



March 14, 2020

Alec Fadel, Adjudicator
Tribunal Services Department
2 Bloor Street East, Suite 1400
Toronto, Ontario M4W 1A8

**GBA REPRESENTATIONS Re: Notice of Inquiry Appeal Number: PA19-00296
Response to Ministry of Natural Resources & Forestry (the “Ministry”)
Representation dated January 20, 2020**

Dear Mr. Fadel,

The Georgian Bay Association (GBA) is an umbrella organization for 19 community associations along the east and north shores of Georgian Bay, representing around 3,000 families. We have been advocating on behalf of our land-owning members for over 100 years and estimate that we reach around 18,000 residents of the Georgian Bay. Our mandate is to work with our water-based communities and other stakeholders to ensure the careful stewardship of the greater Georgian Bay environment.

We welcome the opportunity to respond to all the issues and questions set out in the Notice of Inquiry, and have used the Notice of Inquiry as a framework for abbreviating and summarizing the Ministry’s representations and elaborating our representations and/or responses, as follows:

ISSUE A: SHARING OF REPRESENTATIONS

Should any portions of our representations be kept confidential?

Ministry’s representations (abbreviated):

- That, except for highlighted (blacked-out) portions, their representations may be shared.

GBA’s representations:

- That all our representations may be shared, for the sake of open dialogue.

ISSUE B: LAW ENFORCEMENT

Does the discretionary exemption at section 14(2)(a) apply to the records?

General principle

Has the institution provided detailed evidence about the potential for harm – beyond merely possible or speculative – in reversing the denial of access to the report, i.e. would there be any serious consequences?

Ministry's representation (abbreviated):

That "it is important for investigators to be able to give advice freely and make findings or recommendations in reports without fear of reprisals or public criticism."

GBA's representations:

- We feel that the Ministry has indeed given "merely possible or speculative" reasons for not reversing the denial. They are generalizations, not detailed and compelling evidence about the "potential for harm," or "serious consequences" of reversing the denial of access to the report.
- We believe the public's right to know outweighs the Ministry's need to protect its findings and recommendations.
- In 1999, Article 19, the UK human rights organization, published a paper in its International Standards Series called "The Public's Right to Know." Its opening sentence is "Information is the oxygen of democracy." While the Notice of Inquiry generally adheres to the nine principles set out in that paper, it is worth noting the paper's articulation of some of them.
- Principle 1 of the paper is Maximum Disclosure. In part it says:
The principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances. ... The overriding goal of legislation should be to implement maximum disclosure in practice.
- This principle backs up our contention that the Ministry should exercise Maximum Disclosure and publish its report on the investigation into the Parry Sound 33 (PS 33) fire. Otherwise, its reasons for not doing so are speculative, which is not acceptable.

Section 14(2)(a): law enforcement report

Ministry's representations (abbreviated):

- That the records constitute a report because of the analysis of their findings (i.e. not simply records of information gathered).
- That the purpose of the report was to find the cause of the fire and to determine whether charges should be laid (i.e. that the investigation was one of law enforcement).
- That, in fact, the report describes the investigation processes, summarizes key evidence, sets out the analyses that led to their conclusion – and that the investigation was extensive and complex in nature.

GBA's representations:

