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Via Email to Valerie.Silva@ipc.on.ca

May 29, 2020

Alec Fadel

Adjudicator

Information and Privacy Commissioner of Ontario

Tribunal Services Department

2 Bloor Street East, Suite 1400

Toronto, ON M4W 1A8

Re: Appeal Number(s): PA19-00258 and PA19-00259

Our File Number(s): A-2019-00029 and A-2019-00030

Dear Mr. Fadel,

I acknowledge receipt of your letter dated May 8, 2020 and the appellant's representations in the above-noted appeals. This letter constitutes the Ministry's Reply to those representations.

The Ministry continues to rely on the contents of its representations which were submitted on January 30, 2020. In this Reply, it will endeavor to only address the issues raised by the appellant in his representations dated March 9, 2020.

The Ministry's Claim Based on Clause 14(2)(a)

As set out in detail in the Ministry's earlier representations, the Ministry's decision to deny access to the Wildfire Investigation Report (the Report) for the Parry Sound 33 fire (PS 33 fire) is based on the exemption provided for in clause 14(2)(a) of the *Freedom of Information and Protection of Privacy Ac*t (FIPPA or the Act). It is established that it is

not necessary to show that harm will result from the disclosure of a record in order for the Ministry to properly rely on an exemption based on 14(2)(a).[1] Instead, what must be demonstrated is that, in the words of the clause, the record is "a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law" and meets the tests therefor, as described in the Ministry's representations dated January 30, 2020. It remains the Ministry's position that it has shown in its earlier representations that the record in question does meet these criteria. The appellant does not appear to dispute this in his representations.

Whether the Report is the Result of a Routine Inspection under subs.14(4)

Pursuant to subs.14(4) of the Act, the Ministry must also show that the Report is not one that was "prepared in the course of routine inspections by an agency where that agency is authorized to enforce and regulate compliance with a particular statute of Ontario." This is a point which is disputed by the appellant, who asserts that the investigation was routine. As set out in its earlier representations, it has been established that the nature of the inspection itself is to be considered in determining whether or not the inspection is "routine".[2] In this case, the record in question is the result of an investigation rather than an inspection. The Ministry relies on its representations dated January 30, 2020, wherein it is explained why the investigation in question was not routine, and also includes the decisions cited in this regard in support of the Ministry's position. As indicated in the Ministry's earlier representations, the Report was prepared by staff of the Ministry employed by the Enforcement Branch and the Aviation, Forest Fire and Emergency Services Branch, jointly – this is not the case for every forest fire by any means. In fact, the Report is a result of a Class 4 Investigation which is the highest level investigation, and involves more and higher ranking staff than other classes of investigation. There are fewer Class 4 investigations than investigations ranked as Class 1, 2 or 3.

The Exercise of Discretion by the Ministry in Claiming the Exemption

The Adjudicator is in possession of the Report that is being sought. If the Adjudicator finds that the Report meets the requirements contained in clause 14(2)(a) of the Act, and is not the result of a routine inspection, then the question that is left for the

[1] Order 38; Order 200; David Goodis, The 2019-2020 Annotated Ontario Freedom on Information and Protection of Privacy Acts (Toronto: Thomson Reuters Canada), p.125. The decisions cited in the Notice of Inquiry received by the Ministry for these appeals in relation to the need to show more than possible or speculative harm are PO-2040; Ontario (Attorney General) v. Fineberg (1994), 19 O.R. (3d) 197 (Div Ct); and Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commisioner), 2014 SCC 31. None of these three cases deal with an exemption claimed under 14(2)(a) of the Act.
[2] Order 136

Adjudicator is whether or not the Ministry exercised its discretion properly when claiming this exemption. One of the elements to consider in terms of this issue is whether there is a compelling public interest in the disclosure of the record in question which clearly outweighs the purpose of the exemption (as provided for in s.23 of FIPPA). If the Adjudicator finds that the Ministry's discretion in claiming a discretionary exemption was not exercised properly, the Adjudicator may direct the Ministry to reconsider the exercise of its discretion vis-à-vis the requested record.

This is the area where it appears that the appellant focused most of his representations. In essence, the appellant argues that the investigation carried out by the Ministry raises issues of importance to the public, which has an interest in and should have access to the Report. The appellant appears to be asserting that reasons for this position include enabling the public to see and evaluate how a public institution is carrying out its functions and protecting the public as well as the public interest. The appellant places less weight on the concerns articulated by the Ministry with respect to protecting the investigative process, which is the purpose of s.14 of the Act.

That said, the Ministry points to the principle that, law enforcement exemptions are to be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[3] As such, the Ministry does not agree with the appellant's dismissal of the concerns it took into account in terms of the consequences which could reasonably occur upon disclosing the Report, including on future investigations (as described in its representations of January 30, 2020).

In support of the above assertions, it is worth noting that the Ministry has received communications from some parties indicating that they would not want the portions of the Report which relate to them disclosed. If there were to be any disclosure of the Report, which the Ministry still opposes based on clause 14(2)(a), the Ministry believes that it would be necessary to contact other parties, including in connection with ss.17 and 21 of the Act (which relate to third party information and personal privacy, respectively) and possibly other sections as well.

