



# JUDGMENTS OF THE SUPREME COURT OF CANADA


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## Supreme Court Judgments Help


Case name: Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)  
 Collection: Supreme Court Judgments  
 Date: 2014-04-24  
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 Case number: 34949  
 Judges: LeBel, Louis; Abella, Rosalie Silberman; Rothstein, Marshall; Cromwell, Thomas Albert; Moldaver, Michael J.; Karakatsanis, Andromache; Wagner, Richard  
 Subjects: Access to information  
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### SUPREME COURT OF CANADA

**CITATION:** Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner), 2014 SCC 31     **DATE:** 20140424  
**DOCKET:** 34949

**BETWEEN:**

**Ministry of Community Safety and Correctional Services**  
 Appellant  
 and  
**Information and Privacy Commissioner**  
 Respondent  
 - and -  
**Attorney General of Canada and Information Commissioner of Canada**  
 Interveners

**CORAM:** LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

**REASONS FOR JUDGMENT:** Cromwell and Wagner JJ. (LeBel, Abella, Rothstein, Moldaver and Karakatsanis JJ. concurring)  
(paras. 1 to 68)

**NOTE:** This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

ONTARIO (MCSCS) v. ONTARIO (IPC)

**Ministry of Community Safety and Correctional Services** *Appellant*

v.

**Information and Privacy Commissioner**

*Respondent*

and

**Attorney General of Canada and  
Information Commissioner of Canada**

*Interveners*

**Indexed as: Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)**

**2014 SCC 31**

File No.: 34949.

2013: December 5; 2014: April 24.

Present: LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Access to Information — Exemptions — Confidentiality provisions — Requester seeking disclosure of number of offenders registered under sex offender registry residing in areas designated by first three digits of Ontario's postal codes — Government institution denying request on grounds of exemptions contained in Freedom of Information and Protection of Privacy Act — Information and Privacy Commission ordering disclosure — Standard of review of Commission's decision — Whether Commission made reviewable error in interpreting applicable legislation — Whether Commission applied appropriate evidentiary standard with regards to harms based exemptions — Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F 31, ss. 14, 67 — Christopher's Law (Sex Offender Registry), 2000, S.O. 2000, c. 1, ss. 10, 13.*

A requester sought disclosure from the Ministry of Community Safety and Correctional Services of the number of offenders registered under its sex offender registry residing within the areas designated by the first three digits of Ontario's postal codes. The registry is established and maintained under *Christopher's Law (Sex Offender Registry), 2000*. The information contained in the Registry is kept confidential by the Ministry and police. The Ministry refused to disclose, citing law enforcement and

personal privacy exemptions in the *Freedom of Information and Protection of Privacy Act*. The Information and Privacy Commissioner held that the exemptions do not apply and ordered disclosure. The Commissioner's decision was upheld on judicial review and on appeal.

*Held:* The appeal should be dismissed.

The Commissioner made no reviewable error in ordering disclosure. The applicable standard of review is reasonableness. The Commissioner was required to interpret *Christopher's Law* for the narrow purpose of determining whether it contained a confidentiality provision that prevails over the *Freedom of Information and Protection of Privacy Act*. This task was intimately connected to her core functions. The Commissioner reasonably concluded that the Ministry did not provide sufficient evidence that disclosure could lead to the identification of offenders or of the risks of the harms that the exemptions seek to prevent.

The Commissioner did not grant a right of access that is inconsistent with either Act. Section 67(2) of the *Freedom of Information and Protection of Privacy Act* does not specifically provide that a confidentiality provision in *Christopher's Law* prevails and, although s. 10 of *Christopher's Law* is a confidentiality provision, neither it nor any other part of *Christopher's Law* prevails over the *Freedom of Information and Protection of Privacy Act*. Explicit references to *Freedom of Information and Protection of Privacy Act* in *Christopher's Law* indicate that the Legislature considered the manner in which both statutes operate together. Had the Legislature intended the confidentiality provision in *Christopher's Law* to prevail, it would have included specific language to that effect. Neither s. 13 of *Christopher's Law* nor *Christopher's Law* working together with the *Police Services Act*, R.S.O. 1990, c. P.15, ousts the application of the *Freedom of Information and Protection of Privacy Act*. The Commissioner did not take too narrow a view of the law enforcement exemptions under s. 14(1)(e) and (l) of the *Freedom of Information and Protection of Privacy Act*. Based on the evidence and arguments before her, she properly focused on the reasonableness of any expectation that the requested disclosure would lead to the identification of sex offenders or their home addresses. Because the law enforcement exemptions do not apply, the discretion not to disclose a record under s. 14 of the *Freedom of Information and Protection of Privacy Act* does not apply.

The Commissioner made no reviewable error with respect to the standard of proof applicable to the law enforcement exemptions. There is no difference in substance between "a reasonable expectation of probable harm" and a "reasonable basis for believing" that harm will occur. The "reasonable expectation of probable harm" formulation simply captures the need to demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm. The "reasonable expectation of probable harm" formulation should be used wherever the phrase "could reasonably be expected to" is used.

The Commissioner reasonably concluded that the Ministry did not prove that the Record could be used to identify sex offenders or that it will ignite among sex offenders a subjective fear of being identified that will lead to lower compliance rates with *Christopher's Law*.

