Information and Privacy Commissioner,
Ontario, Canada

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

FINAL ORDER PO-3402-F

Appeals PA-980338-1 and PA-990137-1

Ministry of Community Safety and Correctional Services

September 25, 2014

Summary: Pursuant to the Supreme Court of Canada's decision in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, the ministry's claim of section 14 to withhold, in its entirety, a police report of an investigation into the potential misconduct of state officials during a murder trial was returned to the IPC for reconsideration of the ministry's exercise of discretion under section 14. In Interim Order PO-3231-I, the adjudicator considered the ministry's exercise of discretion and found it had taken into account irrelevant factors and had failed to take into account relevant considerations. The ministry was ordered to re-exercise its discretion. In Interim Order PO-3322-I, the adjudicator found the ministry's re-exercise of discretion was flawed, and ordered a further re-exercise of discretion.

In this final order, the adjudicator considers the ministry's most recent revised decision and finds its further re-exercise of discretion is flawed. Despite having provided guidance on the matter in the two previous interim orders, the adjudicator finds the ministry has again exercised its discretion in an improper manner, including by effectively delegating its discretion to third parties. In the circumstances, however, the adjudicator finds it would serve no useful purpose to return the matter to the ministry for another re-exercise of discretion. Therefore, while the adjudicator does not uphold the ministry's exercise of discretion, in the absence of an adequate alternative remedy, he closes this appeal file.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 14(2)(a), 54(2).

Orders and Investigation Reports Considered: Orders PO-1779, PO-3231-I, PO-3322-I.

Cases Considered: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23; *R v. Court* (1997), 36 O.R. (3d) 263 (Gen. Div.).

OVERVIEW:

[1] This is the final order disposing of the issues arising from a series of access-to-information requests made to the Ministry of the Solicitor General and Correctional Services, now the Ministry of Community Safety and Correctional Services (the ministry), in 1998. The requests were for information relating to an Ontario Provincial Police (OPP) investigation into the disappearance of an audio tape and the conduct of police officers and the Crown Attorney during a double murder trial. The murder charges were eventually stayed after the court found that there had been "many instances of abusive conduct by state officials...".[1]

[2] The ministry identified three records as being responsive to the requests: a 318-page report detailing the results of the OPP investigation, and two documents containing legal advice. The ministry denied access to all three records, in full, pursuant to the exemptions at sections 14(1)(c), (d), (e), (g) and (l), 14(2)(a), 19, 20 and 21(1) of the *Freedom of Information and Protection of Privacy Act* (the *Act*).

[3] The requesters appealed the ministry's decision to this office and three appeal files were opened: PA-980338-1, PA-990137-1 and PA-990218-1. The appellants in appeals PA-980338-1 and PA-990218-1 also claimed there was a compelling public interest in disclosure of the records, thereby raising the application of the public interest override at section 23 of the *Act*.

[4] After conducting an inquiry, former Assistant Commissioner Tom Mitchinson issued Order PO-1779, in which he upheld the ministry's decision not to disclose the records. The former Assistant Commissioner found that all three records contained personal information. He also found that the public interest in disclosure clearly outweighed the purpose of the personal privacy exemption on the facts, and would have applied the section 23 override with respect to the section 21 personal privacy exemption, subject to limited exceptions.[2] However, he ultimately upheld the ministry's decision to withhold the records because the other claimed exemptions (sections 14 and 19) are not included within the section 23 override. He also concluded that the omission of sections 14 and 19 from the public interest override did not constitute a breach of the appellants' rights to freedom of expression under the *Canadian Charter of Rights and Freedoms*.[3]

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[1] *R v. Court*, (1997), 36 O.R. (3d) 263 (Gen. Div.), p. 300 cited in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, para. 10.
[2] Order PO-1779, pp. 22-25.
[3] *Canadian Charter of Rights and Freedoms, Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11, s. 2(b).

[5] The appellant in PA-980338-1 applied for judicial review of Order PO-1779. The Divisional Court upheld the decision not to disclose the records. In a majority decision, the Ontario Court of Appeal allowed the appellant's appeal, finding that the exemption scheme in the *Act* violated the *Charter*.

