that this information is treated as highly confidential and is only disclosed in the law enforcement community on an "absolute" need to know basis.

Further, the Ministry asserts that maintaining the confidentiality of the information in the databases is essential to the ongoing partnership between the PWEU and other investigating agencies, such as the ATF. It says that the value of the information in the databases would be "seriously compromised" and the work of the PWEU and other law enforcement agencies will be "seriously hindered" if the information is publicly disclosed.

The Ministry states, in particular, that the information in the FATE database is used to support the investigative work of tracking a particular United States weapon beyond its first retail purchaser. The FATE database, the Ministry says, reveals step by step methodologies and resources accessed to collect necessary law enforcement information relating to illegal firearms

tracing and enforcement issues. The Ministry states that the information in the FATE database is used by the PWEU for purposes of intelligence analysis, for initiating specific investigations, for ensuring compliance with relevant firearms legislation and related activities. The Ministry asserts that the information in the FATE database conveys details of the procedures and investigative tools used by staff from the PWEU to collect necessary law enforcement information from information sources. The Ministry asserts that these procedures and investigative tools are not widely known.

The Ministry says that release of the detailed information contained in the FATE database would:

- reveal the step by step methodologies and resources accessed to collect information relating to the tracing of firearms and law enforcement issues

- significantly interfere with the ability of law enforcement agencies to identify the sources of smuggled firearms, investigate potential firearms traffickers and prosecute persons confirmed to be involved in the illegal movement and trafficking of firearms

- undermine the law enforcement and intelligence value of the information contained in the database and increase the investigative challenges already faced by law enforcement officials with respect to smuggled firearms

- alert criminals to the nature and extent of information possessed by the PWEU and other law enforcement agencies regarding the sources of smuggled firearms, potential firearms traffickers and others involved in the illegal movement and trafficking of firearms

- help perpetrators of weapons related crimes to escape detection and lead to the suppression or destruction of potential evidence

- lead to identification of individuals who are being monitored with respect to firearms-related criminal activity which could result in persons or organizations of interest going "underground" or otherwise taking steps to conceal their identities, criminal activities or associations

- lead to the identification of confidential sources reflected in the records, which may result in these sources no longer providing such information due to the possibility of reprisals and a reluctance to share intelligence and investigative information

- interfere with the ability of the PWEU and other law enforcement agencies to identify firearms traffickers who supply weapons used in illegal activities and to continue gathering valuable intelligence information relating to the illicit movement of firearms

- reasonably be expected to lead to increased firearms smuggling due to less effective firearms tracing, and

- compromise the PWEU's ability to investigate and remove illegal weapons from communities and may ultimately jeopardize public safety

The Ministry states that the SOURCE database contains detailed information about the whereabouts of specific firearms, in particular, whether the firearm was destroyed, is currently possessed by police or has been returned to the lawful owner after the conclusion of a related investigation or prosecution.

The Ministry submits that disclosure of the information in the SOURCE database would directly or indirectly (through research and by merging the SOURCE data with other publicly available electronic information sources) assist a potential criminal in identifying where one or more firearms are physically housed at a given time. The Ministry submits this could make it easier for criminals to steal firearms from an individual's home, a police detachment or some other location. Once stolen, these “legal firearms” could be “deactivated” through a de-registration process, the serial numbers could be removed and the firearms used as crime guns.

The Ministry submits that knowledge of the serial number, model number and other information about weapons that have been destroyed by police could be used by criminals to re-serialize other illegal weapons. This, it says, could hamper the ability of police agencies to identify such weapons if they are used for criminal activities.

Representations of the Appellant

The appellant submits that the methods used to gather the information in the FATE and SOURCE databases are not investigative techniques but are enforcement techniques employed to assist the PWEU to meet its mandate of “identifying persons involved in the illegal movement of firearms and to take enforcement action”. She further submits that an “investigative technique or procedure” is not “any procedure, protocol or device utilized in the course of investigation”. Rather, it must be a technique or procedure that, if disclosed, would hinder or compromise its effective utilization.