## Cases Cited

**Applied:** *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23;  
**referred to:** Order PO 2312, 2004 CanLII 56430; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815; *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395; *Ontario (Minister of Transportation) v. Cropley* (2005), 202 O.A.C. 379; *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, 2012 ONCA 125, 109 O.R. (3d) 757; *Ontario (Minister of Health and Long Term Care) v. Ontario (Assistant Information and Privacy Commissioner)* (2004), 73 O.R. (3d) 321; *Ontario (Attorney General) v. Pascoe* (2002), 166 O.A.C. 88; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; Order PO 2518, 2006 CanLII 50861; Order PO 3157, 2013 CanLII 28809; *Chesal v. Nova Scotia (Attorney General)*, 2003 NSCA 124, 219 N.S.R. (2d) 139; *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41; *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66.

## Statutes and Regulations Cited

*Access to Information Act*, R.S.C. 1985, c. A 1, s. 20(1)(c).

*Canadian Charter of Rights and Freedoms*, s. 1.

*Christopher's Law (Sex Offender Registry)*, 2000, S.O. 2000, c. 1, Preamble, ss. 2, 3, 10, 11(1), (2), 13.

*Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, ss. 2(1) "personal information", Part II, 10, 12 to 22, Part III, 39(2), 42(1)(e), 67.

*Members' Integrity Act, 1994*, S.O. 1994, c. 38, s. 29(2).

*Mining Act*, R.S.O. 1990, c. M.14, s. 145(11).

O. Reg. 69/01, s. 2(1).

O. Reg. 265/98, s. 2.

*Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Sch. B, s. 56(9).

*Ontario Works Act, 1997*, S.O. 1997, c. 25, Sch. A, s. 75(9).

*Police Services Act*, R.S.O. 1990, c. P.15, s. 41(1.1).

## Authors Cited

Benedet, Janine. “A Victim Centred Evaluation of the Federal Sex Offender Registry” (2012), 37 *Queen’s L.J.* 437.

APPEAL from a judgment of the Ontario Court of Appeal (Laskin, Sharpe and Epstein JJ.A.), 2012 ONCA 393, 292 O.A.C. 335, [2012] O.J. No. 2575 (QL), 2012 CarswellOnt 7088, affirming a decision of Aston, Low and Hourigan JJ., 2011 ONSC 3525, 282 O.A.C. 199, [2011] O.J. No. 2805 (QL), 2011 CarswellOnt 5227, affirming Order PO 2811, 2009 CanLII 43354. Appeal dismissed.

*Sara Blake, Christopher Thompson and Nadia Laeeque*, for the appellant.

*William S. Challis*, for the respondent.

*Christine Mohr*, for the intervener the Attorney General of Canada.

*Richard G. Dearden, Diane Therrien and Michael De Santis*, for the intervener the Information Commissioner of Canada.

The judgment of the Court was delivered by

CROMWELL AND WAGNER JJ. —

## I. Overview

[1] The main question before the Court concerns the interaction between Ontario’s access to information legislation and its confidential Sex Offender Registry (“Registry”). A requester under Ontario’s *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (“FIPPA”), sought disclosure from the Ministry of Community Safety and Correctional Services (“Ministry”) of the number of offenders registered under its Registry residing within the areas designated by the first three digits of Ontario postal codes (the so-called Forward Sortation Areas or FSAs). The information in the Registry, which is established and maintained under *Christopher’s Law (Sex Offender Registry)*, 2000, S.O. 2000, c. 1 (“*Christopher’s Law*”), is confidential but is available for law enforcement purposes only to the Ministry and to police. In this respect, the Ontario Registry is different from those of some other jurisdictions which are public and this difference reflects a clear policy choice. The basis of that choice is the belief that keeping the information confidential for law enforcement purposes will encourage the offenders to comply with registration and reporting requirements and help prevent vigilantism.

[2] The Ministry refused to disclose the requested information (“Record”), citing law enforcement and personal privacy exemptions, but that decision was overruled by the Information and Privacy Commissioner (“Commissioner”) who ordered disclosure. The Commissioner concluded that the Registry was subject to *FIPPA* and that none of the exemptions claimed by the Ministry applied. The information sought was not exempted personal information because it was not reasonable to expect that an individual might be identified if the information were disclosed. The harm-based law enforcement exemptions relied on by the Ministry did not apply because the evidence did not establish a reasonable expectation of harm or a reasonable basis for believing that any danger would result from disclosure. The Commissioner’s decision was upheld on judicial review by the Ontario Divisional Court and on appeal to the Ontario Court of Appeal.

[3] In this Court, the Ministry maintains that the Commissioner interpreted and applied *FIPPA* in a way that is inconsistent with *Christopher’s Law* and imposed too onerous a standard of proof in relation to the exemptions from disclosure. A subsidiary issue concerns the standard of judicial review that applies to the Commissioner’s decision.

[4] We are of the view that the Commissioner made no reviewable error in ordering disclosure. She carefully considered how *Christopher’s Law* and *FIPPA* interrelate. She reasonably concluded that disclosure could not lead to the identification of offenders or of their home addresses and that the Ministry did not provide sufficient evidence of the risk of the harms which the relied-on exemptions seek to prevent. We would dismiss the appeal but, as requested by the Commissioner, without costs.

## II. Facts and Judicial History

### A. *Legislative Framework: Christopher’s Law and FIPPA*

#### (1) *Christopher’s Law*

[5] In 2001, *Christopher’s Law* came into force in Ontario and was the first sex offender registry law in Canada. Its adoption was prompted by a jury recommendation from the 1993 coroner’s inquest into the abduction, sexual assault and murder by a convicted sex offender of an 11-year-old boy named Christopher Stephenson. Its purpose, both preventive and responsive in nature, is to create a regulatory registry scheme which aims to protect the community, reduce recidivism, increase public safety and provide the police with an important investigative tool: *Christopher’s Law’s* preamble; J. Benedet, “A Victim-Centred Evaluation of the Federal Sex Offender Registry” (2012), 37 *Queen’s L.J.* 437.