[6] In 2007, the appellant in PA-990218-1 abandoned the appeal and that appeal file was closed.

[7] The ministry then sought, and was granted, leave to appeal the matter to the Supreme Court of Canada. In a decision issued June 17, 2010,[4] the Supreme Court allowed the ministry's appeal and held that:

- the former Assistant Commissioner's order confirming the constitutionality of section 23 of the *Act* should be restored;

- the two records protected by section 19 of the *Act* should be exempt from disclosure; and

- the claim under section 14 should be returned to this office for reconsideration of the ministry's exercise of discretion.

[8] As a result of the Supreme Court's decision, the matter was remitted to this office for reconsideration of the ministry's exercise of discretion in denying access to the 318-page report, in its entirety, under the discretionary exemption at section 14 of the *Act*. The appeal file was assigned to me to address the matter on reconsideration.

[9] In December 2011, the ministry issued a revised decision granting partial access to the report following notification to the Ministry of the Attorney General, the OPP, the Halton Regional Police Service, the Hamilton Police Service, and 11 individuals who were interviewed as part of the OPP investigation. The appellant in Appeal PA-980338-1 continued to pursue access to the withheld portions of the report.

[10] In Interim Order PO-3231-I, dated July 11, 2013, I found that in exercising its discretion, the ministry had taken into account irrelevant factors and had failed to take into account relevant considerations; as a result, its exercise of discretion was flawed. I ordered the ministry to re-exercise its discretion in accordance with my directions set out in that order.

[11] In October 2013, the ministry issued a further revised decision, disclosing additional portions of the report. The appellant continued to pursue access to the withheld portions.

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[4] 2010 SCC 23.

[12] In Interim Order PO-3322-I, dated March 19, 2014, I considered the ministry's re-exercise of discretion as described in its further revised decision. In that order, I upheld the ministry's exercise of discretion in respect of some, but not all, of the information it continued to withhold from the appellant. In particular, I noted:

> As set out in its further revised decision, the ministry continues to exercise its discretion to withhold five categories of information contained in the report:
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> (a) personal information to which the public interest override did not apply in Order PO-1779;
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> (b) information to which a publication ban applies;
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> (c) information which may identify police informants;
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> (d) notes or summaries of interviews conducted during the investigation for which the interviewees object to the disclosure; and
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> (e) notes or summaries of interviews conducted during the investigation for which the interviewees did not respond to the ministry's consultation letter.
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> I uphold the ministry's exercise of discretion to withhold information in categories (a), (b) and (c).
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> I do not uphold the ministry's re-exercise of discretion with respect to information in categories (d) and (e). Discretion must be exercised properly and based on appropriate principles. The ministry has not done so for these two categories of information.[5]

[13] In that order I set out specific reasons for quashing the ministry's re-exercise of discretion in respect of these two final categories of information. In the result, given this office's inability to substitute its own exercise of discretion for that of the ministry, I remitted the matter to the ministry for another re-exercise of discretion. In that order I provided additional guidance to assist the ministry in its task.[6]

[5] Order PO-3322-I, paras. 17-19.
[6] Order PO-3322-I, para. 32. See discussion below.

[14] On May 26, 2014, the ministry communicated the results of its further re-exercise of discretion in response to Order PO-3322-I, and in light of further consultation by the ministry with the five individuals whose information is contained in the portions of the report remaining at issue.[7]

[15] The ministry advised that as a result of its most recent consultation efforts, two of the five individuals consented to disclosure of their information in the report. The ministry advised that it would exercise its discretion to disclose information relating to the two consenting individuals, with severances of certain information.[8]

[16] The ministry also advised that it is "further exercising its discretion not to disclose" the information relating to the remaining three individuals who have not consented to disclosure of their information.

[17] Following the ministry's most recent revised decision, the interview information remaining at issue is contained on pages 18, 19, 23, 42-44, 121-161, 286-292 and 308-318 of the report. The appellant continues to challenge the ministry's exercise of discretion in respect of the withheld portions of the report.

