A Report on a Submission from Amnesty International

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1. Introduction

This report is in response to a submission from Amnesty International (Amnesty) in 2018 to the Information and Privacy Commissioner's Office (the IPC). In the submission, Amnesty requested that the IPC investigate concerns and complaints with the conduct of the Ministry of the Solicitor General (formerly the Ministry of Community Safety and Correctional Services, now referred to in this report as the ministry) with respect to its responses to a set of Amnesty's access requests and IPC appeals, as well to investigate systemic problems in Ontario's Freedom of Information regime.

2. Background

From 2003 to 2008, community members from the Tyendinaga Mohawk Territory in Eastern Ontario carried out a series of blockades, land occupations and other protest actions. Between June 28-29, 2007 and between April 21-28, 2008, Ontario Provincial Police (OPP) officers were present and arrested numerous individuals. Ultimately, 100 charges were laid against 19 individuals involved in the protests.

Following these protest actions, Amnesty launched the Tyendinaga Research Project in co-operation with local Tyendinaga residents in May of 2008. Amnesty discussed the goal in correspondence to the IPC:

> The overall goal of Amnesty's research was to determine whether the policing by the OPP of the Mohawk land rights protests and occupations was consistent with Ontario public policy and international human rights standards. In particular, the research sought to determine whether the policing of these two land rights protests reflect on-the-ground implementation of the policing recommendations contained in the Report of the Ipperwash Inquiry and especially the OPP's own Framework for Police Preparedness for Aboriginal Critical Incidents.

As part of its research, Amnesty made access requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the ministry for records relating to the protest actions and the OPP's responses to those protest actions in 2007 and 2008. These requests, and related appeals to this office, were filed between 2008 and 2014.

As indicated above, Amnesty's over all goal with the project was "to determine whether the policing by the OPP of the Mohawk land rights protests and occupations was consistent with Ontario public policy and international human rights standards." Amnesty informed our office that some of the records disclosed as a result of these requests were used in a documentary aired on the Aboriginal People's Television Network in November 2018. At this time, Amnesty alleged that the records showed a deep-seated bias in how the OPP handled the land dispute, and called for an independent investigation of police conduct during the blockades.[1]

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According to Amnesty, it submitted 86 access requests to the ministry. It filed over 50 appeals with the IPC, some of which were resolved at intake and mediation, while other files resulted in orders. Amnesty also ultimately abandoned some of its appeal files. The submission described the reasoning for that as the following: "In the end, the process has proven so time consuming and exhausting of Amnesty's limited resources that the organization eventually and reluctantly abandoned 11 outstanding appeals."

This series of requests was complex for a few reasons. First, several of them were multi part, and a great number of them came at once in a 49-part request (which the ministry divided into individual requests). In addition, in response to many of the requests, the ministry decided at the outset that the responsive records were excluded from the *Act*

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1 https://aptnnews.ca/2018/11/23/documents-show-deep-seated-bias-by-police-during-operations-against-mohawks-of-tyendinaga/

under the ongoing prosecution exclusion (section 65(5.2)). Lastly, some requests covered a voluminous number of records. The last of the appeals arising out of these requests was closed in July 2016, through an order of this office.

The Amnesty submission addressed to Commissioner Brian Beamish requested that the IPC investigate the following concerns and complaints, grouped into two categories.

I. The conduct of MCSCS and the OPP with Respect to their Responses to Amnesty's FOI Access Request and Appeals to the IPC

1. Violations by MCSCS and the OPP of Sections 26 and 27 of *FIPPA* in more than 75% of the Ministry's decision letters to Amnesty,
2. Violations by MCSCS of Section 29(1)(b)(ii) of *FIPPA* and refusal to comply with IPC Practice Guidelines for Drafting a Letter Refusing Access to a Record in 98% of its refusal letters to Amnesty,
3. Violations by MCSCS and the OPP of the Section 65(5.2) exclusion from *FIPPA* in 25% of Amnesty's total FOI access requests and 60% of Amnesty's FOI access requests where access was denied,
4. Missing OPP responsive records in more than 10% of Amnesty's FOI access requests and contradictory explanations for the missing OPP records,
5. Actions by MCSCS and the OPP which undermined the spirit and intent of Ontario's freedom of information regime,

II. Systemic Problems in Ontario's Freedom of Information Regime

6. Flaws in *FIPPA* resulting in concerns about the inability to enforce statutory requirements in Ontario's freedom of information legislation,
7. Actions by some IPC adjudicators that unnecessarily exacerbated delays in the freedom of information process,
8. Possible excessive and/or unjustified reliance by IPC adjudicators on 'confidential' information from the OPP that was not shared with Amnesty thus making it impossible for Amnesty to determine whether use of the law enforcement intelligence information exemption under *FIPPA* was appropriate, and
9. The need to hold individuals more accountable for upholding and adhering to the letter and spirit of *FIPPA*.

Commissioner Beamish advised the ministry and Amnesty that Assistant Commissioner Sherry Liang would take the lead in examining these issues further.