- The Ministry says the records qualify as a report – but we have no evidence to support that contention, and do not accept that that is the case without specific evidence.
- Regarding the cause of the fire, the February 22, 2019 News Release (articulated in the Ministry's Part D below) said the fire began at the location of a disabled vehicle, which we know to be an Argo. Apart from wanting to know more about how that vehicle caused the fire and why no charges were deemed to be required, we want to know about any investigation into the subsequent days, especially the next two days after it began when the fire spread so broadly, burning down 11 properties (a property being the main cottage and all other buildings) and more than 11,000 hectares of forest with important biodiversity and habitat for the 1,100 native plant and animal species found in Eastern Georgian Bay, 50 of which are at risk.
- In addition, the News Release said there was no provincial offence committed under the Forest Fires Prevention Act. Since then, to the best of our knowledge, no charges have been laid in any other respect. We are prepared to agree that any sections of the report that relate specifically to enforcement issues should be kept confidential. However, all general information on the cause of the fire and fact findings should be released. If this is agreed, then the Ministry cannot rely upon Section 14(2)(a): law enforcement report in order to refuse the release of general information on the cause of the fire and fact findings contained in the report.
- There is a compelling public interest case for releasing this report in order to provide information that will inform future prevention of forest fires from a similar cause. The GBA and others intend to use the findings to inform our members and the public of important "lessons learned" from this fire. Publicly-funded investigations into fires should support public education efforts to avoid similar tragedies.

Section 14(4): routine inspection report

Ministry's representations (abbreviated):

- That the report was not routine in nature, but an investigation into a high-profile fire that resulted in property and other losses (i.e. that the investigation had to be done without the possibility of being affected by public criticism).

GBA's representations:

- The Forest Fire Protection Act states that all forest fires must be investigated. Therefore, investigation reports are, de facto, routine in nature. MNRF has confirmed that no charges are, or will be, laid under the Act. The opinion of the Ministry that it was a high-profile fire that resulted in losses in fact only reinforces our case that there is a compelling public interest in disclosure. It is not an argument that the report was not a routine investigation.

Section 14(5): success of a law enforcement program

Could disclosure prejudice, interfere with, or adversely affect matters in sections 14(1) or (2)?

Ministry's representations (abbreviated):

- That the report concerns itself with the cause of the fire and not the topic of success in the Ministry's law enforcement program or activities.

GBA's representations:

- It was not here, but later in its representations that the Ministry concluded that public confidence in the Ministry would not diminish from the disclosure of the report is good reason for disclosure (see Issue C: Should the exercise of discretion be upheld? – Relevant considerations (3)).
- We submit that the opposite has happened, i.e. that denying the disclosure is decreasing public confidence in the operation of the Ministry, and raising significant concerns about the integrity of the Ministry.
- We would advise that withholding the report has led to the local community drawing negative conclusions about the Ministry, such as:
 - The Ministry must be intending to recover its costs for fire suppression by seeking civil action against the construction company and is placing its cost recovery interest above the public interest; and
 - The Ministry must be hiding its failure to suppress the fire on the first day, which allowed the fire to reignite and decimate such a large area.

ISSUE C: SHOULD THE EXERCISE OF DISCRETION BE UPHeld?

General principles:

Did the institution err in exercising its discretion?

Relevant considerations (1):

- Purposes of the Act (that information should be available to the public, and that the privacy of individuals should be protected).
- The wording of the exemption and interests it seeks to protect.

Ministry's representations (abbreviated):

- That the discretion to deny access was properly exercised, and took into account the relevant considerations provided by the Notice of Inquiry.

GBA's Representations:

- No specific evidence or information has been provided by the Ministry to show that the discretion to deny access was properly exercised. Without such specific evidence or information, the statement by the Ministry that the discretion to deny access was properly exercised should be disregarded. Therefore, GBA contends that the discretion to deny access was not properly exercised.
- That any interests it seeks to protect are outweighed by the questions that the wording of the exemption raised. (See Relevant considerations (3) below and the rationales for a compelling public interest throughout this document.)

Relevant considerations (2):

- Is the requester seeking personal information?
- Does the requester have a sympathetic or compelling need to receive the information?
- Is the requester an individual or organization?
- Is there a relationship between the requester and any affected persons?

Ministry's representations (abbreviated):

- That it has not been made aware that the information sought is a requester's own personal information, nor of any relationship between the requester and any affected persons.
- That certain requests may have been made on behalf of cottager(s) who were impacted by the fire – which could make such a request a sympathetic one.

