



Information and Privacy
Commissioner of Ontario
Commissaire à l'information et à la
protection de la vie privée de l'Ontario

February 4, 2020

VIA COURIER

Mr. Rupert Kindersley
Executive Director
Georgian Bay Association
15 Falcon Street
Toronto, ON M4S 2P4

Dear Mr. Kindersley:

**RE: Notice of Inquiry
Ministry of Natural Resources and Forestry
Appeal PA19-00296**

This appeal is now in the inquiry stage. The *Freedom of Information and Protection of Privacy Act* (the *Act*) provides that parties involved in an inquiry are entitled to make representations to this office. It is the practice of this agency to invite the parties to submit their representations in writing.

I have received representations from the ministry. I am enclosing a Notice of Inquiry which summarizes the facts and issues in the appeal.

Please find attached the non-confidential representations of the ministry. Please note that portions of the representations if the ministry have been withheld due to confidentiality concerns. If you believe that there are additional factors which are relevant to this appeal, please refer to them. The deadline for receipt of representations is **February 26, 2020**. Please send them to my attention.

The representations you provide to this office should include all of the arguments, documents and other evidence you rely on to support your position in this appeal. Your representations may be shared with other parties to the appeal unless they meet the confidentiality criteria identified in *Practice Direction Number 7*, which are reproduced on page three of the enclosed "Inquiry Procedure at the Adjudication Stage". Please ensure that your representations state your position concerning the sharing of your representations.

As also noted in "Inquiry Procedure at the Adjudication Stage", and in *Practice Direction 2*, a party's initial representations should be concise and, except in unusual circumstances, should be no longer than 20 pages. Attachments may be provided, but their relevance must be explained in the representations.



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Once representations are received, they will be considered by me in making my decision in this appeal, and an order will be issued to resolve the outstanding issues. I will not be contacting you again during this process unless I need to clarify something in your representations.

Should your representations not be received by the date specified in this letter, the decision making process will proceed, and an order may be issued in the absence of these representations.

If you have any questions about any aspect of your appeal, please contact **Valerie Silva**, Adjudication Review Officer at **(416) 325-9172** or our toll free number 1-800-387-0073.

Yours truly,

A handwritten signature in blue ink that reads "Alec Fadel".

Alec Fadel
Adjudicator

Encl.

cc: Ministry of Natural Resources and Forestry (letter only)

Ministry of Natural Resources
and Forestry
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Sent by Courier and E-mail

January 30, 2020

Alec Fadel
Adjudicator
Information and Privacy Commissioner of Ontario
Tribunal Services Department
2 Bloor Street East, Suite 1400
Toronto, ON M4W 1A8

Re: **Notice of Inquiry**
Appeal Number: PA19-00296
Our File Number: A-2019-00047

Dear Mr. Fadel,

Representations of the Ministry of Natural Resources and Forestry

This letter constitutes the representations of the Ministry of Natural Resources and Forestry ("MNRF" or "the Ministry") relating to Appeal No. PA19-00296, of the decision not to grant access to the following record, based on clause 14(2)(a) of the Freedom of Information and Protection of Privacy Act ("the Act"):

- The Wildfire Investigation Report dated February 6, 2019 and its attachments (111 pages in total), except for the attachments which have been covered and disclosed as set out in Part C, below

The Ministry consents to the disclosure of these representations to the other party(ies) to the appeal except for the highlighted portions which would reveal information contained in the Wildfire Investigation Report for which an exemption is claimed under s. 14. The highlighted portions of these representations are supplied to the Information and Privacy Commissioner in confidence and the Ministry does not consent to their disclosure.

Part A - Law Enforcement Exemption

Clause 14(2) (a) of the Act provides that,

(2) A head may refuse to disclose a record,

- (a) that 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;

in order to qualify as an exemption under clause 14(2)(a), the record in question must be shown

under clause 14(2)(a) (set out above) have been met.

Certain cases considering the application of 14(2)(a) have focused on the first part of the test, namely, whether the record comprises a report. In order to be found to be a report, the record is to be evaluative in nature, and contain analysis and conclusions rather than just observations or recordings of facts. The Wildfire Investigation Report at issue in this case is such a report, in that it sets out a formal account of the investigators' findings in a manner that includes collating and considering the various informations and factors that were learned, and evaluating them in order to reach a conclusion.

The Wildfire Investigation Report prepared by staff is the final, formal report by Ministry staff into their investigation of the cause(s) of PS 33. It describes the processes employed in the investigation, summarizes key evidence, and sets out the analyses and expectations which led staff to their conclusion. In other words, the Report identifies the evidence and factors viewed by staff as determinative, and sets out their deliberative processes, including the elimination of various potential causes of the fire. The record does not merely list the observations of Ministry staff and the statements made to them.

In addition to being a report as required under clause 14(2)(a), the Ministry submits, more generally, that it is entitled to protect its ability to effectively carry out such investigations by claiming this exemption. Investigative staff should be able to consider and evaluate the circumstances in the Report which they authored, and to be able to rely on the frank input and cooperation of members of the public without concerns of a chilling effect to that may well be caused if disclosure of such information is made. There are a number of instances in the record in question where members of the public may have been less forthcoming if it was clear that the information provided by them would be disclosed. Examples of this include:

[REDACTED]

Moreover, given the high profile of this particular fire and the resulting property and other losses experienced by members of the public, there has been a considerable amount of interest in this investigation. It is therefore particularly important that Ministry staff have the necessary room to set out their deliberations and evaluative accounts in a report without the possibility of being affected by public criticism.¹¹