[6] Under section 2 of *Christopher's Law*, the Ministry must establish and maintain the Registry containing the names, dates of birth and addresses of sex offenders, as well as the sex offences for which they are serving or have served a sentence, or of which they have been convicted or found not criminally responsible on account of mental disorder. Additional contents of the Registry are prescribed by regulation (O. Reg. 69/01, s. 2(1)) and include photographs and physical descriptions of the offenders, work address and telephone number, addresses of secondary residences, as well as the name and address of any educational institution where the offender is or has enrolled, attended or worked. The Registry includes the information provided directly by the offender, as well as information obtained from provincial and federal governments. It is computerized and can be accessed by police throughout the province.

[7] Registered sex offenders are required to report annually to the police and to promptly notify the police of any change in residence: s. 3 of *Christopher's Law*. Non-compliance is made an offence pursuant to s. 11(1) of *Christopher's Law*.

[8] The information contained in the Registry is kept confidential by the Ministry and police. The confidentiality of the Registry stands in contrast to its publicly accessible counterparts established and maintained in the United States: see Benedet, at pp. 442 and 470. The rationale for keeping the information confidential is that this encourages offenders to comply with the registration and reporting requirements, thereby making it a more useful law-enforcement tool while at the same time reducing the risk of harm to the offenders themselves resulting from vigilantism.

(2) FIPPA

[9] *FIPPA* provides for a general right of access to information that is under the control of an institution (a defined term referring to various government and related bodies), unless the record falls under the exemptions listed under ss. 12 to 22: s. 10(1). Among these exemptions is a mandatory exemption applying to third party “personal information”, a defined term in *FIPPA*, meaning in part, “recorded information about an identifiable individual”: s. 2(1). There are also discretionary exemptions relating to law enforcement, including exemptions where the disclosure could reasonably be expected to “endanger the life or physical safety of a law enforcement officer or any other person” or to “facilitate the commission of an unlawful act or hamper the control of crime”: s. 14(1)(e) and (1). The purpose of the law enforcement exemptions is to protect public safety and ensure effective law enforcement.

[10] Section 67 of *FIPPA* sets out the general priority of the Act over other confidentiality provisions in other legislation:

**67.** — (1) This Act prevails over a confidentiality provision in any other Act unless

subsection (2) or the other Act specifically provides otherwise.

[11] In light of s. 67(1), an institution cannot refuse to disclose a record requested under *FIPPA* on the basis that its governing legislation mandates that the information contained in the record be kept confidential. Section 67(2) lists specific confidentiality provisions which prevail over *FIPPA*. No provisions from *Christopher's Law* are listed therein.

#### B. *Background Facts*

[12] A requester submitted a request to the Ministry under *FIPPA* for disclosure of the first three digits of Ontario postal codes (FSAs) and the corresponding number of registered sex offenders who reside in each. Each FSA has a specific geographical boundary, and the number of FSAs varies from region to region. For instance, the city of Ottawa has 40 FSAs, whereas the town of Dryden only has one. The number of residents in Ontario FSAs varies from less than 400 to over 110,000 individuals. The average population *per FSA* in Ontario is approximately 25,000 residents.

[13] The Ministry denied access, citing law enforcement and personal privacy exemptions listed under ss. 14(1)(e), 14(1)(l), 21(1), 21(2)(e), 21(2)(f) and 21(2)(h) of *FIPPA* in justifying its refusal. The requester appealed the Ministry's decision to the Information and Privacy Commissioner ("Commissioner") on August 21, 2008. The Commissioner received representations from the Ministry, including an affidavit sworn by Superintendent Truax of the Ontario Provincial Police, as well as representations from the requester. Superintendent Truax's affidavit noted the high compliance rate with the Ontario Registry (over 96%) and his belief that this high rate is due in part to the Registry's confidentiality. He outlined concerns about sex offenders going "underground" in fear of vigilantism as well as general social unease, negatively affecting relations between sex offenders, the police and the public: A.F., at para. 25.

#### C. *Decisions*

(1) Information and Privacy Commissioner Decision, Order PO-2811, 2009 CanLII 43354 (ON IPC)

[14] On August 7, 2009, Senior Adjudicator John Higgins ordered the Ministry to disclose the Record to the requester. For the sake of clarity, we will refer to this decision as the Commissioner's decision.

[15] The Commissioner turned first to whether *Christopher's Law* ousted the operation of *FIPPA*. Section 67 of *FIPPA* provides that *FIPPA* will prevail over a confidentiality provision in any other Act



unless the other Act specifically provides otherwise. The question was whether s. 10 of *Christopher's Law* specifically provided otherwise. Section 10 provides that, subject to collection, retention and use for specified law enforcement purposes and personnel, no one shall disclose to another person "information obtained from the sex offender registry in the course of his or her duties under this Act or received in the course of his or her duties under this Act".