GBA's Representations:

- That, as the requester, we have not sought personal information.
- GBA represents the interests of ~18,000 residents along the east and north shores of Georgian Bay. There was considerable anxiety concerning this fire throughout the entire region, with many downwind affected by smoke clouds up to a distance of around 100 kms. There is a universal desire amongst these residents to ensure that the report is released, so lessons can be learned, and information is made available, that will inform future prevention of forest fires from a similar cause.
- At a local level, GBA represents the interests of the Key River Area Association and its members (KRAA), some of whose properties were destroyed by the fire. The fire has caused significant and undue anxiety and stress to KRAA. We submit that KRAA therefore has a compelling and sympathetic need to receive the report, in order to fully understand what occurred and help relieve their anxiety and stress.
- Some of the factors causing undue anxiety and stress for KRAA are:
 - Some of the destroyed properties had been owned by families for generations;
 - Owners grieve the loss of their favourite trees, views and cottage memorabilia;
 - Some owners attempted to protect their homes (only one was successful) and the experience was devastating.
- Beyond KRAA, most of the property destroyed by PS 33 is owned by the French River Provincial Park, a public institution. The balance was crown (public) land. Therefore, this loss is a public matter and the release of the report is in the public interest.

Relevant considerations (3):

- Will disclosure increase public confidence in the operation of the institution?
- Nature of the information and extent to which it is significant and/or sensitive to the institution, the requester or any affected person

Ministry's representations (abbreviated):

- That in considering public confidence in the operation of the institution, the Ministry considered the contents of the report – the investigative processes as well as the evidence and evaluative content – and concluded that the disclosure would not call into question public confidence in the Ministry.

GBA's Representations:

- The Ministry's conclusion that public confidence in the Ministry would not result from the disclosure of the report is a good reason for disclosure.
- As elaborated in Section 14(5): success of a law enforcement program, we submit that denying the disclosure is decreasing public confidence in the operation of the institution and causing significant concern about the Ministry's motivations.
- That, in fact, in this time of climate change when flooding and forest fires are on the rise, Parry Sound 33 could be a precursor for the Georgian Bay coastline, and the findings of the Ministry's investigation into the cause of it will contain information that is vital to preventing future wildfires on the coast.

Relevant considerations (4):

- Age of info
- Historic practice of the institution regarding similar information

Ministry's representations (abbreviated):

- That the report is recent

GBA's Representations:

- While the Ministry acknowledged that the report was recently completed, it did not provide historic practice by the institution regarding similar information. This lack of precedence lends more weight to our argument that the decision to deny access was improperly made.

Relevant considerations (5):

- Did the institution exercise its discretion?
- What factors did it consider?
- Was denying its publication in bad faith or for an improper purpose?
- Did the institution take into account all relevant factors?
- Did the institution take into account any irrelevant factors?

Ministry's Representations (abbreviated):

- That the decision to deny access to the report was not based on bad faith or improper purposes.

GBA's Representations:

- That the decision to deny access to the report did not take into account the repercussions of non-disclosure set out above, nor did it take account of the value of public release of the report in informing future decisions and actions to prevent future fires.
- The Ontario government has a policy to provide openness and transparency in government operations and public relations. Not disclosing the report is inconsistent with the aims and practices of open, transparent government.
- No evidence has been provided by the Ministry that there will be any: "chilling effect that may well be caused if disclosure of such information is made." (page 3 of Ministry's Representations) Therefore, this contention should be disregarded.

SEVERENCES

Section 10(2) – Is there any undisclosed information that can be severed without disclosing material that is exempt?

Ministry's representations (abbreviated):

- That the five documents as named in the representations that were disclosed were felt to be largely factual findings or observations rather than summative and evaluative information (see Section 14(2)(a), and that discretion was properly applied to the rest of the report

GBA's Representations:

- The five documents as named in the representations that were disclosed have no useful value with regard to the main objectives for GBA, which are to address the public interest with regard to:
 - Determining why the fire started; and
 - Informing future decisions and actions to prevent future fires.