In her representations the appellant relies on the Supreme Court of Canada’s decision in *R v. Mentuck*, [2001] 3 S.C.R 442, which held that the publication of undercover “operational methods” undertaken by police to gather evidence regarding a murder suspect would not seriously compromise the effectiveness of similar operations, as “there are a limited number of ways in which undercover operations can run” and most of these would be known to criminals through “common sense perceptions” or “similar situations depicted in popular films and books.” The appellant submits that similarly, there are a limited number of ways in which police can trace firearms, and these methods are widely known to the public. The “lay person” would expect that police trace firearms by documenting ownership history and coordinating with other law enforcement agencies, firearms dealers, manufacturers and confidential sources.

Moreover, the appellant states, following the provision of similar information by the ATF, many investigative techniques or procedures that could be gleaned from the databases have already been disclosed.

The appellant further submits that not all information gathered by police in a covert manner can be "intelligence" information. Such a reading, the appellant submits, would be contrary to the purposes of the *Act* in that it would result in a blanket exemption for all information held by the police. In addition the appellant submits that the language of section 14(l)(g) limits the application of the exemption to intelligence information "respecting organizations or persons" and that raw data about weapons that have already been seized by police cannot therefore be "intelligence". Moreover, she says, many weapons seized by the police are not gathered in a covert manner.

The appellant submits that she has only requested the raw data from PWEU, not methodologies, details of Ministry procedures, any analysis of the data, or any information about specific individuals, sources, or organizations other than about commercial dealers of firearms.

The appellant asserts that the Ministry has provided no evidence to support its submissions that disclosure of the information in the FATE database could result in the identification of individuals, organizations or sources. Furthermore, because she does not request information that could result in the disclosure of individuals, confidential sources or organizations, the appellant states that the Ministry's position is "untenable".

The appellant submits that the Ministry's predictions of harm are entirely speculative. Its assertions, the appellant says, are broad conclusions, not "detailed and convincing" evidence. In particular, the appellant submits that for the exemption in 14(1)(l) to apply, there must be a connection between the released information and a potential crime that makes it "reasonable", and not just possible, that the release of the information will lead to the commission of an unlawful act. The appellant points out that she does not seek home addresses or other identifying information regarding individuals. She states that the suggestion that criminals will storm police detachments to steal weapons is absurd and that, in any event, it is well known that all police detachments house firearms.

The appellant states that the type of information she seeks would be used by non-governmental organizations to generate public debate and encourage accountability. She refers to a report enclosed with her submission entitled "Selling Crime, High Crime Gun Stores Fuel Criminals" by Americans for Gun Safety, which, she says, analyzes gun tracing information to identify dealers associated with a high volume of sales of guns used in crime.

Finally, the appellant relies on a 2001 decision of the United States District Court for Illinois, a decision affirmed on appeal in 2002 by the United States Court of Appeals for the Seventh Circuit in *City of Chicago v. United States Dep't of the Treasury*, 287 F. 3d 628 as amended by order dated July 25, 2002 (*City of Chicago*). (The latter decision was itself overturned in 2005 for other reasons on a rehearing by the United States Court of Appeals for the Seventh Circuit).

The appellant submits that in this decision, which dealt with a request under the U.S. *Freedom of Information Act* (*FOIA*), the District Court ordered disclosure of the contents of a "Trace Database" and a "Multiple Sales Database", despite the claim that information was exempt under (among others) the law enforcement exemption in section 7(A) of the *FOIA*. That section states that the right of access does not apply to:

> records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information
>
> > could reasonably be expected to interfere with enforcement proceedings

In *City of Chicago*, the court ordered disclosure of several fields of information in these databases. However, the court did *not* order disclosure of full serial numbers of guns (it ordered disclosure of "partially redacted" serial numbers).