[16] The Commissioner noted a previous appeal (Order PO-2312, 2004 CanLII 56430 (ON IPC)) where the former Assistant Commissioner had ruled that s. 10 of *Christopher's Law* is not a confidentiality provision that prevails over *FIPPA* because the language it uses is not specific enough to do so, and it does not directly address *FIPPA* requests, but instead refers to the disclosure of information obtained by police in the course of their duties under *Christopher's Law*. The Commissioner agreed with the conclusion in Order PO-2312 that s. 10 of *Christopher's Law* is not a confidentiality provision that prevails over *FIPPA*. The Commissioner concluded, therefore, that the information requested was subject to *FIPPA* and that the Registry, as a record under the Ministry's custody and control, is subject to the access provisions and the exemptions scheme set out in ss. 12 to 22 of *FIPPA*. Therefore, the question for the Commissioner was whether the Record requested was exempted from the general right of access provided by s. 10 of *FIPPA*: pp. 4-5.

[17] The Commissioner noted that the requester was *not* seeking access to the entire database, but only a list of FSAs and the number of registered sex offenders residing in each. Therefore, she concluded that the information was not "personal information" as defined in s. 2(1) of *FIPPA* because it could not reasonably identify any individual listed on the Registry and was therefore not exempt from disclosure on that basis under s. 21 of *FIPPA*: p. 3.

[18] The Commissioner then turned to the harm-based law enforcement exemptions under *FIPPA* at ss. 14(1)(e) and 14(1)(l). These apply when it is shown that disclosure could reasonably be expected to endanger the life or physical safety of a law enforcement officer or other person or to facilitate the commission of an unlawful act or hamper the control of crime.

[19] In the case of s. 14(1)(e), the Commissioner concluded that the Ministry had not established a reasonable basis for believing that endangerment would result from disclosure. The Commissioner considered the Ministry's submissions that the requested information could be cross-referenced with other publicly available information to identify the location of the sex offender's residence, that multiple requests showing movement could lead to identification, and the Ministry's concerns about citizen vigilantism, harassment of the sex offender, decreased compliance with reporting requirements and recidivism. The Commissioner noted that all the Ministry's arguments depended on identifiability and that she had previously concluded that it was not reasonable to expect that an individual could be identified if the

Record were disclosed: pp. 11-14. The Commissioner expressly noted that she was not requiring that the Ministry demonstrate that harm was probable, but that even the lower threshold of a reasonable basis for believing that harm would result from disclosure was not established here: pp. 14-15.

[20] With regards to the s. 14(1)(l) exemption (facilitate the commission of an unlawful act or hamper crime control), the Commissioner noted that her conclusion according to which it was not reasonable to expect that offenders may be identified from the disclosure was sufficient to dispose of the Ministry's arguments under this exemption as well. The Commissioner was not persuaded that disclosure of the requested information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime: pp. 15-17.

[21] Given the conclusion that none of the exemptions applied, the disclosure of the Record was ordered: p. 17.

(2) Divisional Court, 2011 ONSC 3525, 282 O.A.C. 199

[22] The Ministry's application for judicial review was dismissed in brief oral reasons. The Ministry challenged only the Commissioner's conclusions on the ss. 14(1)(e) and 14(1)(l) law enforcement exemptions.

(3) Court of Appeal, 2012 ONCA 393, 292 O.A.C. 335

[23] The Ministry's further appeal was dismissed. The Court of Appeal agreed with the Divisional Court that the Commissioner's decision was reasonable. It noted that the Ministry offered little, if any, evidence that the information requested could be used to locate sex offenders within communities or engender an offender's subjective perception of this possibility, resulting in lower compliance with the Registry. The Court of Appeal found that the correct test had been applied and that the factual findings were supported by the evidence.

### III. Issues

[24] The following issues arise from the case on appeal:

A. What is the applicable standard of review of the Commissioner's decision?

B. Did the Commissioner make a reviewable error by granting a right of access for purposes that are not consistent with *Christopher's Law* or with *FIPPA*?

C. Did the Commissioner make a reviewable error in the interpretation of *FIPPA* law enforcement exemptions by applying an elevated standard for establishing a reasonable prediction of future harm to public safety and to the ability of police to control crime?

[25] We will discuss them in turn.

#### IV. Analysis

##### A. *Standard of Review*

[26] Both this Court and the Ontario courts have held that a reasonableness standard of judicial review generally applies to decisions by the Commissioner interpreting and applying disclosure exemptions under *FIPPA*: see, e.g., *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, at para. 70; *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.) (“*Worker Advisor*”), at para. 18; *Ontario (Minister of Transportation) v. Cropley* (2005), 202 O.A.C. 379, cited in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, 2012 ONCA 125, 109 O.R. (3d) 757, at para. 14; *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)* (2004), 73 O.R. (3d) 321 (C.A.), at paras. 26-47; *Ontario (Attorney General) v. Pascoe* (2002), 166 O.A.C. 88, at para. 3. Moreover, the Court has repeatedly said that the reasonableness standard will generally apply to a tribunal interpreting its home statute or statutes closely connected to its function: see, e.g., *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 28. The Ministry concedes this general point, but argues that because the Commissioner also interpreted *Christopher's Law*, which is not her home statute, the standard of correctness should apply.

[27] We do not agree. The Commissioner was required to interpret *Christopher's Law* in the course of applying *FIPPA*. She had to interpret *Christopher's Law* for the narrow purpose of determining whether, as set out in s. 67 of *FIPPA*, it contained a “confidentiality provision” that “specifically provides” that it prevails over *FIPPA*. This task was intimately connected to her core functions under *FIPPA* relating to access to information and privacy and involved interpreting provisions in *Christopher's Law* “closely connected” to her functions. The reasonableness standard applies.