GBA is requesting the entirety of the report, but we do not need to receive contents relating to the analysis and evaluation of evidence with respect to charges, nor any comments on whether to lay charges or not.

Part D – Applicability of the Public Interest Pursuant to section 23 of the Act

(not a separate Issue in the framework provided in the Notice of Inquiry, but an additional section in the Ministry's Representations)

Whether an exemption from disclosure of a record ... does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

Ministry's Representations (1) (abbreviated):

- That it is up to the party seeking to rely on section 23 of the Act to establish that the provision is applicable.
- That, although section 14 is not included in the list of sections of the Act that apply, public interest must be taken into account when exercising the discretion to claim an exemption under section 14.

GBA's Representations:

- We would argue that the section in the 2019-20 Annotated Ontario Freedom of Information and Protection of Privacy Act written by David Goodis (and quoted by the Ministry) is not a rationale for exemption. Rather it is applicable to our request for disclosure. This portion states that, "*for the override to apply, there must be a compelling public interest in disclosure of the record*" which, when "*weighed against the purpose of the exemption ... favours the public interest.*"
- As Article 19's paper on The Public's Right to Know says in its discussion of the principle of maximum disclosure:

[Maximum disclosure] encapsulates the basic rationale underlying the very concept of freedom of information and ideally it should be provided for in the Constitution to make it clear that access to official information is a basic right. ...

- Furthermore:

The exercise of this right should not require individuals to demonstrate a specific interest in the information.
- This provides a rationale for our belief that there is a compelling public interest in the investigation into PS 33, and by extension, in the disclosure of the record.
- Indeed, the Ministry itself says in its representations re clause 14(2)(a) that "there has been a considerable amount of interest in this investigation."
- Examples of affected parties include the following:
 - Residents inside and around the perimeter of the fire who were evacuated include, amongst others:
 - The 100+ Key River and area residents;
 - Pickerel River residents;
 - Hartley Bay Road residents; and
 - Henvey Inlet First Nation's population.
 - Campers at Grundy Lake Park's 230 campsites were evacuated.
 - Many other locations were put on alert of potential evacuation, e.g.:

- the town of Alban, where residents were quoted as saying “the eyes get irritated, so we stay inside, close the windows and doors even though it’s very hot.” (CBC News · Posted: Aug 01, 2018 6:23 AM ET | Last Updated: August 1, 2018).
- Businesses in and around the perimeter of the fire were affected, e.g.:
 - Marinas catering to evacuated areas including Key Marine, Camp Doré, Smith Marine (at the Pickerel River);
 - Grundy Lake Supply Post;
 - Seguin Hardware and Building Supplies – owner said that business was reduced by half; and
 - The French River Trading Post

Ministry’s Representations (2) (abbreviated):

- That the News Release of February 22, 2019 provided sufficient information to make the disclosure of the whole report not viewed as a compelling interest.
- That there is no compelling public interest that would outweigh the purpose of the exemption and the Ministry’s obligation to protect members of the public and Ministry staff who supplied information/allegations.

GBA’s Representations:

- As already noted, the residents along the entire east and north coasts of Georgian Bay are looking for answers, together with the above list of residents and businesses more directly affected. Collectively this demonstrates a compelling public interest to obtain more information. In addition, there is a strong public interest in educating the broader public in Ontario about the findings and lessons learned from this fire, particularly residents of, and visitors to, forested areas of the province.
- Other examples of keen interest in the effects of Parry Sound 33 include the extensive reporting by:
 - Dave Seglins of CBC;
 - CTV;
 - Global News;
 - Globe and Mail;
 - Toronto Star;
 - National Post;
 - Toronto Sun;

- the Weather Network; and
- many local outlets, such as Parry Sound News;

It is therefore clear that all the major media outlets were supplying information about PS 33 to satisfy the public's appetite for information about the fire and interest in the issues.