I will address the applicability of the *City of Chicago* decision in more detail below.

Law Enforcement Definition

The term "law enforcement" is used in the exemptions at sections 14(1)(a), (c) and (g), and is defined in section 2(1) of as follows:

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

In addition to the representations set out above, the Ministry points to provisions of the *Police Services Act* (sections 1 and 42) to demonstrate the wide ambit of what is included in "policing" and how maintaining the databases falls within it. In light of the reasons why the databases were created, how they are used and the information they contain, I find that the creation and maintenance of the SOURCE and FATE databases fall within the "policing" component of the law enforcement definition cited above, and therefore qualifies as "law enforcement".

Section 14(1)(g): Law Enforcement Intelligence Information

In Order PO-2330, I agreed with the definition of “intelligence information” that Inquiry Officer Asfaw Seife adopted in Order M-202, where he stated with respect to 8(1)(g) of the *Municipal Freedom of Information and Protection of Privacy Act* (*MFFIPA*), which is the equivalent in that statute of section 14(1)(g) of the *Act*:

> In my view, in order for a record to qualify for exemption under section 8(1)(g) of the *Act*, the Police must establish that disclosure of the record could reasonably be expected to:
>
> > (a) interfere with the gathering of law enforcement intelligence information respecting organizations or persons, or
> >
> > (b) reveal law enforcement intelligence information respecting organizations or persons.
>
> The term "intelligence" is not defined in the *Act*. The *Concise Oxford Dictionary*, eighth edition, defines "intelligence" as "the collection of information, [especially] of military or political value", and "intelligence department" as "a [usually] government department engaged in collecting [especially] secret information".
>
> The Williams Commission in its report entitled *Public Government for Private People, the Report of the Commission on Freedom of Information and Protection of Privacy/1980*, Volume II, (the Williams’ Commission Report) at pages 298-99, states:
>
> > Speaking very broadly, intelligence information may be distinguished from investigatory information by virtue of the fact that the former is generally unrelated to the investigation of the occurrence of specific offences. For example, authorities may engage in surveillance of the activities of persons whom they suspect may be involved in criminal activity in the expectation that the information gathered will be useful in future investigations. In this sense, intelligence information may be derived from investigations of previous incidents which may or may not have resulted in trial and conviction of the individual under surveillance. Such information may be gathered through observation of the conduct of associates of known criminals or through similar surveillance activities.
>
> In my view, for the purposes of section 8(1)(g) of the *Act*, "intelligence" information may be described as information gathered by a law enforcement

> agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violation of law, and is distinct from information which is compiled and identifiable as part of the investigation of a specific occurrence.

In formulating the discussion at pages 298 and 299 of the Williams' Commission Report, the American experience and the wording of the United States *Freedom of Information Act* then in force, were considered.

I have carefully considered the representations of the parties and the representative records, which provide an example of the fields and information that is found in the FATE database. I am satisfied that this information falls within the definition of "intelligence information" set out in Order M-202 above. I am satisfied that the information in the FATE database is assembled in a covert manner, kept confidential, and shared only in the law enforcement community on a "need to know" basis. I am also satisfied that this database was created and developed in the context of an ongoing effort devoted to the detection and prosecution of crime or the prevention of a possible violation of law. I find that its disclosure could reasonably be expected to reveal law enforcement intelligence information respecting organizations or persons. As a result, I find that the exemption in section 14(1)(g) of the *Act* applies to this information.

I have also reviewed the content of the FATE database with the provisions of section 10(2) of the *Act* in mind. That section requires the Ministry to "disclose as much of the [exempt] record as can reasonably be severed without disclosing the information that falls under one of the exemptions". I can find no way of meaningfully severing the record without disclosing the information that I have found to fall within section 14(1)(g). As a result, I am not satisfied that the FATE database should be provided in a severed form. [see Orders PO-1727 and PO-1878]

This finding is not inconsistent with the *City of Chicago* decision. In that case, the ATF did not claim that the information at issue was exempt under section 7(D) of the *FOIA*, an exemption that deals with intelligence information in that statute.