3. The Issues Paper

Assistant Commissioner Liang reviewed Amnesty's submission, the IPC orders issued out of Amnesty's appeals, and a number of the appeal files in order to understand the substance and context of Amnesty's complaints.

Based on this review, the IPC prepared an Issues Paper (the paper) which outlined the areas and questions that Assistant Commissioner Liang decided to explore with Amnesty and the ministry. The IPC determined it would be most useful to examine the ministry's pattern of delays in responding to Amnesty's access requests and IPC appeals. It appeared that most of Amnesty's concerns relate, directly or indirectly, to delays in the access process.

The IPC determined that the handling of the Amnesty requests created an opportunity to examine how the ministry, and, other institutions, can respond in a timely way to a request, or series of requests that, while made in good faith, are atypical in nature and volume.

The IPC approached this review with the goal of gaining insight into the broad circumstances that influenced the processing of these Amnesty requests, rather than engaging in a detailed fact-finding mission and making findings of fault. While it was necessary to examine some aspects of the history of these requests, the purpose of doing so was to help point the way to recommendations for positive change.

The IPC sent the paper to both parties and asked them to review it and respond to the eight following questions:

a. A fee estimate can give a requester details about search time, preparation time, photocopy costs for the request and anticipated degree of disclosure, allowing the requester to consider narrowing the request. Did the ministry use these measures to help manage the Amnesty requests? If not, why were these measures not employed?

b. Does the ministry currently use these measures to help manage complex or unique requests? Are there additional tools the ministry uses to help manage complex/voluminous requests in order to keep within the legislated timeframes?

c. Given Amnesty's analysis that 77% of the ministry's initial and supplemental decision letters were late, as well as the delays described in some of the IPC's orders, what factors prevented the

ministry from meeting statutory timelines for responding to Amnesty's requests?

d. At the time Amnesty was starting its research project, did the ministry explore options of how best to assist Amnesty with accessing the information it was seeking other than through the FOI process? Does the ministry at this time have solutions it can offer to requesters about how best to formulate requests or work with the ministry on large-scale research projects?

e. Does the ministry currently employ any strategies when responding to complex and/or voluminous requests to avoid the types of delays encountered in the Amnesty requests?

f. What factors contributed to apparent contradictions between earlier and later decisions, and the lack of fuller explanations and greater clarity from the ministry?

g. How could these issues have been avoided?

h. In light of the steps taken by the Ontario Public Service to strengthen its FOI programs across ministries and strengthen accountability for its statistics, do the facts that Amnesty bring forward suggest the need for additional measures to ensure accurate compliance statistics from the ministry?

4. The responses of the ministry and Amnesty

The ministry responded with a letter and included the following information:

- The ministry makes all efforts to respond to access requests and ensure compliance with access to information and privacy legislation.

- The ministry understands that "the volume of requests filed by Amnesty International placed a large resource strain on staff at the time and that all efforts were made to ensure a timely response in accordance with FIPPA."

- The following process has been developed to respond to "extraordinarily large or multi-part requests":

    - The ministry will contact the requester and outline its commitment to providing access to the information that has been requested.

In order to ensure compliance, the ministry will need the requester **to prioritize the requests to five at a time**. The requester will also be given the opportunity to clarify in what order they want to receive the information.

- In addition, the ministry will discuss with the requester the potential of narrowing the request and outline some options for consideration, including:
    - Information which can be disclosed with no fee,
    - Information which can be disclosed with a fee, and
    - Fees associated with a voluminous request.

- As the access request moves through the process, staff take a proactive approach by reaching out to the requester and making an effort to determine the specific information the requester is seeking. Staff will also keep the requester informed of the status of their request as it moves through the process.

- There may be a situation where a time extension is applied in accordance with section 27 of FIPPA. We also apply fees in accordance with section 57 of FIPPA. When the fee is over $100, a fee deposit of 50% is required before proceeding with the request. In both instances, these decisions would be communicated to the requester.

The ministry did not respond to all of the questions raised in the paper.

Amnesty reviewed the ministry's response to the paper, and provided the following comments:

- Amnesty contends the ministry only replied to two of the eight questions from the paper.

- Amnesty believes that a more cooperative approach from the ministry and OPP could have avoided the long and frustrating history set out in Amnesty's complaint.

- Amnesty is troubled by the new measures adopted by the ministry to deal with large requests that were described in the ministry's letter. Amnesty contends that the ministry offered no definition of what 'extraordinarily large or multipart requests' are, nor did it detail about how the request to prioritize five at a time will be handled with the requester.

- Amnesty does not see how this process would have improved the timelines or make it more manageable for the ministry or Amnesty.

- Amnesty sees the issue being more about the ministry being resistant and recalcitrant rather than the ministry having to deal with a volume of requests.

- In terms of the compliance rate issue, Amnesty wants to reiterate its recommendation that ministry FOI compliance statistics be disaggregated to establish a separate compliance rate for those concerning records under the control of the OPP.