[18] For the reasons that follow, I do not uphold the ministry's further re-exercise of discretion in respect of the information it continues to withhold. In the circumstances, however, I conclude that ordering the ministry to undertake another re-exercise of discretion would serve no useful purpose. As no other remedy is available to me under the *Act* to address the ministry's repeated failure to exercise its discretion in a proper manner, I will close these appeal files.

DISCUSSION:

Did the ministry properly exercise its discretion under section 14?

[19] The sole issue for me to consider is whether the ministry properly exercised its discretion in withholding the portions of the report remaining at issue in this appeal.

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[7] I note that paragraph 32 of Order PO-3322-I contains a typographical error. As the ministry identifies in its May 26, 2014 letter, the two final categories of information at issue comprise the information of five interviewees, not six. This error has no bearing on my findings in Order PO-3322-I or in this final order.

[8] The following categories of information were redacted from the statements and summaries of statements of the two consenting individuals: personal information to which the public interest override was found not to apply in PO-1779, and "similar information"; information which may identify a police informant; and information regarding confidential law enforcement processes, techniques and equipment.

[20] These portions have been withheld pursuant to section 14(2)(a) of the *Act*, which reads:

> A head may refuse to disclose a record... that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law.

[21] The exemption is discretionary. It permits an institution to disclose information that is subject to the exemption, despite the fact that the information could be withheld under the *Act*. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[22] 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
- it fails to take into account relevant considerations.

[23] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[9] This office may not, however, substitute its own discretion for that of the institution.[10]

[24] The onus is on the institution to demonstrate that it has properly exercised its discretion.

[25] In both my interim orders issued on this matter, I referred to the following comments made by the Supreme Court about the purpose of the exemption at section 14(2)(a), and the scope of this office's powers to address an improper exercise of discretion:

> The main purpose of this section is to protect the public interest in getting full and frank disclosure in the course of investigating and reporting on matters involving the administration of justice; an expectation of confidentiality may further the goal of getting at the truth of what really happened. At the same time, the discretion conferred by the word "may" recognizes that there may be other interests, whether public or private, that outweigh this public interest in confidentiality.

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[9] MO-1573.
[10] Section 54(2) of the *Act*.

...

> The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations ... .[11]

[26] In considering whether the ministry's May 26, 2014 decision evinces a proper exercise of discretion, I am mindful of the important purposes served by the exemption and the competing interests, including the public interest in disclosure, that may outweigh these important purposes. I am also mindful of the limits of this office's authority to address any improper exercise of discretion.

[27] I will now address the reasons provided by the ministry in its May 26, 2014 decision to continue to withhold certain information pursuant to section 14(2)(a) of the *Act*.

Dispute with IPC finding on the "chilling effect" of disclosure

[28] The ministry disputes my finding, made in both interim orders, that disclosure of information obtained from interviews of members of the public service could not be expected to have the same "chilling effect" on public cooperation with future law enforcement investigations as would the disclosure of information received from the general public. In both interim orders I found the ministry had failed to consider the nature of the relationship between the interviewees and the government in according "significant weight" to the importance of ensuring public cooperation in future law enforcement investigations and protecting the privacy of individuals who supply information in these investigations.

[29] The ministry takes particular issue with my characterization of the OPP investigation as an "internal investigation," rather than as a criminal investigation with potential ramifications to the interviewees as subjects of an investigation into certain *Criminal Code* offences. In the latter context, the ministry submits, the identity of the interviewees as current or former members of the public service is irrelevant, as they were in the same position as any member of the public being interviewed in relation to criminal allegations. The ministry asserts that not disclosing information obtained during a criminal investigation (for purposes other than the investigation and related proceedings, or without consent) is important to "[e]nsuring that individuals, including police officers and assistant Crown Attorneys who can also be the subject of such an investigation, continue to cooperate with police..."

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[11] *Criminal Lawyers' Association,* supra note 1, at paras. 50 and 71.