As I have found the section 14(1)(g) exemption to apply to the FATE database, it is not necessary to consider whether the other exemptions claimed by the Ministry also apply.

I have reached a different conclusion about the SOURCE database. Although the Ministry cites concerns that disclosure of the list would allow private residences (as well as police stations) to be targeted by interested individuals, no municipal addresses appear on the sample of the SOURCE database the Ministry provided, nor is municipal address a data field. Bearing in mind the nature of the mandate to collect this information found in section 134(8) of the *Police Services Act* and the more general information that the SOURCE database contains, I find that the information does not meet the definition of "intelligence information" articulated in Order M-202. I am not satisfied that the information was collected in a "covert" manner. Rather, much of it appears to be collected in the course of day-to-day police activities, including circumstances where guns are turned into the police or seized, all in accordance with a legislative mandate.

Many of these activities undoubtedly relate to specific occurrences, and information collected under these circumstances was expressly excluded from “intelligence information” by former Commissioner Wright in Order M-202. Nor am I satisfied that disclosure of this information could reasonably be expected to interfere with the gathering of “intelligence information”. I therefore find that section 14(1)(g) does not apply to the SOURCE database.

Since I have found that the section 14(1)(g) exemption does *not* apply to the SOURCE database, I will now consider whether the other exemptions claimed by the Ministry apply to it.

Section 14(1)(a): Interference with a Law Enforcement Matter

In Order MO-1578, Adjudicator Bernard Morrow addressed the scope and meaning of the word “matter” as it appears in section 8(1)(a) of *MFFIPA*, which is equivalent to section 14(1)(a) of the *Act*. That order addressed a request for the location of red light cameras in Hamilton, Ontario. In his decision, after quoting an excerpt from the decision of former Assistant Commissioner Tom Mitchinson in Order MO-1262, Adjudicator Morrow states:

> Applying [the] Assistant Commissioner’s analysis and reasoning to the facts of this case, for the City to successfully apply the section 8(1)(a) exemption it must establish that disclosure of the records would interfere with a *specific*, *ongoing* law enforcement matter. In my view, section 8(1)(a) is not intended to permit an institution to withhold records that relate only generally to law enforcement, and not to a specific matter. While the RLC pilot project is clearly a law enforcement initiative, section 8(1)(a) cannot apply in the absence of a direct link between the records at issue and a specific law enforcement matter. This is not to say that the section 8 exemption is not designed to protect law enforcement interests beyond a specific investigation or prosecution. Other subsections under section 8 do precisely that, such as section 8(1)(c), which protects certain “investigative techniques and procedures”, or section 8(1)(l), which permits an institution to withhold records that could reasonably be expected to “facilitate the commission of an unlawful act or hamper the control of crime.”

I agree with this approach.

The Ministry states that addressing the issue of illegally imported firearms smuggled into Canada and the use of domestic firearms in criminal activities are ongoing law enforcement matters. The Ministry also submits that the SOURCE database is used by the police in the course of these law enforcement matters. But its representations only refer to one specific initiative involving the PWEU that took place in April 2003. There is no indication in the Ministry’s representations that this specific initiative is ongoing, or that other specific ongoing law enforcement matters may be involved.

As referenced above, for the exemption set out in section 14(1)(a) to apply, the law enforcement matter in question must be a specific, ongoing matter. The exemption does not apply where the

matter is completed, or where the alleged interference is with "potential" law enforcement matters [Orders PO-2085, MO-1578]. While I am satisfied that the SOURCE database relates generally to law enforcement, the Ministry has failed to establish that the records at issue relate to any specific law enforcement "matter". As a result, I find that the Ministry has failed to establish that the disclosure of the SOURCE database could reasonably be expected to interfere with a law enforcement matter.