The IPC did not find it necessary for the ministry to provide further comments on Amnesty's response.

5. Drawing lessons

The findings in this report are based on the IPC's review of Amnesty's submission, appeal files and orders, as well as the responses from the ministry and Amnesty to the IPC's Issues Paper. The IPC's review of the history of Amnesty's requests was limited to those requests that resulted in appeals to our office. Drawing lessons from this review, the IPC provides some recommendations for improving the FOI process in order to respond to requests of this nature.

a. Pattern of Delays

Time lines for responding to Amnesty's requests are set out in the *Act*, as well as in IPC orders. Amnesty has documented the ministry's failure to respond within statutory timelines. The IPC did not find it necessary to confirm the accuracy of the statistics put forward by Amnesty. The ministry did not dispute them, and our review of the material before us confirms a pattern of delays in responding to Amnesty's requests. Beyond the failure to respond within statutory timelines, the IPC's orders also describe delays in responding to IPC-imposed timelines. For example:

Order PO-3166 (appeal file PA12-388) disposed of a deemed refusal appeal under the *Act* with regard to 13 requests out of the original 49-part request made to the ministry.

By way of background, the ministry, in response to some of the requests of the original 49-part request, issued several decision letters to the requester citing section 65(5.2) (ongoing prosecution) of the *Act* to deny access to the requested records. Amnesty appealed the ministry's decisions to the IPC. The appeal files were placed on hold at adjudication until the completion of the prosecutions. Once the prosecutions were completed, the adjudicator wrote in January 2011 to the ministry requiring it to issue access decisions using the date of the letter as the date of the request to calculate the

30-day period for responding with decision letters. The ministry, however, failed to issue any of the outstanding decision letters within this timeframe.

In early 2011, the ministry and the appellant exchanged correspondence regarding the outstanding decision letters. In the spring of 2011, the ministry advised that it would be giving notice to affected third parties regarding one of the requests. In the fall of 2011, and then in early 2012, and lastly in the summer of 2012, the appellant contacted the ministry inquiring on the status of the outstanding decision letters, but no decisions had been issued.

The appellant therefore filed a deemed refusal appeal with the IPC, which became PA12-388. As indicated above, this appeal addressed 13 requests out of the original 49-part request. At the end of 2012, the ministry proposed a timetable for issuing final decision letters. The ministry revised the timetable to later dates in 2013 due to the voluminous nature of parts of the requests. The first revised deadline that the ministry proposed was missed, with no notice to the IPC or to the appellant.

On February 22, 2013, two years after the letter from the adjudicator directing the ministry to issue decision letters, the IPC ordered the ministry to issue final decision letters regarding the 13 outstanding requests without recourse to further time extensions. The ministry complied with the order.

PO-3162-I, dated February 14, 2013, the IPC ordered the ministry to issue decisions that were overdue by many months with respect to two appeal files, PA09-125-2 and PA09-125-3. The history of these appeal files began eight months before this order when the IPC, by letter dated May 31, 2012, directed the ministry to issue new decisions to Amnesty, following a finding upholding the validity of consent forms that Amnesty had submitted to the ministry. The ministry was ordered to treat the date of the letter as the date of the request for the purpose of calculating the 30-day period for responding with an access decision.

The ministry extended the time to respond with an access decision to the end of September 2012 due to the responsive records being voluminous. After that date had passed, the IPC contacted the ministry on several occasions over several months seeking updates on the status of the outstanding access decisions and gave additional directions to issue these decisions. In January 2013, the adjudicator wrote to the ministry requiring access decisions be issued to the appellant by January 30, 2013, and indicating that if the deadline was not met, the adjudicator would issue an order directing the ministry to provide the access decisions. Almost eight months after the letter decision, the ministry issued an access decision for one of the appeals, but not the remaining two appeals. As a result, in Order PO-3162-I, the IPC addressed the remaining two appeals. In this order, the adjudicator stated:

> To date, the ministry has still not advised this office as to when the decision letters relating to these appeals will be issued.

> Consequently, in the absence of a firm commitment for the issuance of the required decision letters, which have now been due for many months, I will order the ministry to issue decision letters to the appellant with respect to appeals PA09-125-2 and PA09-125-3.
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As set out in these orders, there were considerable delays in issuing decisions in response to Amnesty's requests. The ministry did not meet statutory time lines for issuing access decisions, resulting in appeals to this office. Further, during the appeals of some of the files, the ministry did not meet timelines that were agreed to by the parties or after the IPC intervened.

It would be an understatement to say that the ministry's response was, on the whole, deficient and not in keeping with the spirit or the letter of Ontario's access legislation. The ministry's failure to comply with specific and repeated directions from this office is in itself troubling. Amnesty described the above as a "plethora" of actions by the ministry and the OPP which, in Amnesty's view, reveal a pattern of delay, bad faith and obstruction.