[30] The ministry made similar arguments in its October 25, 2013 revised decision in objecting to my finding, in my first interim order PO-3231-I, that the interviewees' status as current or former members of the public service is pertinent to a consideration of the potential chilling effect of disclosure of the particular information at issue in this appeal. In that order I noted the ministry had offered no evidence to support a finding that interviews with public servants relating to the performance of their professional duties would negatively impact the general public's cooperation in future law enforcement investigations. Even accepting that the potential ramifications to members of the public service who are subjects of a criminal investigation are no different than those for any member of the public in the same circumstance, I do not agree that their status as members of the public service is irrelevant. Even if the statutory obligations to cooperate to which I referred in Order PO-3322-I were not applicable to public servants in the context of a criminal investigation, I do not accept that any future unwillingness on the part of public servants or any other member of the general public to cooperate with law enforcement would be attributable to the disclosure of the specific information at issue in this appeal.

[31] As the ministry's most recent decision contains a reiteration of its objections to re-exercising its discretion, rather than reflecting an actual re-exercise of discretion in respect of this factor, I find the ministry has again failed to appropriately exercise its discretion under the *Act*.

Dispute with IPC finding on expectation of confidentiality

[32] The ministry takes issue with my finding in Order PO-3322-I that there is no evidence that the interviewees were provided any assurance that the information gathered in the interviews would remain confidential. The ministry submits that such assurances are not possible in a criminal investigation, as the information collected may be used in a consequent prosecution. Nonetheless, the ministry asserts that the interviewees cooperated with the OPP investigation on the "implicit understanding that their statements would be used for the purposes of that criminal investigation" only, and not voluntarily disclosed in response to an access request. On this latter point the ministry states that it is "not reasonable to assume that a person providing a statement to police as part of a criminal investigation would anticipate that the police might turn around and disclose that statement in response to an access request for a record to which the discretionary law enforcement exemption applied."

[33] An expectation of confidentiality on the part of the interviewees may be a relevant factor in the ministry's exercise of discretion under section 14(2)(a). However, even if I accept the ministry's assertion that there was an implicit expectation concerning the intended uses and disclosures of the interviewees' information, I find no basis for the ministry's contention that there could be no reasonable expectation that a record subject to the discretionary law enforcement exemption might be disclosed in response to an access request. By its nature a discretionary exemption permits an

institution to disclose information, despite the fact the institution could withhold it. Given this, an expectation that a record subject to the discretionary law enforcement exemption will never be disclosed is not a reasonable one.

[34] I am not persuaded by the ministry's new arguments on the relevance of this factor, and the ministry does not appear to have undertaken any re-exercise of discretion in relation to this factor.

Dispute with IPC finding on weight to be given to interviewees' wishes regarding disclosure

[35] In my two previous orders issued in this matter, I expressly disapproved of the manner in which the ministry appeared to have fettered its discretion based on the interviewees' positions on disclosure of their information. In Order PO-3322-I, I provided the following additional direction based on my finding that the ministry had, for a second time, failed to exercise its discretion in light of this factor:

> Given that this office may not substitute its own exercise of discretion for that of the institution, my only recourse is to send this matter back to the ministry to once again re-exercise its discretion. In doing so, I wish to guide the ministry in its task. To be clear, any exercise of discretion in which the ministry continues to withhold all parts of the six[12] interviews (including the very fact that interviews were conducted with these individuals) where the interviewee either did not respond or objected to the disclosure of their interviews is improper and will not be upheld by this office. In such situations, the ministry is not exercising its discretion. Instead, the ministry is improperly delegating its discretion to third parties who may have a vested personal interest in withholding the information. The discretion is the ministry's to exercise, not the interviewees'.[13]

[36] In its May 26, 2014 decision, the ministry again defends the weight it has accorded to the opinions of the interviewees whose information is at issue in this appeal.

[37] First, the ministry asserts that not disclosing information obtained during a criminal investigation without consent, or for specified law enforcement purposes, is necessary to ensuring cooperation with law enforcement investigations. I have addressed this argument in my discussion of the potential chilling effect of disclosure on public cooperation with law enforcement, above.