In the 2002 decision in *City of Chicago*, the court made similar comments with respect to the applicability of the analogous *FOIA* exemption (section 7(A)) as follows:

> . . .ATF failed to identify any particular ongoing investigations . . .
>
> In enacting Exemption 7(A), "Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it came time to present their case." *Robbins Tire*, 437 U.S. at 224. However, Congress did not intend to preclude disclosure of investigatory records; rather, Congress sought to protect against interference with investigatory files prior to the completion of an actual or contemplated proceeding . . .
>
> . . . [T]he potential for interference set forth by ATF is only speculative and not the "actual, contemplated enforcement proceeding" that Congress had in mind when drafting Exemption 7(A) . . .
>
> . . . . .
>
> . . . ATF's evidence might predict a *possible* risk of interference with enforcement proceedings, but these predictions are not *reasonable*. Instead, ATF has provided us with only far-fetched hypothetical scenarios; without a more substantial, realistic risk of interference, we cannot allow ATF to rely on this *FOIA* exemption to withhold these requested records.

I therefore find that section 14(1)(a) does not apply to the SOURCE database.

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

Previous orders of this office have distinguished techniques and procedures that are "investigative" and those that relate to enforcement. Those orders have held that the exemption will not apply to "enforcement" techniques or procedures [Orders PO-2034, P-1340].

I am not satisfied on the representations of the Ministry that the information "deemed to be relevant" for inclusion in the SOURCE database, or the maintenance of the SOURCE database, would reveal techniques or procedures. As this is an essential element of the exemption which is not established, it is not necessary to determine whether any technique or procedure is "investigative".

I am not satisfied that disclosure of the SOURCE database could reasonable be expected to reveal investigative techniques or procedures, and I find that section 14(1)(c) does not apply to it.

Section 14(1)(l): facilitate commission of an unlawful act/hamper control of crime

In addition to the submissions recounted above, the appellant references Order PO-2166 to support her position that the disclosure of raw data contained in the SOURCE database would not cause the harms alleged by the Ministry.

In Order PO-2166, the Ministry of Natural Resources argued that releasing the data in that appeal would reveal the locations of cormorant colonies and lead to the vandalism or the destruction of nests (since the large cormorant population was becoming a concern). Adjudicator Frank DeVries disagreed and ordered that the requested records be disclosed. In ordering disclosure Adjudicator DeVries found that the Ministry had failed to provide any information as to whether the nests or colonies were difficult to locate, or whether the destruction of nests and birds in New York had anything to do with similar information being released in that locale.

The appellant also points to Order P-1487, in which this office addressed a request for the manuals used by the Centre of Forensic Sciences. In that appeal, the Ministry's predecessor (then the Ministry of the Solicitor General and Correctional Services) submitted that a knowledgeable offender could use the information to increase his or her chances of avoiding detection during the commission of a crime.

In Order P-1487, Inquiry Officer Laurel Cropley found that the Ministry's predecessor did not explain "how any of this could reasonably be expected to occur," and ordered the records released. The appellant submits that the same type of allegation is made in this appeal because the Ministry argues that release of the requested information will make it easier for crimes to occur, but does not offer any explanation as to how this could reasonably be expected.

In my opinion, the submissions of the Ministry that revealing of locations of the storage of firearms as a result of disclosure of the SOURCE database are not persuasive. I agree with the appellant that the general public is aware that firearms are stored at police detachments. Even if the descriptions of weapons that may be at a particular police detachment were disclosed, the prospect of them being stolen from such premises and used to commit crimes, thereby facilitating unlawful acts or hampering the control of crime, is too remote to qualify as a "reasonable expectation". Moreover, my review of the representative record for the SOURCE database does not indicate any municipal address where a firearm could be returned to its owner, so there is no reasonable prospect that the municipal address where a gun owner resides would be revealed by disclosing the SOURCE database.