Although some of the ministry's actions are indeed concerning, the IPC's review of the material did not suggest that the pattern of delays arose from a deliberate effort on the part of the ministry to stonewall Amnesty's search for information. Despite the high level of non-compliance with statutory timelines, the ministry participated in mediation, agreeing to reconsider some of its access decisions, disclosing additional records, conducting additional searches and actively offering settlement options.

It is apparent from the ministry's response to the paper and our review of the appeal files that this group of requests placed unusual demands on the ministry. Amnesty itself described the requests a part of a "research project". The requests were intended to be exhaustive, as demonstrated by the number of access requests, some of which were multi-part, in an attempt to uncover as much information as possible about a high-profile policing effort involving numerous individuals and law enforcement personnel.

That said, the volume of the requests does not justify the degree to which the ministry failed to meet both statutory and other timelines. This leads to the question: how could the ministry have done better?

Below, the report discusses a variety of techniques that an institution should consider to help it meet its obligations under the *Act* when faced with a higher than normal number (voluminous set) of access requests received simultaneously, as well as requests that produce a high volume of responsive records (voluminous requests).

Adjust resources

An obvious answer to the challenges posed by requests such as these is to devote greater resources to responding to them. The IPC is not in a position to comment on or provide recommendations on the resourcing of an institution's FOI team and acknowledges that institutions have resource constraints.

Here is a success story, which is an example of a novel approach to answering a voluminous set of access requests in a particular context. The Ministry of Community and Social Services provided the following information to the IPC for its 2014 Annual Report:

> In 2014, in addition to [responding to 2988 access to information requests], the [Ministry of Community and Social Services] also responded to another 2,974 access requests for personal information arising out of unprecedented and unanticipated circumstances. These additional requests related to three class action proceedings brought on behalf of individuals who lived at provincial residential facilities for individuals with a developmental disability. A dedicated team of staff worked to respond to these requests, which resulted in the release of over 2.1 million pages of documents, most of which were decades old. The ministry waived all fees associated with access to these resident files. As well, the ministry proactively disclosed a very large (approximately 500,000 pages) group of documents related to the settlement of these class action proceedings, spanning 1945 to 2009.

This example demonstrates the ability of an institution to respond to a particularly high volume of requests over a specific period. Although the circumstances are different from those described in Amnesty's brief, this approach suggests that it is possible for an institution to adjust its normal practices and workforce when necessary.

The IPC recommends that the ministry explore the establishment of a dedicated team of FOI personnel (which could be based within the ministry or be available to assist a number of ministries), that could be deployed whenever an unusually demanding request or set of requests is presented.

Working together with the requester to clarify the request

It appears from the files and Amnesty's submission that the clarity of Amnesty's requests was not an issue. Nevertheless, this step in the request process may prove helpful for institutions dealing with a high volume of requests or a request that may produce a very high volume of records.

The *Acts* specify that a person seeking access to a general record or to his or her own personal information shall provide sufficient detail to enable an experienced government employee to identify the record. The *Acts* also state, that if the request does not sufficiently describe the record sought, the institution "shall inform the applicant of the defect and shall offer assistance in reformulating the request." In the case of a request that is unclear, it is helpful to quickly obtain a general understanding of the types of records that may be responsive to the request. Identifying what is and is not available in response to the request through program staff prior to seeking clarification from the requester can be beneficial.

It generally reduces the time needed for clarification by identifying at the outset what information is or is not available and allows the institution to suggest alternatives (e.g., the information may not be available in the format requested but may be available in another format). This step can be accomplished by reviewing record indexes, communicating with program areas and determining whether the records have been the subject of previous requests. Where clarification of a voluminous request is necessary, a general understanding of the categories of records will allow an institution to explore with the requester, in an informed way, the types of records being sought.

At the outset, some questions that can be explored with a requester are:

- Are there particular records of interest?
- Do the records involve a specific incident?
- Is access to another individual's personal information being requested?
- Are the records being requested from a specific time period?
- Are the records being requested from a particular branch or from a specific geographic area?
- Has the requester already spoken with the specific branch or with a particular individual from the program area (this may have shed light on the particular records or subject of interest)?

Providing advance notice:

As fee estimates for requests covering voluminous records are usually high due to search fees, the IPC recommends that an institution contact the requester prior to issuing the interim access decision, which includes a fee estimate, to let him/her know what to expect and why. The IPC also recommends that institutions address in advance any time extensions that may apply. It may be best to reach out to the requester directly via phone or email and begin a dialogue about the request, before formalizing the decision.

This kind of approach would also be helpful where a requester submits a large volume of requests at once for a specific purpose, such as in the case of Amnesty's requests.

Issuing a detailed fee estimate and time extension simultaneously

The *Act*, as it is written currently, allows for an interim access decision, together with a fee estimate, to be issued prior to the 30 day statutory deadline. The purpose of the fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access. The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.

When an interim access decision which includes a fee estimate is issued, it stops the clock within the 30-day timeline. Time extensions can also be issued within the 30 days. The problem that arises where these two types of decisions follow on each other, instead of being issued together, is that there might be occasions where a requester has paid an interim fee to process a request, only to learn afterwards that there may be a significant time extension.

