



June 23, 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
Sur Reply to Ministry of Natural Resources & Forestry (the “Ministry”)
Reply dated May 29, 2020 (“Sur Reply”)**

Dear Mr. Fadel,

This letter represents our Sur Reply to the MNRF Reply as noted above. We have analyzed the Ministry’s Reply to our March 14th, 2020 Representations (MNRF Reply) and the extent to which they have addressed the points we made at that time, as below in ***bold red italics***.

Please note that, with regard to some of the points below, GBA supports and agrees with the Sur Replies of Jean Burke and Dave Seglins both dated June 26, 2020 which set out additional evidence of a compelling public interest to release the report and this will be referenced as ***Compelling Public Interest Arguments*** below.

Please also note that this letter contains the headings and relevant GBA representations from our March 14th, 2020 submission for reference purposes.

Finally we confirm that this Sur Reply may be shared with other parties to the review.

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

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. ***No actual evidence in this respect was provided in the MNRF Reply.***
- We believe the public’s right to know outweighs the Ministry’s need to protect its findings and recommendations. ***Compelling Public Interest Arguments.***

- 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.

With regard to these 3 bullet points above, whether or not the Adjudicator is bound under Canadian law by these general principles is beside the point. The purpose of a Freedom of Information Act should be to disclose information to the public were there is a clear public interest in so doing, not the reverse.

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

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. ***It is still the case that no evidence has been produced in this respect.***
- 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. ***Not addressed in the MNRF Reply.***
- 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. ***We continue to insist that the absence of any charges laid as a result of the Investigation negates the Ministry's reliance on 14(2)(a) to not release the report, despite the MNRF Reply.***

- 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. ***Compelling Public Interest Arguments.***

Section 14(4): routine inspection report

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. ***The MNRF Reply contending that a Class 4 Investigation does not qualify as a routine matter is rejected. The Class of the Investigation is irrelevant in this respect, as it is simply related to the severity of the incident, and is therefore routine for a severe fire such as Parry Sound 33.***

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

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

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.

In addressing the above representations, the MNRF Reply states: “none of the record in question deals with the topic of success in the Ministry’s law enforcement program or activities, and it contains no analyses in this regard, statistical or otherwise.” ***Since no actual evidence of this is provided in the MNRF Reply, we contend that the public has a right to determine based on the contents of the Investigation Report whether subs.14(5) apply, or not, to the exemption of the record in question under clause (a) of 14(2) of the Act, and the Adjudicator should therefore approve release of the Investigation Report to allow the public to make this determination.***

ISSUE C: SHOULD THE EXERCISE OF DISCRETION BE UPHELD?

Did the institution err in exercising its discretion?

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. ***The MNRF Reply does not contain any evidence in this respect.***
- 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.) ***Compelling Public Interest Arguments.***

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?

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.

In addressing the points above the MNRF Reply relies on the narrow scope of the Investigation Report as a rationale for not releasing it, since it will not address any of these points. With respect the extent to which the Investigation Report addresses these matters is a determination that the public should have the right to make, not the Ministry and therefore the alleged narrow scope of the investigation cannot be used as a rationale to prevent its release.

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.

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.

To clarify the argument in favour of releasing the report in the above representations, GBA submits that the continued resistance by the Ministry for releasing the report is undermining public confidence in the Ministry, as the public believes that the Ministry is more concerned with protecting business interests (in this case all the businesses involved with the construction of the Henvey Inlet Windfarm project in any capacity) than the interests of the public. Therefore, agreement to release the report will improve public confidence in the Ministry and that that is an argument in favour of its release.

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

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. *This matter was not addressed in the MNRF Reply.*

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?

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.

With regard to the above and the conclusions on page 5 of the MNRF Reply, the Compelling Public Interest Arguments apply.

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

GBA's Representations (1):

- 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

The MNRF Reply contains this response to the above: “In order to demonstrate, under s.23 of the Act, that the Report should be released on the basis of the public interest - despite qualifying for an exemption under clause 14(2)(a) - it has been held that disclosure of the record in question would have to contribute to public objectives such as open government, public debate, or the proper functioning of government institutions, including the Ministry. The Report, if disclosed, simply would not have this effect. If, however, the Adjudicator does not uphold the Ministry’s exercise of discretion, then he may direct the Ministry to re-exercise its discretion vis-à-vis the request for the Report.”

It is clear to GBA that disclosure of the record in question would contribute to open government. GBA would also submit that transparency is a proper function of the Ministry which it is not demonstrating by withholding release of the report. Accordingly, GBA submits that the Adjudicator should not uphold the Ministry’s exercise of discretion and permit the release of the report.

GBA’s Representations (2):

- 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.

The above further confirms that there is a compelling public interest and the Compelling Public Interest Arguments apply.

GBA's Representations (3):

- 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).

The Ministry did not address these points in the MNRF Reply.

GBA's Representations (4):

- 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.

The Ministry did not address this point in the MNRF Reply.

GBA's Representations (5):

- 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.

The Ministry did not address these points in the MNRF Reply.

GBA's Representation (6):

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.

The Ministry did not address this point in the MNRF Reply.

CONCLUSION

For the reasons set out above and in our March 14 Representation GBA does not agree with the conclusions on page 6 of the MNRF Reply and the previous summary conclusions repeated below stand:

GBA's Representations - Conclusions:

- 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 Sur Reply. We believe that, when combining them with the Sur Replies 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