Nevertheless, bearing in mind the need to approach the law enforcement exemption in a sensitive manner, and also the difficulty in predicting future events in a law enforcement context, I am satisfied that some information could permit the cross-referencing or other misuse of a firearms

serial number in the database, and its disclosure could reasonably be expected to facilitate unlawful acts or hamper the control of crime. For this reason, I will order the Ministry to withhold the last one half of the digits, or letters, in the serial numbers of all the listed firearms, under section 14(1)(l). For example if the serial number reads FX1111XF, only the first four digits and letters would be disclosed i.e FX11. If the serial number is an odd number, the Ministry shall round up and withhold one more digit or letter, as the case may be, than the portion that is disclosed.

This finding with respect to the firearms serial numbers is not inconsistent with the *City of Chicago* decision. In that case the exact serial numbers were not ordered disclosed.

In summary, I find that the FATE database is exempt under section 14(1)(g), but that with the severances set out above, none of the exemptions claimed by the Ministry apply to the SOURCE database.

PUBLIC INTEREST IN DISCLOSURE

Section 23 of the *Act* provides as follows:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

Although section 14 is not among one of the exemptions that can be overridden by section 23 of the *Act*, the appellant submits that because she is a member of the press she should be entitled to rely on the public interest override exception and that to hold otherwise is contrary to the "rights to freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication" enshrined in section 2(b) of the *Canadian Charter of Rights and Freedoms*.

In *Criminal Lawyer's Assn. v. Ontario (Ministry of Public Safety and Security)* (2004), 70 O.R. (3d) 332, leave to appeal granted [2004] O.J. No. 3199 (C.A.) (*Criminal Lawyers Assn.*), the Divisional Court upheld the decision of former Assistant Commissioner Tom Mitchinson that the legislature's failure to apply the section 23 public interest override to section 14(2)(a) (also a law enforcement exemption) does not violate section 2(b) *Charter* rights. The Court's finding was based on the view that non-disclosure of information in the law enforcement context did not impede freedom of expression. Although the requester in that case was a lawyers' organization rather than a member of the media, and the decision deals with a different part of section 14, I am satisfied that it is equally applicable here. I therefore reject the appellant's *Charter* argument on this issue.

EXERCISE OF DISCRETION

Introduction

On appeal, this office may review the Ministry's decision in order to determine whether it exercised its discretion in denying access to the FATE database and the portions of the SOURCE database that I have determined should be withheld, and, if so, to determine whether it erred in so doing.

I may find that the Ministry erred in exercising its discretion where, for example:

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In these cases, I may send the matter back to the Ministry for an exercise of discretion based on proper considerations [Order MO-1573].

Representations of the Ministry

The Ministry states it is mindful of the major purposes and objects of the *Act* and submits that it gave careful consideration to releasing the information to the appellant notwithstanding that discretionary law enforcement exemptions from disclosure applied.

The Ministry submits it considered whether disclosure of the requested records in response to the appellant's requests would increase public confidence in the delivery of public services. It says it also gave careful consideration to the future law enforcement harms that could result from the release of information to the appellant in the circumstances of her requests. The Ministry says it also took into consideration the fact that confidentiality of law enforcement information in some instances is necessary for public safety and protection.

The Ministry states that its historic practice has been to give "strong consideration" to protecting sensitive intelligence information from public disclosure except as necessary to achieve law enforcement objectives. Such information, it says, is usually considered highly confidential. The Ministry asserts that inappropriate release of such information may lead to serious reprisals against individuals, hamper the control of crime and jeopardize the safety of our communities.

The Ministry says it took into account the ongoing nature of the firearms-related crimes and that the information contained in the records is still relevant vis-a-vis current investigations or intelligence gathering activities relating to illegal firearms. As part of its exercise of discretion, it says it took into consideration the information it provided to the appellant in response to her

earlier request [Ministry file number CSCS-A-2004-00100] for information from the PWEU relating to illegal firearms.