The length of time it will take to receive a final access decision may be a factor in a requester's decision about paying the requested deposit (50% of the total fee) to pursue access. The IPC, therefore, recommends institutions to decide whether they require a time extension as early as possible in the process, as well as identify the reasons for taking that position. In the event of an interim access decision, the institution could communicate both the time extension and detailed fee estimate in the same letter. This practice would assist the requester in making an informed decision about whether to pay the deposit, or revise the scope of the request.

Addressing the time extension issue in the interim access decision would also be practical for an institution given that, in formulating the fee estimate that accompanies the interim access decision, the institution might also be able to consider how much time it might take to process the request.

The institution can put together the decision letter encompassing both the time extension, fee estimate and interim access decision by either:

- conducting a search for a representative sampling of the records; or
- consulting with employees of the institution who are familiar with the type and content of the records

It is important that this fee estimate/interim notice/time extension be issued to a requester within 30 days from the day the institution receives the request. When the institution fails to issue a fee estimate/interim notice/time extension within this 30 days, it triggers a "deemed refusal". A deemed refusal occurs when an institution fails to carry out its duty under the legislation within the time constraints imposed, and can no longer apply a time extension to the request.

For more guidance on fee estimates, please see the IPC's guideline titled Fees, Fee Estimates and Fee Waivers.

Working with the requester to see if the request can be narrowed or if there are alternative ways of addressing the requester's needs.

Narrowing a request refers to the process of working with the requester to reduce the scope of the request or the number of records involved. Although there is a 30-day period in which to appeal the fee estimate once it is issued, an institution should take advantage of this window and invite the requester to narrow the scope of the request. The list of record categories (for example, the location of the records, such as legal department files, enforcement branch files, etc.) accompanying the interim access decision, which includes a fee estimate, may help a requester identify records that can be eliminated. The possibility of finding alternative ways of addressing the requester's needs can also be explored. For instance, does it appear that the requester has a specific interest that can be addressed in an alternate manner, such as meeting with a particular program area? Can the request be broken into segments and processed in order of importance to the requester? These approaches may benefit both parties by making the request more manageable or, in some cases, by eliminating the need for the request altogether.

This kind of approach would also be helpful where a requester submits a large volume of requests related to one general theme, such as the Amnesty requests.

The IPC's 2018 Annual Report provides a success story of an institution and appellant that significantly narrowed a request. Here is an excerpt from the report:

> The City of Toronto received a request from a reporter for all drafts and the final version of the city's long-term financial plan, as well as any notes and tracked changes associated with the documents. The city denied access because the plan is publicly available. During mediation, the city noted the large size of the request, indicating more than 200 staff had provided input into more than 300 draft versions of the document. Of these drafts, about 70 per cent did not contain significant changes. Based on this information, the reporter narrowed the request to specific versions of the plan, receiving a fee estimate of $450 to process the request. To reduce the fee, the reporter narrowed the request further to only the four to five iterations of the plan held by city manager's office – resulting in a $120 fee estimate. After receiving a deposit, the city issued a decision granting partial access, resolving the appeal.

If such work can be done by the parties during the request stage, thus avoiding the appeal process, it would allow for quicker access to records and more efficient use of staff time and resources.

Allowing the requester to address questions about the records directly with program areas.

Where the requester has questions about the records, the IPC recommends that the employee who is most knowledgeable about the records communicate directly with the requester. This may not only be beneficial when initially clarifying the request, but also after the interim access decision/fee estimate has been issued, where the program areas might be able to speak to what the search entailed and the basis for the fee estimate.

Given that the Amnesty requests covered records that were located at local OPP detachments, direct communication between OPP personnel knowledgeable about the records and Amnesty may have provided a helpful forum for managing the requests.

Exploring staged processing.

Where an institution has issued a time extension, or intends to do so, processing the request in stages is often an effective strategy that can benefit the institution and the requester. The parties may be able to assess the requester's priorities and reach an agreement on a staged response. When reaching such an agreement, however, it is imperative that the institution abide by the timelines in it and that the parties understand that failure to do so will be grounds for an appeal to the IPC.

The ministry describes a strategy of capping the number of requests with a requester to five requests and working with the requester throughout the process. As a way to manage voluminous requests, this strategy is to be encouraged, but unless it is at the agreement of the parties it does not relieve the institution of its statutory obligations to respond to requests within 30 days.

b. The Impact of Inadequate Decision Letters

Some of the delays in processing Amnesty's requests were caused by decisions that were contradicted by later decisions, or decisions that were not adequate. The lack of clarity about what records existed led to inquiries and orders on the adequacy of the ministry's search. The ultimate determination that some responsive records never existed came after the expenditure of much time and resources by all involved. It also resulted in a level of mistrust with the FOI process on the part of Amnesty.

In one appeal, the IPC found the ministry's decision letter to be inadequate, stating that it failed "to identify each record or portion of a record and explain why it is claiming a particular exemption or exception […]" (Order PO-2913).