Ministry's Representations (3) (abbreviated):

- That, as per Inquiry Officer Holly Big Canoe's quotation of Order P-1467, compelling public interest in disclosure depends upon "*the information contained in a record ... [serving] the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.*"

GBA's Representations:

- Again, not disclosing the information has raised significant concerns.
- That, immediately after the publication of the News Release, a reason for denying public access to the report that had to do with government activities was raised, and it was to preserve confidentiality in the report in the event that the Ministry chose to pursue civil litigation.
- Indeed, the Forest Fire Prevention Act makes this choice allowable in Administration, section 3(2):

Ministry's Representations (4) (abbreviated):

- That, as Big Canoe also points out: "*just because a topic was the subject of media coverage does not necessarily mean that there is a compelling public interest in the disclosure of the records.*"

GBA's Representations:

- There are numerous rationales presented in this document that demonstrate the case for a compelling public interest for release of the report that are unrelated to the extent of the media coverage of the fire. Therefore, this axiom is not relevant.

Ministry's Representations (5) (abbreviated):

- Further, that "the status of a requester as a member of the media, of itself, has been found not to mean that the public interest is engaged."

GBA's Representations:

- GBA is not arguing that a request from the media is automatically a matter of public interest.
- However, Mr. Seglin's experience in investigative journalism makes him acquainted with public interest issues, including circumstances where it is necessary to request information under Freedom of Information legislation.
- Moreover, Mr. Seglin's reporting for CBC did not stand alone; there was also much reporting by CTV, Global News, the Globe and Mail, the Toronto Star, the National Post, the Toronto Sun, the Weather Network as well as local outlets, e.g. Parry Sound News. It is clear from this list that all the major media outlets were supplying information about PS 33 to satisfy the public's appetite for information about the fire and interest in the issues.

Ministry's Representations (6) (abbreviated):

- That s.23 does not apply to private matters – and that “property damage caused by fire has been found to be a private rather than public interest.”

GBA's Representation:

Although there was private property damage that resulted from the fire, there was also damage to more than 11,000 hectares of forest on crown and French River Provincial Park land, with important biodiversity and habitat for the 1,100 native plant and animal species found in Eastern Georgian Bay, 50 of which are at risk. Therefore, the damage was predominantly to public lands in the public interest. Therefore, the contention that “s.23 does not apply to private matters” as grounds for not releasing the report is invalid. Furthermore, throughout this document we have set out the reasons why there is a broader public interest in releasing the report on this fire, which extend well beyond questions of damages to either private or public property.

Ministry's Representations (7) (abbreviated):

- That the underlying facts [of the cause of the fire] may be available
- That, even without publishing the report, members of the public could “question, scrutinize, or criticize government...”
- That, accordingly it is the Ministry's position that there is no compelling interest in the disclosure of the Report

GBA's Representations:

- That facts about the fire “may be available” is a curious and extraneous representation. If these facts are available, the Ministry should provide details of where they can be found. We submit that the principles of openness and transparency require that the report should be released to the public.
- And, as addressed in several segments above, the public is indeed questioning the government's decision not to release the report.

CONCLUSION

Ministry's Representations (abbreviated):

- That, in summary, the Ministry acted in good faith in making its decision to claim the discretionary exemption provided for in clause 14(2)(a)

GBA's Representations:

- That, in summary, the Ministry should have given substantially more consideration to:
 - The compelling public interest in disclosing the report;
 - The public's right to know;
 - Openness and transparency in government policy and actions; and
 - The government's responsibility for Maximum Disclosure.
- That, with forest fires on the rise, there may be vital information in the report for informing future decisions and actions to prevent future fires.
- That publishing the report will quell rumours and significant concerns about why the Ministry is not disclosing the report.

Thank you for considering our representations. We believe that, when combining them with the representations from Jean Burke and David Seglins of CBC, who have also requested the release of the report, you will determine that it is in the public interest to require release of the report.

Yours sincerely,



Rupert Kindersley
Executive Director