##### B. *Purposes of FIPPA and Christopher's Law*

[28] The Ministry claims that the Commissioner granted a right of access which was inconsistent

with the purposes of *Christopher's Law* and of the right of access under *FIPPA*. It advances three main points with respect to this issue. We will address them in turn.

(1) Does *Christopher's Law* Contain a Confidentiality Provision that Prevails over *FIPPA*?

[29] As noted, s. 67 of *FIPPA* provides that *FIPPA* prevails over a “confidentiality provision” in any other Act unless s. 2 or the other Act specifically provides otherwise. Because *Christopher's Law* is not listed in s. 67(2), the issue is whether *Christopher's Law* has a confidentiality provision that “specifically provides” that it prevails over *FIPPA*.

[30] The Ministry argues that the Commissioner used s. 67 of *FIPPA* as a licence to disregard *Christopher's Law*, and that resorting to s. 67 was unnecessary because there is no conflict between both statutes: A.F., at para. 68. The Ministry also submits that *Christopher's Law* does “specifically provide” that *FIPPA* does not prevail, as required by s. 67(1) of *FIPPA*. *Christopher's Law* does so, it is argued, by a combination of ss. 10(1), 10(2), 11(2), and 13 as well as s. 41(1.1) of the *Police Services Act*, R.S.O. 1990, c. P.15. It appears that these points were not clearly raised at any earlier stage of this litigation.

[31] The Commissioner noted, however, that in a *previous* appeal, the Ministry had argued that s. 10 of *Christopher's Law* was a confidentiality provision which prevailed over *FIPPA*. That argument was rejected in the previous appeal on the ground that s. 10, while a confidentiality provision, did not “specifically provide” that it prevailed over *FIPPA*. That same analysis was accepted by the Commissioner in this case. We find this to be a reasonable conclusion.

[32] The legislature turned its mind to the interaction between *FIPPA* and *Christopher's Law*: A.F., at para. 73. This is evidenced by explicit reference to *FIPPA* in some of *Christopher's Law*'s provisions. Section 10(4), for instance, deems access to, use and disclosure of personal information by the police under s. 10(2) and (3) to be in compliance with s. 42(1)(e) of *FIPPA* (which in turn provides that an institution shall not disclose personal information in its custody, except for the purpose of complying with an Act of the legislature). Such specific references to *FIPPA* indicate that the legislature considered the manner in which both statutes would operate together and the possibility of conflict. Section 67 of *FIPPA* is the mechanism the legislature chose to resolve any conflict.

[33] However, no confidentiality provision in *Christopher's Law* specifically states that *FIPPA* does not prevail over it, as s. 67(1) of *FIPPA* requires. The text of the confidentiality provision of *Christopher's Law*, s. 10(1), is the following:

**10.** (1) Subject to subsections (2) and (3), no person shall disclose to another person

information obtained from the sex offender registry in the course of his or her duties under this Act or received in the course of his or her duties under this Act except as provided by this Act.

Had the legislature intended the confidentiality provision in *Christopher's Law* to prevail over *FIPPA*, it could easily have included specific language to that effect. Section 10(1) contains no such language. The fact that s. 11(2) of *Christopher's Law* makes it an offence to contravene s. 10 does not impute the necessary specificity required by s. 67(1) of *FIPPA*.

[34] When the legislature in other statutes intended that *FIPPA* would not prevail, it found specific language to make that intent clear. For instance, s. 29(2) of the *Members' Integrity Act, 1994*, S.O. 1994, c. 38, states that “[s]ubsection (1) prevails over the *Freedom of Information and Protection of Privacy Act*”: see also the *Mining Act*, R.S.O. 1990, c. M.14, s. 145(11); *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Sch. B, s. 56(9); *Ontario Works Act, 1997*, S.O. 1997, c. 25, Sch. A, s. 75(9). Such language leaves no room for doubt, and is notably absent from *Christopher's Law*.

[35] The Ministry also argued that s. 10(2) of *Christopher's Law* and s. 41(1.1) of the *Police Services Act* prescribe complete disclosure rules: A.F., at para. 70. Section 10(2) of *Christopher's Law*, acting as an exception to the confidentiality provision at s. 10(1), provides that the police may collect, retain and use information obtained from the Registry for any purpose under s. 41(1.1) of the *Police Services Act*. Section 41(1.1) provides that “[d]espite any other Act, a chief of police . . . may disclose personal information about an individual in accordance with the regulations”. This disclosure may be made for purposes of protecting the public or victims of crime, amongst others, when it is reasonably believed that the individual poses a significant risk of harm to other persons: s. 41(1.2) *Police Services Act*; O. Reg. 265/98, s. 2. The combined effect of these provisions is to allow police to disclose *personal information* about sex offenders when they are believed to pose a risk of harm to other persons, despite protections to personal privacy otherwise provided for in “any other Act”, such as *FIPPA*. The information at issue in this case is not personal information. These combined provisions do not specifically oust the application of *FIPPA*.

[36] The Ministry further argues, apparently for the first time in this Court, that s. 13 of *Christopher's Law* “specifically provides otherwise” as required by s. 67(1) of *FIPPA*: A.F., at para. 72. We see no merit in this submission: s. 13 does specifically mention *FIPPA*, but not in relation to *Christopher's Law's* confidentiality provisions. Section 13(1) of *Christopher's Law* provides:

**13.** (1) Personal information may be collected, retained, disclosed and used in accordance with this Act despite the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act*.