In another appeal, which dealt with a request for videos of cells, booking and interview areas in two OPP detachments. The ministry initially claimed the section 65(5.2) exclusion, and following the completion of the prosecution, claimed the law enforcement exemption (section 14 of the *Act*). Later, the ministry withdrew its section 14 claim, and granted partial access to the records subject to the application of the personal privacy exemption at section 21(1) of the *Act*.

Eventually, in the context of a reasonable search appeal, the ministry submitted that one of the videos of particular interest to Amnesty had been destroyed and the other never existed. During the mediation process, the ministry did not make it clear that the cell videos that were of interest to Amnesty did not appear to exist; rather, Amnesty understood that they were subject to the above-noted exclusion and exemptions, alongside other responsive videos that were located. This appeal file subsequently led to two orders, PO-3487-I, and PO-3561-F which dealt with the issue of reasonableness of search.

It is imperative that institutions provide proper decision letters, in order for requesters to be able to fully and meaningfully exercise their rights under the *Act*.

Minimum requirements for a written response to an access request are set out in the *Act*. Sections 26 and 29 provide:

> 26. Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 18, the head of the institution to which it is forwarded or transferred, shall, subject to sections 27, 28 and 57, within thirty days after the request is received,
>
> > (a) give written notice to the person who made the request as to whether or not access to the record or a part of it will be given; and
> >
> > (b) if access is to be given, give the person who made the request access to the record or part, and if necessary for the purpose cause the record to be produced.
>
> 29. (1) Notice of refusal to give access to a record or part under section 26 shall set out,
>
> > (a) where there is no such record,
> >
> > > (i) that there is no such record, and
> > >
> > > (ii) that the person who made the request may appeal to the Commissioner the question of whether such a record exists; or

> (b) where there is such a record,
>
> > (i) the specific provision of this *Act* under which access is refused,
> >
> > (ii) the reason the provision applies to the record,
> >
> > (iii) the name and position of the person responsible for making the decision, and
> >
> > (iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

The purpose of the inclusion of the information as described in section 29(1)(a) and (b) in a decision letter is to put the requester in a position to make a reasonably informed decision on whether to seek a review of the head's decision. Simply restating the language of the legislation is not sufficient to satisfy the requirement in section 29(1)(b)(ii).

In addition to the minimum requirements set out in the *Act*, the following components of a proper decision letter will help to properly explain an institution's decision, which will in turn minimize potential delays caused by confusion, lack of information or ambiguity in the decision:

- Provide an index of records. The IPC has found that providing a list of records satisfies some appellants who decide not to proceed further with an appeal.
- Assign a document number to each record and provide a general description of each record. If third party notice is required, use the same document number for the records being sent with the notice. The description should provide enough detail so that the requester (and in some cases the third party) has an understanding of the type of information contained in it.
- For each record or part of a record that is refused, provide the specific provision of the *Act* under which access is refused. It is helpful to attach copies of the sections of the *Act* that are cited.
- For each record or part of a record that is refused, **explain why the provision applies to the record**. This explanation, along with the general description of the record, should enable the requester to understand why the information cannot be disclosed.
- Where a fee is charged, provide the requester with information about the charging or waiving of a fee in connection with the request.
- Provide the name and the position of the person responsible for making the decision.
- Include a paragraph informing the requester that he/she can appeal the decision to the IPC within 30 days. Let the requester know that an appeal should be accompanied by:

- the file number assigned by the institution to the request;
- a copy of the decision letter;
- a copy of the original request for information;
- information about the appeal fee.

The above components are also helpful where an institution believes that records responsive to the request fall under an exclusion. In such a situation, the institution should provide as much information as possible to explain why the record at issue is covered by an exclusion. Again, the provision of this information avoids delay and assists in informed decision-making about a request or appeal.

c. Alternative strategies

The issues raised by Amnesty provide an opportunity to review how well the statutory mechanisms in the *Act* accommodate a requester engaged in broad scale research, such as the type undertaken by Amnesty into the Tyendinaga policing actions.

The breadth of Amnesty's project is demonstrated by the number of formal requests it made - 86 in all, some of which were multi-part requests and 49 of which were received simultaneously. What emerges from the IPC's review is that the ministry did not respond to the requests in an orderly, timely and efficient manner. It is perhaps no surprise that its response was deficient, given the extraordinary volume of the requests.

Above, the IPC set out recommendations and requirements aimed at institutions responding to a voluminous set of access requests received simultaneously, as well as requests that produce a high volume of responsive records. There are also steps that requesters can take when seeking a large volume of information from a government organization, as part of a research project.

One approach that both institutions and requesters may consider is to collaborate on a plan for disclosure of information that takes account of statutory obligations while also allowing for the proactive disclosure of information. Such an approach may be successful if a researcher and institution communicate early on in the process. A researcher who intends to submit a large volume of requests on a specific theme could consider contacting an institution in advance of the requests, to initiate a dialogue about the information sought, and to explore a mutually generated plan to achieve the purposes of the requests in an efficient manner.