The Ministry explains in its reply submissions that in response to that earlier request it granted the appellant total access to a substantial amount of available, non-identifying firearms information that would appear to be relevant with respect to the current appeals. It states that the information released to the appellant included the following:

- Total number of firearms contained in the SOURCE database, administered as per the requirements of section 134(8) of the Police Services Act, from 1998 to 2002;

- Total number of seized firearms contained in the SOURCE database from 1998 to 2002;

- Confirmation that the SOURCE database does not contain specific information relating to “crime gun traces”;

- Total number of firearms trace requests made to the PWEU by the Toronto Police Service for the years 2000 to 2003;

- The total number of seized firearms by weapon type and year the firearm came into the possession of the police for the years 2000 to 2002;

- The top 10 manufacturers of crime guns traced by manufacturer in the years 2000 to 2003;

- Total numbers and types of firearms seized by the Toronto Police Service by year 2000 to 2002;

- Crime categories associated to firearms that have been seized and traced by the PWEU and numbers of involved firearms in each crime category for the years 2000 to 2003;

- A breakdown of the number of firearms seized in Ontario and traced to their original source (including those traced to a dealer in the United States) for the years 2000 to 2003;

In exercising its discretion to provide the appellant with total access to what it says is available non-identifying information from the SOURCE and FATE databases, the Ministry submits that it already provided the appellant with access to information similar to the publicly available Canadian firearms-related information that was enclosed with the appellant’s appeal submission.

In its exercise of discretion, the Ministry submits that it carefully considered the potential benefits to the appellant should the exempted information be disclosed in response to her request.

The Ministry states that it is aware that the appellant's requests were submitted in her professional capacity as a media representative and that she believes that the information contained in the PWEU databases is of particular interest to the general public.

The Ministry also considered whether it would be possible to release any non-exempt information to the appellant. The Ministry says it ultimately concluded in its exercise of discretion that release of information is not appropriate in the circumstances of the appellant's requests.

Representations of the Appellant

The appellant characterizes the submissions of the Ministry in a different way. She submits that the Ministry failed to appropriately exercise its discretion, engaging instead in a "wholesale denial of the request". She asserts that the Ministry's submission suggests that the fact she is a member of the media weighed against disclosure. She submits that this is contrary to the right to "freedom of the press" enshrined in section 2(b) of the *Charter*.

Furthermore, the appellant submits that the section 14 exemption must not be broadly construed as that would effectively render police documents inaccessible, which would be contrary to the spirit of the *Act* and unconstitutional. She also submits that in accordance with the Supreme Court of Canada's ruling in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (*Baker*), any exercise of discretion under section 14 must be in a manner consistent with section 2(b) of the *Charter*.

Analysis and Findings

I have considered the representations of the parties and I am satisfied that the Ministry reasonably exercised its discretion to withhold access to the FATE database and the portions of the SOURCE database that I have determined should be withheld.

As has been stated on a number of occasions, when determining the application of exemptions in the *Act* the preamble sets out the fundamental purposes of the *Act* that must be considered in this exercise. It provides that:

> The purposes of this *Act* are,
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and

(iii) decisions on the disclosure of government information should be reviewed independently of government; and

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

Based on its submissions as set out above, I am satisfied that the Ministry took into account relevant considerations, including the purposes of the *Act*, in deciding to withhold the information I have found to be exempt. I also find that it did not take irrelevant considerations into account.

Moreover, in my view, the appellant's arguments on the exercise of discretion, which focus on the *Charter*, are not persuasive. First of all, I reject the argument that the appellant's status as a member of the media was a factor that the Ministry considered in the exercise of its discretion as a basis for withholding the information. I do not agree with the appellant's characterization of the Ministry's submission in that regard and find that this portion of the appellant's argument is without evidentiary foundation.