It is hard to see how this is a “confidentiality provision”: it authorizes the collection, retention, disclosure and use of information rather than prevents such activities. Moreover, nothing in s. 13(1) suggests that *FIPPA* does not prevail over *Christopher’s Law’s* confidentiality provisions. Instead, s. 13(1) relates to Part III of *FIPPA*, which *protects personal privacy*. What s. 13(1) does is *permit* the collection, retention, disclosure and use of sex offenders’ personal information, *despite* the protections afforded in *FIPPA*, to which sex offenders would otherwise be entitled. Not only is this exception to the protection set out in Part III of *FIPPA* irrelevant to the present appeal, which is concerned with access under Part II of *FIPPA*; it is clear that the Record in this case does not constitute personal information. Section 13(1) is therefore inapplicable in the circumstances of this case.

[37] Section 13(2) of *Christopher’s Law* expressly holds that s. 39(2) of *FIPPA*, which requires notice to the individual whose *personal information* is being collected, does not apply. Again, because it relates to personal information, this section is irrelevant to our purposes and is of no aid to the Ministry’s position. Moreover, the specific and limited reference to *FIPPA* suggests that where *Christopher’s Law* was intended to prevail over aspects of the scheme established by *FIPPA*, express words were used to make that intention clear. The Ministry’s argument with respect to s. 13 of *Christopher’s Law* must therefore be rejected.

[38] We reject the Ministry’s position and conclude that the Commissioner reasonably concluded that *Christopher’s Law* does not contain a confidentiality provision that specifically indicates that it prevails over *FIPPA*. It follows that the Record is subject to *FIPPA* and its exemption scheme.

## (2) The Law Enforcement Exemption

[39] The Ministry submits that the Commissioner took too narrow a view of the law enforcement exemptions and placed undue emphasis on whether disclosure would serve to identify registered sex offenders. As the Ministry expresses it, “[w]hile identification of an individual could lead to [the harms referred to in the law enforcement exemptions], these consequences can happen in circumstances where no one has been identified. Community unease and vigilantism can arise from concern about the presence in the neighbourhood of any registered sex offender regardless of his identity”: A.F., at para. 44.

[40] The short but complete answer to this submission is that it was unsupported by the evidence and arguments placed before the Commissioner. The Commissioner focused on whether the disclosure could reveal sex offenders’ identity or location because that was the key to the submissions placed before her by the Ministry. Those submissions turned on the reasonableness of any expectation that the disclosure of the Record would lead to the identification of sex offenders or their home address. Specifically, the Ministry’s submissions referred to risks related to public identification, identification of the location of the

sex offender's residence, and location itself as an identifier.

[41] The Ministry's submissions did not focus on general social unease in the absence of identification or location of a given sex offender; nor did they focus on sex offenders' "subjective fear" of identification. Instead, fear was discussed in relation to the objective possibility of identification. Social unease was only alluded to once in Superintendent Truax's affidavit.

[42] To the extent that the Ministry is also arguing that the Commissioner erred by focussing only on whether the disclosure could reveal the sex offender's personal identity, as opposed to also revealing his or her physical location, we are of the view that no such distinction can logically be sustained: locating a sex offender's residence is intimately related to the sex offender being identifiable. In any event, the Commissioner committed no such error. The Commissioner did consider whether disclosure of the Record could lead to the location of any given sex offender, thus leading to their identification. She contrasted this request with an earlier appeal (Order PO-2518, 2006 CanLII 50861 (ON IPC)) where she denied disclosure of *full* postal codes of sex offenders, which could allow the public to "pinpoint the location of an offender's residence within five or six houses", thus making a sex offender's location reasonably identifiable: p. 8. The Commissioner found that disclosing FSAs was not comparable: p. 10.

[43] The purposes of the law enforcement exemptions — protecting public safety and effective policing — are not thwarted by the Commissioner's decision; nor did she fail to give them proper regard. She did not unreasonably narrow the law enforcement exemptions under s. 14(1)(e) and (l).

### (3) Discretion

[44] The Ministry also argues that the exemption under s. 14 of *FIPPA* confers a discretion to disclose the record. The exercise of this discretion involves a weighing of the purposes of the right of access under *FIPPA* (informed citizenry and democracy) against the purposes of the exemption (effective policing and public safety): A.F., at paras. 75-77. According to the Ministry, an important factor to consider in this weighing exercise is the requester's purpose in requesting access — a purpose which, according to the Ministry, fosters neither democracy nor effective policing and public safety: A.F., at para. 80.

[45] This submission overlooks the fact that there is no discretion unless the exemption applies and, as we shall see, the Commissioner reasonably concluded that it does not. As explained in *Criminal Lawyers' Association*, at para. 48, the discretion on the part of the Ministry is not engaged until the exemption is found to apply. The Ministry in fact had no discretion to exercise under s. 14 of *FIPPA* in this case because, as we will discuss shortly, the exemption did not apply. The Ministry's argument that the Commissioner failed to examine whether its exercise of discretion was appropriate is without merit.

(4) Conclusion on Second Issue

[46] The Ministry’s arguments with respect to the Commissioner’s approach to the interaction between *FIPPA* and *Christopher’s Law* must be rejected.

C. *Standard of Proof for the Harm-Based Law Enforcement Exemptions in FIPPA*

[47] The Ministry argues that the Commissioner did not apply the appropriate evidentiary standard with regards to the harm-based exemptions contained in *FIPPA*. Section 14 of *FIPPA* provides:

**14.—(1)** A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (a) interfere with a law enforcement matter;  
    . . .
- (e) endanger the life or physical safety of a law enforcement officer or any other person;  
    [or]  
    . . .
- (l) facilitate the commission of an unlawful act or hamper the control of crime.