Institutions should consider designating a person who can respond to researchers wishing to explore this kind of plan. This person should be familiar with the record holdings of the institutions and the types of records that could be proactively disclosed outside of the request process in the *Act*.

This report has noted that the ministry's practice of "staged disclosure" is inconsistent with the requirements of the *Act* unless it is based on mutual agreement. There are many reasons why requesters who wish to submit a large volume of requests should seek mutual agreement for staged disclosure wherever possible. One benefit is that it results in a known timetable, instead of the prospect of unilateral time extensions that give rise to appeals to this office. As long as the institution complies with the timetable, such an agreement also avoids the potential for multiple deemed refusal appeals. Providing an institution with advance notice of a large volume of requests, and initiating a dialogue on a staged disclosure agreement, can also uncover possibilities for proactive disclosure.

d. Compliance statistics

In Amnesty's submission and subsequent correspondence, it recommended the Treasury Board Secretariat audit the ministry's compliance statistics. It also requests that the ministry's compliance statistics be "disaggregated" to report on compliance rates for requests that pertain specifically to OPP records.

Amnesty's rationale for the first request is based on a profound skepticism about the ministry's reported compliance statistics, which is significantly at odds with its experience in relation to these requests. It cites the high level of non-compliance with the statutory time lines for responding to Amnesty's requests, which is in marked contrast with the average reported by the ministry as a whole.

The IPC does not find it necessary to recommend an audit of the ministry's compliance statistics. The IPC's 2016 Annual Report described that, as a result of concerns about inaccurately reported statistics from the Ministry of the Environment and Climate Change, the Commissioner requested the government's Ontario Internal Audit Division to conduct spot audits in other ministries to assess whether the issues identified at the Ministry of the Environment and Climate Change were more widespread. Among them was the Ministry of Community Safety and Correctional Services (now the ministry). In addition, the Commissioner requested that deputy ministers sign and submit an annual attestation to the IPC, indicating that their respective ministries comply with the statistical reporting requirements set out in the *Act* and that their statistics are accurate.

The IPC is satisfied that the above measures are adequate at the present time to ensure the validity of the ministry's compliance statistics.

The IPC finds merit, however, in the second of Amnesty's suggestions above. The OPP is, by its own description, the largest police force in Ontario. Other police services provide compliance statistics to the IPC. Through the IPC's publication of these statistics, the public can compare the responsiveness of these different services under Ontario's freedom of information legislation. The IPC and the public can also observe trends from

year to year. The absence of compliance statistics relating to the OPP, separate from the rest of the ministry, is arguably a gap in the public's ability to understand how all police services across the province respond to requests.

The IPC will thus be contacting the ministry to explore how it can report separately the compliance statistics for OPP-related requests, which is in the interests of greater transparency about this part of the ministry's mandate.

6. A note on scope

The IPC considered the concerns raised by Amnesty and ultimately decided not to inquire into all of them. In some instances, the IPC reviewed the relevant files and were not convinced the facts warranted further inquiry. In others, the passage of time or other factors led this office to conclude that a detailed review of the events covered by Amnesty's complaints would not be fruitful. Set out below in this report are the reasons for not reviewing some particular issues.

"Violations by MCSCS and the OPP of the section 65(5.2) exclusion from *FIPPA*"

The IPC understands Amnesty's allegation to be that the ministry intentionally misapplied the section 65(5.2) exclusion, without justification, in response to the majority of its requests. It alleges that this was done in order to deny access. In support of this allegation, Amnesty notes that the ministry and the OPP claimed this exclusion for records that were later determined to be non-existent or missing.

In Amnesty's opinion, the exclusion was also improperly claimed when relevant prosecutions had been completed and where the relevant individuals had not been charged. Lastly, Amnesty explains in its brief that the ministry used the exclusion "in spite of the fact that a later review of court documents unearthed no evidence that the information that would have been disclosed by the relevant records pertained to charges laid or prosecutions conducted."

An institution must meet a relatively low evidentiary threshold to establish that records are excluded under this section (i.e. an institution merely has to establish that there is *some connection* between "a record" and an ongoing "prosecution"[2]).

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2 *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, cited above; see also *Canada (Information Commissioner) v. Canada (Commissioner, RCMP)*, 2003 SCC 8, [2003] 1 S.C.R. 66 at para. 25.

A number of appeals raising the application of the section 65(5.2) exclusion came before an IPC adjudicator. After reviewing the appeal files, the adjudicator ultimately decided to put the files on hold in a letter dated November 30, 2010 while waiting for the last trial to complete, instead of conducting an inquiry into the merits of the appeals. The ministry notified the IPC of the completion of the criminal proceedings on January 4, 2011, stating in part:

> …I am writing to advise you that the criminal trial of [named individual] has concluded. Accordingly, [the ministry] is withdrawing its claim that the records that are in dispute with respect to [four referenced appeal files]are excluded from the jurisdiction of [the *Act*] pursuant to subsection 65(5.2) of that *Act*.