In addition, I disagree with the appellant that the Supreme Court of Canada decision in *Baker*, cited above, mandates a different exercise of discretion in this case. The Court's description of administrative discretion (at paragraph 53) is instructive in this regard:

> Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. The rule has been that decisions classified as discretionary may only be reviewed on limited grounds such as the bad faith of decision-makers, the exercise of discretion for an improper purpose, and the use of irrelevant considerations [citations omitted]. A general doctrine of "unreasonableness" has also sometimes been applied to discretionary decisions [citation omitted]. In my opinion, these doctrines incorporate two central ideas -- that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the decision-maker's jurisdiction. These doctrines recognize that it is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in

> accordance with the principles of the rule of law (*Roncarelli v. Duplessis*, [1959] S.C.R. 121), in line with general principles of administrative law governing the exercise of discretion, and consistent with the Canadian Charter of Rights and Freedoms (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038).

In view of the fact that I have upheld the Ministry's application of the section 14(1)(g) and (l) exemptions to the information that will remain undisclosed pursuant to this order, I am satisfied that the Ministry's exercise of discretion is well within a "reasonable interpretation of the margin of manouevre contemplated by the legislature." I have also found the Ministry's exercise of discretion regarding that information to be consistent with the principles of administrative decision-making. In addition, the *Criminal Lawyers Assn.* case indicates that non-disclosure under a closely-related provision of the *Act* does not violate section 2(b) rights. I therefore reject the appellant's argument based on *Baker*.

In conclusion, I believe the comments of the Supreme Court of Canada in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, are extremely pertinent to the question of whether the *Charter* should be considered in assessing the exercise of discretion by the Ministry under the *Act*. At paragraph 66, the Court observes that "… where a statute is unambiguous, courts must give effect to the clearly expressed legislative intent and avoid using the *Charter* to achieve a different result." In my view, sections 14(1)(g) and (l) are unambiguous. (See also the decision of the Supreme Court of Canada in *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] S.C.J. No 31 at paragraph 48). The Divisional Court addressed an argument of this nature in a discretionary context in the following way in *Criminal Lawyers Assn.*:

> Mr. Oliver submitted on behalf of the CLA that the notion of *Charter*-consistent interpretation comes into play when the Assistant Commissioner is asked to exercise his discretion under ss. 14 and 19 -- or, more accurately, I suppose, where the Assistant Commissioner is asked to exercise his reviewing discretion with respect to the head's exercise of discretion under those sections. He argues that there is an ambiguity built into this process because of the discretionary nature of the exercise, and therefore that the discretion must be exercised in a fashion that is consistent with *Charter* values and the principles of democracy. I do not accept this submission. It cannot prevail for the same reasons that the court does not resort to the principle of *Charter*-consistent interpretation in the case of unambiguous language.

I therefore dismiss the appellant's *Charter* arguments made in the context of the exercise of discretion issue.

I find that in all the circumstances the Ministry's exercise of discretion was proper.

ORDER

1. I order the Ministry to disclose the SOURCE database fields and data, except for the last one half of the digits, or letters, in the serial numbers of all the listed firearms, by sending it to the appellant by **April 5, 2006** but not before **March 31, 2006**. If the serial number is an odd number, the Ministry shall round up and withhold one more digit or letter, as the case may be, than the portion that is disclosed. For greater certainty, I have highlighted the exempt information on a copy of the representative example of the fields and data in the SOURCE database, which I provide to the Ministry with this order. The highlighted information is **not** to be disclosed.

2. I uphold the Ministry's decision to deny access to the FATE database in its entirety and to the withheld portion of the SOURCE database fields and data that are highlighted on a copy of the representative example of the fields and data in the SOURCE database which I provide to the Ministry with this order.

3. In order to verify compliance with provision 1 of this order, I reserve the right to require the Ministry to provide me with a copy of the SOURCE database fields and data as disclosed to the appellant.

Original signed by: February 28, 2006

Steven Faughnan
Adjudicator