[48] With respect to the exemption contained at s. 14(1)(l), which relates to hampering the control of crime, the Commissioner held that the Ministry must provide “‘detailed and convincing’ evidence to establish a ‘reasonable expectation of harm’”: p. 11. The Commissioner added that evidence amounting to speculation of possible harm would not be sufficient. Then turning to s. 14(1)(e), which pertains to the endangerment of someone’s life, the Commissioner held that the Ministry “must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure”: *ibid.* (emphasis added).

[49] Both the Divisional Court and the Court of Appeal found that there was no basis to interfere with the Commissioner’s decision.

[50] The Ministry, however, takes issue with the standard of proof identified by the Commissioner. It contends that the latter wrongly applied the standard of proof identified by this Court in *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23. In that decision, this Court was interpreting s. 20(1)(c) of the *Access to Information Act*, R.S.C. 1985, c. A-1, which provides that a government body shall refuse to disclose information if it “could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a



third party”. The extent of the risk of harm was thus expressed in identical language — “could reasonably be expected to” — as in *FIPPA*. A unanimous Court affirmed as correct the elaboration of this standard as a “reasonable expectation of probable harm”, the elaboration long applied by the federal courts: para. 206. The Ministry contends that the Commissioner should have instead applied what it says is a lower standard of proof, namely the “reasonable basis for believing” formulation that has generally been applied by the Ontario courts and others interpreting similar statutory language.

[51] The first difficulty with this submission is its premise. The Ministry’s argument assumes that there is a difference in substance between a “reasonable expectation of probable harm” and a “reasonable basis for believing” that harm will occur. This is a premise that we do not accept: see, for example, Order PO-3157, 2013 CanLII 28809 (ON IPC), at para. 48.

[52] It is important to bear in mind that these phrases are simply attempts to explain or elaborate on identical statutory language. The provincial appellate courts that have not adopted the “reasonable expectation of probable harm” formulation were concerned that it suggested that the harm needed to be probable: see, e.g., *Worker Advisor*, at paras. 24-25; *Chesal v. Nova Scotia (Attorney General)*, 2003 NSCA 124, 219 N.S.R. (2d) 139, at para. 37. As this Court affirmed in *Merck Frosst*, the word “probable” in this formulation must be understood in the context of the rest of the phrase: there need be only a “reasonable expectation” of probable harm. The “reasonable expectation of probable harm” formulation simply “captures the need to demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm”: para. 206.

[53] Understood in this way, there is no practical difference in the standard described by the two reformulations of or elaborations on the statutory test. Given that the statutory tests are expressed in identical language in provincial and federal access to information statutes, it is preferable to have only one further elaboration of that language; *Merck Frosst*, at para. 195:

I am not persuaded that we should change the way this test has been expressed by the Federal Courts for such an extended period of time. Such a change would also affect other provisions because similar language to that in s. 20(1)(c) is employed in several other exemptions under the Act, including those relating to federal-provincial affairs (s. 14), international affairs and defence (s. 15), law enforcement and investigations (s. 16), safety of individuals (s. 17), and economic interests of Canada (s. 18). In addition, as the respondent points out, the “reasonable expectation of probable harm” test has been followed with respect to a number of similarly worded provincial access to information statutes. Accordingly, the legislative interpretation of this expression is of importance both to the application of many exemptions in the federal Act and to similarly worded provisions in various provincial statutes. [Emphasis added.]

[54] This Court in *Merck Frosst* adopted the “reasonable expectation of probable harm”

formulation and it should be used wherever the “could reasonably be expected to” language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the allegations or consequences”: *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 40.

[55] We do not find any of the Ministry’s arguments for a different approach convincing. It argues, for example, that while the “reasonable expectation of probable harm” standard is an appropriate one to be balanced against third-party interests, the proposed *FIPPA* lower threshold would reflect the greater need to protect personal safety, which is the interest at stake in s. 14: A.F., at para. 88. This submission assumes, however, that there is some practical difference between the formulations, an assumption that we have rejected.

[56] The Ministry also relies on the difference in the French texts of the Ontario and federal provisions. We do not find this persuasive, however. *FIPPA*’s s. 14 in its French version expresses the English text “could reasonably be expected to” with the words “*s’il est raisonnable de s’attendre à*”. This may be contrasted with the French version of s. 20(1)(c) of the federal *Access to Information Act* which uses these words to express the same English text: “*des renseignements dont la divulgation risquerait vraisemblablement de causer des pertes*”.

[57] However, this divergence between the Ontario and the federal French texts does not support the Ministry’s position that some different standard was intended. The terms “*s’il est raisonnable de s’attendre à*” is a direct translation of the terms “could reasonably be expected to” used in the English version. It is therefore hard to see how such a close translation could express a different meaning than the English text. The 2002 Ontario amendments to the French version support this position, as they made clear that demonstration of probable harm was not required (s. 14 formerly read “*si la divulgation devait avoir pour effet probable*”). The current French version of s. 14 of *FIPPA* amply supports the “reasonable expectation of probable harm” formulation of the standard.