Since the application of the exclusion was no longer at issue, on January 20, 2011 the adjudicator wrote to the ministry requiring it to issue access decisions with respect to original 49-part request the requests that were previously on hold.

It was in the adjudicator's discretion to weigh the benefits and costs of proceeding with an inquiry in which the records might ultimately be found to be excluded from the *Act*, or placing the appeals on hold pending the conclusion of the prosecutions. The appellant did not ask the adjudicator to reconsider the decision to place the appeals on hold.

Given the resolution of the exclusion claim, it would serve no useful purpose to re-open this issue by inquiring into Amnesty's concern about its overbroad application.

"Missing OPP responsive records in more than 10% of Amnesty's access requests and contradictory explanations for the missing OPP records"

Amnesty raises concerns about records that it believes should exist in response to some of its requests, but which the ministry did not locate. For example, appeals PA11-360 and PA11-515 involved emails Amnesty believed should exist. During mediation, the ministry confirmed that there were no responsive emails on the relevant servers. Both at mediation, and in its brief, Amnesty questioned whether the OPP may have inappropriately deleted these records, perhaps through a "triple deletion." Amnesty did not proceed to adjudication on these appeals.

Amnesty also notes it was greatly concerned that the OPP was unable to locate specified OPP officer witness statements. Adjudicator Hamilton dealt with the issue of the search for those statements in Order PO-3500 finding that the ministry had conducted a reasonable search. Amnesty did not submit representations during the inquiry for that order.

Another example of missing records that Amnesty believes should exist or may have been inappropriately destroyed is seen in appeal PA13-232, relating to cell video and audio recording of an affected party who alleged he had been mistreated by police at specific times. Amnesty notes a "disconcerting paradox" that audio/visual records pertaining to the detention of other affected parties on the specified date were not written over, while one of the particular records sought was "written over long ago, and no longer exists." It made submissions on this issue to the adjudicator in this appeal, who acknowledged Amnesty's concerns by stating that there was "some substance to them" (Order PO-3561-F).

In all of these appeals, Amnesty questioned the reasonableness of the ministry's search for records and raised the possibility that additional relevant records should have been located. It had broad concerns about the OPP's records retention practices, which it raised before the IPC. At the time of these appeals, it had the opportunity and did not or was unable to provide a basis for the IPC to order additional searches.

In its brief, Amnesty now requests that the IPC investigate whether a practice of "triple deletion" of emails exist, as well as the "full circumstances" surrounding the missing audio/video records at issue in Order PO-3561-F.

The above inquiries have already addressed at least part of Amnesty's concerns in this regard, or provided an opportunity to do so. Outside the context of an appeal, the IPC has limited authority to conduct freestanding inquiries into allegations of wrongdoing such as those asserted here. The IPC also recognizes the prejudice of inquiring into events occurring up to 12 years ago. In light of all of these factors, the IPC will not inquire further into these issues.

"Flaws in *FIPPA* resulting in concerns about the ability to enforce statutory requirements in Ontario's FOI legislation," and "the need to hold individuals more accountable for upholding and adhering to the letter and spirit of *FIPPA*"

Amnesty asked the IPC to explore the feasibility of proposing amendments to the *Act* to ensure that penalties or sanctions can be imposed on appropriate officials who violate statutory requirements, such as the requirement to provide decisions within a specified time.

In the IPC report *Deleting Accountability: Record Management Practices of Political Staff*, this office recommended that the Legislature consider certain amendments to the *Acts*, including the creation of a new offence of willful destruction of records that are subject to, or may reasonably be subject to, an access request under the *Acts.*

In 2016, the *Acts* were amended by adding an offence provision prohibiting any person from altering, concealing or destroying a record, or causing any other person to do so, with the intention of denying a right of access.

The IPC's Annual Report already provides statistics on the timeliness of institutions covered by the *Acts* in responding to access requests.

The IPC does not currently see the need for additional accountability measures beyond those just described. However, if facts come before the IPC suggesting that these measures are inadequate, it will consider proposing statutory amendments.

"Actions by some IPC adjudicators that unnecessarily exacerbated delays in the FOI process"

Amnesty claims that some IPC adjudicators contributed to delays in appeal process by, among other things:

- How an adjudicator dealt with Amnesty's objections regarding the application of section 65(5.2)
- Delays in the inquiry process
- Errors in the adjudication process, such as in not considering all of the responsive records relating to an appeal

The IPC considered the concerns raised by Amnesty relating to IPC's internal processes. Although not included in the scope of this review and report, the IPC has taken into consideration the history of these requests and the issues raised by Amnesty, in internal reviews on how best to process appeals arising from voluminous or multi-part requests.

7. Conclusion

The IPC appreciates the efforts of Amnesty in compiling the information in its submission. While recognising that the steps taken by the IPC in response to the submission will not fully address the issues Amnesty raised, the IPC hopes that the parties will benefit and be guided by the ideas and recommendations that were put forward in the report.

Sherry Liang
Assistant Commissioner

October 31, 2019