In any event, it is necessary as part of the decision-making to balance the relevant factors for the exercise of discretion by the Ministry, such as, the purposes of FIPPA and of the exemption in question; the nature and importance of the information in question to various persons or parties; and the reasons for and against claiming the exemption or disclosing the record. In this regard, the Ministry continues to rely on its representations of January 30, 2020 wherein it describes in detail the factors it

[3] Ontario (Attorney General) v. Fineberg (1994), 19 O.R. (3d) 197 (Div Ct)

considered when exercising its discretion, which it carried out properly when it decided to claim this exemption.[4]

While the investigation conducted into PS 33 was in-depth and extensive, the purpose and scope of the Wildfire Investigation Report – which, as indicated above, the Adjudicator has a copy of – are quite narrow. It was created as a result of a law enforcement investigation carried out under the *Forest Fires Prevention Act*, and addresses only the potential direct causes of this one specific fire, the PS 33 fire. As indicated in the News Release issued by the Ministry on February 22, 2019, which is set out in the Ministry's previous representations, it was found that the fire originated at the location of a disabled vehicle. Despite what the appellant may expect of the Report, it does not provide information in response to the majority of the questions listed on page 2 of the appellant's representations. It is not designed to, nor would it, shed light on forest fire risks generally (i.e., beyond this particular fire), or with respect to issues such as extreme weather conditions or climate change.

As indicated above, much of the appellant's representations emphasize the importance of access to the Report by the public. One specific point that the appellant raises in favour of the public interest in disclosure of the Report is that a large area of public land was burned by PS 33, as well as private property. While true, it is the Ministry's view that this does not engage a compelling public interest – clearly outweighing the purpose of the exemption in question - in the way that previous decisions require under s.23 of FIPPA. It has been held that disclosure of the record in question would have to contribute to 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, even taking into account the fact that a considerable amount of public land was damaged in the PS 33 fire.

Similarly, the Ministry respectfully submits that raising the issue that members of the public will have questions or concerns in connection with a record for which the Ministry exercises its discretion to claim an exemption as an investigative report under clause 14(2)(a) also should not be determinative. In other words, disappointment by members of the public that the Ministry has claimed this exemption should not, by itself, result in the exercise of the Ministry's discretion – which is provided for in the Act - not being upheld.

The Ministry submits that it carefully considered the factors which are to be taken into account in exercising its discretion to claim an exemption under clause (a) of subs.14(2) of the Act, as set out in its earlier representations. Such factors included the significant

[4] As an aside, the Ministry continues to rely on Order PO-3496 with respect to the exercise of its discretion, including in relation to the public interest under s.23, and also continues to rely Order P-1587.

public interest in disclosure, but also (among other things, as set out in its earlier representations) the purposes of s.14 of the Act, such as the importance that investigative staff are able to (i) obtain the input and cooperation of members of the public, and (ii) set out their analyses, evaluative content, comments and findings without fear of reprisal or criticism. In terms of maintaining public confidence, the Ministry considered this factor from the perspective of both claiming the exemption, on the one hand, or releasing the Report on the other hand. In the end, it decided that it should claim the exemption under 14(2)(a) of the Act. In this regard, it also did not find that a rousing public interest in favour of disclosing the Report existed, as set out in the cases cited in its earlier representations with respect to s.23 of the Act.

Miscellaneous

It is not entirely clear whether or not the appellant takes issue to the Ministry's decision around severance from, and disclosure of, certain parts of the Report. To the extent that this may be the case, the Ministry relies on Part C of its previous representations.

As well, contrary to the appellant's representations, it is the Ministry's position that it has no obligation to disclose the Report pursuant to s.11 of FIPPA. There is no "reasonable and probable grounds to believe that" the Report "reveals a grave environmental, health or safety hazard to the public" as required by that provision. Moreover, the power in s.11 lies with the head of an institution only; the Information and Privacy Commissioner does not have the power to make an order requiring disclosure of a record under s.11 of the Act.[5]

Conclusion

It is the Ministry's position that it has shown in its representations and in this Reply that the Report qualifies as an investigative report under clause 14(2)(a) of FIPPA, and that it clearly was not prepared during the course of a routine inspection. The Report sets out the analyses that led investigative staff to their conclusions, identifies the evidence and factors viewed by staff as determinative, and sets out their deliberative processes – it is evaluative and summative in nature and does not merely list the observations of these staff and the statements made to them. This is the area that clause 14(2)(a) is intended to protect. Much of the factual information that the appellant appears to be seeking would be available to him (subject to other exemptions contained in the Act) and any other members of the public, if they were to make a FIPPA request seeking the information or records that contributed to the making of the Report.[6] In this way, it is also open to the appellant to obtain information, apart from a copy of the Wildfire

[5] Order 187; Order MO-2205
[6] In fact, such a request has been made; there was no appeal in response to the records released by the Ministry.

Investigation Report, on which he could base an examination of the scope and competence of the Ministry's actions and conclusions with respect to the PS 33 fire.

Further, the Ministry submits that it has demonstrated that it considered relevant factors, and only relevant factors, in exercising its discretion to claim the exemption provided for under clause 14(2)(a), and that it exercised this discretion properly, including having appropriate regard to the public interest in disclosure of the Report.

Thank you for the opportunity to make this Reply. If you require any further information from the Ministry, please do not hesitate to contact me.

Sincerely,

Karen Inselsbacher

Counsel

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