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[12] This should read five, not six. See footnote 7 regarding typographical error in this paragraph.
[13] PO-3322-I, para. 32.

[38] Second, the ministry reiterates an argument made at earlier stages of this appeal, including in its October 2013 revised decision, concerning mandatory notification to affected parties under a previous version of the *Act*.[14] The ministry submits that the individuals whose information is at issue in this appeal are affected parties to whom the IPC would have been required to give notice under the provisions of the *Act* in force at the time the access requests were made and the appeals originally heard by the IPC. According to the ministry, "[t]he fact that these individuals appear to have been denied their right to have been given notice of the original appeal by the IPC and to provide representations, is [in] the Ministry's opinion another reason why it is appropriate to give some weight to their views ...." The ministry goes on to note that one of the three individuals who continues to withhold his consent is of the opinion that any use of his statement without consent would be contrary to his *Charter* rights.

[39] First, I note that the issue of affected party notice under now-superseded provisions of the *Act* was not a part of the process of judicial review of Order PO-1779 that culminated in the Supreme Court's decision in *Criminal Lawyers' Association*. In any event, the interviewees whose information remained at issue when the matter was returned to this office for reconsideration were notified of the appeals and given an opportunity to participate in the reconsideration process (and, in the case of non-consenting interviewees, were given multiple opportunities to participate) by the ministry. I also note that the only disclosures of interview information that have been made to date are of information relating to consenting interviewees. In light of all this, I find that any harm occasioned by a failure to notify the interviewees during the original processing of these appeals was minimal, and has since been remedied by the ministry's notification efforts during the reconsideration process.

[40] The issue under this heading is not whether the consent of the interviewees to disclosure of their information is a relevant factor, which I accept it is, but rather whether the ministry inappropriately fettered its discretion under section 14(2)(a) based on this factor. In its May 26, 2014 decision, the ministry describes its reasons for having found it was "appropriate to give some weight" to the views of the interviewees. As I described in some detail in Order PO-3322-I, however, I found that by treating the consent of the interviewees as the determinative, if not the only, factor in deciding whether to disclose the information, the ministry had failed to exercise its discretion. In

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[14] The ministry notes that at the time this office heard the appeals giving rise to Order PO-1779, sections 50(3) and 50(13) of the *Act* read as follows:

> 50(3) Upon receiving a notice of appeal, the Commissioner shall inform the head of the institution concerned and any other affected person of the notice of appeal.
>
> 50(13) The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

making its decision, by its own admission, "in accordance with" the wishes of the interviewees, the ministry did not merely "give some weight" to an appropriate factor; instead, by doing so, the ministry effectively delegated its discretion to third parties who may have vested personal interests in withholding the information. This is not a proper exercise of discretion.

[41] On my review of the ministry's May 26, 2014 decision, I find no evidence that it has since exercised its discretion in accordance with the guidance provided in Order PO-3322-I. The additional disclosure resulting from the ministry's most recent decision again corresponds exactly to the additional consents obtained by the ministry through its further consultation process; similarly, the withheld portions contain information relating to interviewees who did not provide consent. In both previous interim orders, I did not uphold the ministry's exercise of discretion where its decisions on disclosure appeared to have been controlled by third party consent, rather than reflecting a proper consideration of all relevant factors. In Order PO-3322-I, I explicitly advised the ministry that I would not uphold any exercise of discretion where the ministry continues to withhold information based on failure to consent. Yet the ministry's most recent disclosure decision does precisely this. Rather than reflecting a reasoned consideration of all relevant factors, including consent, the ministry simply reiterates its arguments for treating consent as the determinative factor, despite its claim it has accorded only "some weight" to the consent of the interviewees.

[42] In sum, I find no evidence in the ministry's most recent decision that it treated the factor of consent any differently than it did in its two previous decisions, which manner I found to be improper in my orders addressing these decisions. As a result, I find the ministry has once again failed to exercise its discretion in accordance with my orders.