[58] The Ministry also argues that the “reasonable basis for believing” formulation adopted in Ontario properly mirrors the “reasoned apprehension of harm” test applied under s. 1 of the *Canadian Charter of Rights and Freedoms*. Such similarity, the argument goes, would be principled as s. 14 and s. 1 would contemplate similar kinds of harms to society. Respectfully, we do not find the analogy to the *Charter* appropriate in this context. As the Commissioner points out, the Ministry, when it interprets

exemptions under *FIPPA*, has no policy role analogous to that played by Parliament when it enacts laws. Further, as we have held, institutional heads are not entitled to deference in their interpretation of exemptions: see, e.g., *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66, at para. 17.

[59] The Commissioner specifically stated that the Ministry needed to show only “a reasonable basis for believing” to apply the exemption related to the endangerment of life. She further stated that “detailed and convincing” evidence must establish a “reasonable expectation of harm” with regards to the exemption protecting the control of crime. The Commissioner held that “speculation of possible harm” would not be sufficient: p. 11. After considering the Ministry’s arguments, the Commissioner found that “the Ministry’s representations, including the affidavit, [did] not provide a reasonable basis for believing that endangerment [would] result from disclosure”: p. 14. She added that the possibility of identification, or even presumed identification, was “too remote to meet even the lower evidentiary threshold for section 14(1)(e) established in the *Office of the Worker Advisor* case cited above”: p. 15. Of course, as noted above, there is no such “lower evidentiary threshold” and the Commissioner simply meant that she did not require proof that harm was probable. Indeed, the Commissioner then emphasized that she did not require “that the Ministry demonstrate that harm is probable; there need only be a reasonable basis for believing that harm will result, and it is not established here”: *ibid*. Taken together, these statements properly identified the applicable standard of proof.

[60] Then turning to the application of this standard, the Commissioner determined that the Ministry did not provide any specific evidence explaining how the Record could be cross-referenced with other information in order to identify sex offenders. We find this to be a reasonable determination. A review of the Ministry’s evidence shows that there is hardly any support in the record for its claims. The Ministry provided the Commissioner with several newspaper articles reporting past violent events, but all those reports pertained to situations where offenders were actually identified through information publicly available (e.g., detailed personal information in online registries available in other jurisdictions). The Ministry also provided unconvincing and generic scholarly research on “identifiability”. These papers did not address the specific facts of this case.

[61] With regards to the unpredictability of future available information on the internet, despite the Ministry’s contentions, the Commissioner specifically held that the identification of sex offenders would be facilitated “in no way” by cross-referencing the number of offenders in an FSA with any other publicly available information: p. 8 (emphasis deleted). Moreover, it must be stressed that the Ministry only referred vaguely to the unpredictability of internet developments and did not provide any specifics about how identification could occur. On the record before her, the Commissioner’s conclusions are reasonable.

[62] The Commissioner also held that she did not believe that “even multiple requests for the number of offenders in each FSA could lead to the reasonable prospect that an offender could be identified” (p. 8). She noted that she was not, in any case, dealing with multiple requests and that she was not aware of such a series of requests: *ibid.* Once again, this is a conclusion that was reasonably open to her on the record.

[63] The Ministry submitted that disclosure of the Record would ignite among sex offenders a “subjective fear” of being identified, and that such fear would in turn lower compliance rates. As previously discussed, it appears that the “subjective fear” line of argument was not advanced before the Commissioner. The Ministry did put before the Commissioner an affidavit from Superintendent Truax, which drew a connection between offenders’ beliefs about their personal information being released to the public and their ensuing desire to go “underground” out of fear and thus undermining the important objectives of the Registry. It follows that an offender’s perception about the risk of this occurring, whether reasonable or not, might well be relevant to the question of whether the harm-based law enforcement exemptions apply.

[64] However, the evidence adduced by the Ministry does not provide a basis to think that the release of the information sought in this case could have the effect of triggering this sort of subjective fear. Superintendent Truax’s affidavit refers to fear that could arise from the public release of personal information from the Registry. However, the information at issue here is not “personal information”. If the Ministry seeks to rely on an argument that non-personal information can trigger a subjective fear that can reasonably be expected to result in non-compliance with the Registry — which arguably could fall within the law enforcement exemption — it must point to evidence supporting that position. It failed to do so and, given the insufficient support for this position in the record, the result reached by the Commissioner in this respect was reasonable.

[65] We agree with the Ontario courts that the Commissioner made no reviewable error in the application of the standard of proof to the law enforcement exemptions relied on by the Ministry.

[66] In sum, the Commissioner’s decision reasonably applied the appropriate evidentiary standard. The Commissioner took into account the fact that the Registry’s efficiency is based on its confidentiality. However, she had to balance this concern with the public’s interest in having transparent and open governmental institutions. In striking a balance between those two competing interests, the Commissioner decided that the risks suggested by the Ministry were too remote and not supported by the evidence to ground a reasonable expectation of probable harm. This finding was reasonable.

[67] Indeed, the Commissioner’s 17-page decision was well articulated, transparent, and intelligible. It presented extensively the arguments submitted by the Ministry and it considered them in a

fair manner. As an expert in privacy rights, as well as in access to information requests, the Commissioner's decisions deserve deference, short of an unreasonable conclusion falling outside the range of possible and acceptable outcomes. The Ministry did not succeed in demonstrating that such an error occurred.

## V. Disposition

[68] We would dismiss the appeal, but, as requested by the Commissioner, without costs.

*Appeal dismissed without costs.*

*Solicitor for the appellant: Attorney General of Ontario, Toronto.*

*Solicitor for the respondent: Information and Privacy Commissioner/Ontario, Toronto.*

*Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Toronto.*

*Solicitors for the intervener the Information Commissioner of Canada: Gowling Lafleur Henderson, Ottawa.*

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