Other objections, and conclusion

[43] The ministry raises other objections to my findings in Order PO-3322-I. It takes issue with my observation that neither of the two police services involved in the original murder investigation had any law enforcement concerns with the release of the report (with the exception of information that would identify police informants). The ministry states that it is the OPP, as the investigating police service, that has an interest in claiming the law enforcement exemption for the report, rather than the two police services whose interest in the report was as employers of individuals whose conduct was under scrutiny and not as investigating police services. Whatever the basis for their position, I find the lack of concern on the part of the police services over disclosure of the report, save certain portions, is a relevant factor in the ministry's exercise of discretion.

[44] In respect of my comment regarding the importance of accounting for the public interest in disclosure of the information at issue in this appeal, the ministry asserts that it did consider whether the public interest in disclosure outweighs the other considerations described in its decision letter, but concluded that it does not. The ministry submits that it considered a number of factors in arriving at this decision, including that the criminal investigation and related prosecution in this matter occurred in the 1990s, that the subsequent OPP investigation into the original investigation and prosecution concluded in April 1998, and that a news release on this matter was issued by the OPP at that time. Based on these factors, the ministry states it concluded that the public interest in disclosure in this particular case was outweighed by the law enforcement issues described in its decision.

[45] In Order PO-3322-I, I found that the ministry's recitation of a series of factors that it states it took into account in reaching its decision (including the factors of the passage of time and the age of the record) did not amount to a credible explanation of how the interests in non-disclosure could outweigh the public interest in disclosure. I arrive at the same conclusion here. The ministry has provided additional details, including dates, to bolster the previously-cited factors relating to the passage of time since the completion of the report. It has not provided the requested elaboration on how these interests in non-disclosure could outweigh the compelling public interest in this case, the essence of which has been described as the "need to assure the public that the OPP investigation was conducted in a thorough and fair manner, and that despite the strongly worded judgment of Glithero J., criminal charges were not warranted."[15] Instead of demonstrating that it has undertaken a fresh exercise of discretion based on relevant considerations, the ministry devotes much of its May 26, 2014 decision to reiterating its objections to findings made in the interim orders. For the reasons set out above, I do not accept these objections. I also find that in spite of the direction to exercise its discretion based on relevant considerations and without regard to irrelevant considerations, the ministry has again failed to do so.

[46] As noted above, where this office finds an institution has failed to exercise discretion or has erred in the exercise of discretion, it may send the matter back to the institution for a re-exercise of discretion.[16] This office may not substitute its own discretion for that of the institution. In two previous orders I found the ministry had not exercised its discretion in a proper manner, and I required it to re-exercise its discretion in accordance with the guidance provided in those orders. In all three of its revised decisions purporting to reflect a re-exercise of discretion, the ministry has failed to properly consider relevant factors and has taken into account irrelevant considerations.

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[15] PO-1779, p. 24.
[16] Order MO-1573.

[47] In the circumstances, and given the absence of an adequate alternative remedy, I find there is no purpose in ordering yet another re-exercise of discretion. In the course of the original processing of this appeal and this reconsideration process, the ministry has disclosed most of the report at issue, including portions relating to interviews with all but three individuals. Through the two interim orders and this final order issued on reconsideration of this appeal, this office has provided some guidance to institutions on the proper exercise of discretion. The ministry's revised decisions in response to these orders demonstrate a repeated refusal to heed this guidance. As a result, while I do not uphold the ministry's exercise of discretion reflected in its May 26, 2014 revised decision, I find it would serve no useful purpose to return this matter to the ministry for a further re-exercise of discretion based on principles the ministry has chosen to disregard. As I have no other recourse to address the ministry's improper exercise of discretion, I will close these appeal files without making further orders to the ministry.

ORDER:

I do not uphold the ministry's exercise of discretion in respect of the portions of the record it continues to withhold. In the circumstances, however, I close these appeal files with this final order.

Original Signed by: September 25, 2014
Brian Beamish
Information and Privacy Commissioner (Acting)