To conclude on this topic, the Ministry submits — based on the above — that the Wildfire Investigation Report meets the three criteria for the exemption contained in clause 14(2)(a) set

⁸ Criminal Lawyers' Association v. Ministry of Community Safety and Correctional Services, 2016 ONSC 6948; Order P-548; Order MO-2025; Order PO-2177; Order PO-3034; Order P-480; Order PO-3126; Order PO-1988

⁹ Order MO-2446; Order PO 3068-1; MO-1192; Criminal Lawyers' Association v. Ministry of Community Safety and Correctional Services, 2016 ONSC 6948; Order MO-2025; Order PO-3084; Order P-480; Order PO-3126; Order PO-1988

¹⁰ Criminal Lawyers' Association v. Ministry of Community Safety and Correctional Services, 2016 ONSC 6948; Ontario v. Criminal Lawyers' Association [2010] 1 SCR 815; Order MO-1192

¹¹ Order PO-3469

The following factors were taken into account during the consideration of whether or not to claim an exemption for the records under clause 14(2)(a) of the Act:

- the purposes of the Act, including the principles that: information should be available to the public; individuals should have a right of access to their own personal information; exemptions from the right of access should be limited and specific; and the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether disclosure will increase public confidence in the operation of the institution
- whether the requester has a sympathetic or compelling need to receive the information
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

In addition, the Ministry submits 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.

In this case, it is the Ministry's firm view that the application of clause 14(2)(a) to the Wildfire Investigation Report is in keeping with the purpose of the exemption and what it seeks to protect (for the reasons described in detail, in Part A above).

It seems that, after a decision has been made not to lay charges (as occurred in this case), final reports relating to forest fires have been released by the Ministry at times in the past. Hence, the principle that information should be available to the public (and similarly, that exemptions to access should be limited and specific) was given serious consideration.

[REDACTED]

To this end, the Ministry relies on Order P-5400 and Order P-1507. In the former case, it was recognized that disclosure of an investigation report into a fatal motor vehicle accident would not increase public confidence but would merely subject prosecution decisions to public scrutiny and compromise the ability of the Ministry of Labour to be an impartial and effective regulator. In the latter case, it was found that the public interest in protecting the integrity of the investigation process of the Gaming Control Commission outweighed the media's interest to expose the regulation of the casino industry.

Similarly, the Ministry considered whether or not the contents of the Report would likely influence public confidence in the operation of the institution. The Report describes in detail the processes undertaken as part of the investigation, as well as the evidence and evaluative content which were the bases for the conclusions reached, and as such the Ministry concluded that disclosure of the records would not reveal anything that would call into question public confidence in the Ministry. Moreover, the Report, dated February 6, 2019, is recent.

As well, the Ministry understands that certain request(s) may have been made by or on behalf of cottager(s) who were impacted by the fire. This may make such a request a sympathetic one, but considering the factors for the exercise of discretion as a whole, the Ministry was not persuaded that it should release the Report rather than exercise its discretion to rely on the exemption provided for in clause (a) of subs. 14(2) for the reasons set out in Part A and in this Part.

outweighs the purpose of the exemption.

Although the exemption contained in s.14 is not included in this provision, it has been established that the public interest is a factor that an institution must take into account when exercising the discretion to claim an exemption under s.14.²⁰ It is important to note that a "compelling public interest" has been described as one that is a rousing, strong interest.²¹

David Goodis, in The 2019-20 Annotated Ontario Freedom of Information and Protection of Privacy Act²² writes, in respect to s.23 that,

For the override to apply, there must be a compelling public interest in disclosure of the record. That interest must be weighed against the purpose of the exemption. If the balance favours the public interest, the record should be disclosed.

In terms of the record in question for which disclosure has been sought, consideration was given to whether or not the public interest overrode the purposes of the exemption in clause 14(2)(a) of the Act – in other words, whether s.23 of the Act therefore formed a basis for disclosing the Report (this was in addition to the exercise of discretion described in Part B, above). It was decided that it did not do so, and that disclosure of the Report would not contribute to objectives such as open government, public debate, or the proper functioning of government institutions, including the Ministry, for the reasons set out below.

In this case, after the Wildfire Investigation Report was completed, the Ministry issued a News Release on February 22, 2019 which set out the following:

The Ministry of Natural Resources and Forestry has completed its extensive investigation into the Parry Sound 33 wildland fire.

The ministry's team of investigators found that the fire originated at the location of a disabled vehicle in a remote area of Hervey Inlet. Assistance was sought from a forensic fire expert.

While the investigation was able to determine the origin of the fire, no provincial offence under the Forest Fires Prevention Act was found to have been committed.

The public has therefore been made aware by the Ministry of the location where the fire originated, and that no charges under the FFPA would be laid. Considering the contents of the Report in question, its disclosure cannot be viewed as meeting a compelling public interest.

on the other hand, the Report contains information/allegations supplied by members of the public who cooperated in the investigation and also the evaluative analysis of Ministry staff, both of which ought to be protected pursuant to the exemption provided for in s.14. As such, the Ministry submits that there is no compelling public interest which would outweigh the purpose of the exemption claimed and therefore indicate that disclosure of the record should occur.

In this case it is questionable whether the public interest would potentially be served by the disclosure, much less that such public interest constitutes a strong or rousing reason for disclosing the record. In Order P-1467, Inquiry Officer Holly Big Canoe quotes Order P-984 as follows,

²⁰ Ontario v. Criminal Lawyers' Association [2010] 1 SCR 815.

²¹ Order P-1398.

²² (Toronto: Thomson Reuters Canada Limited), 2019, p. 264.

In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve 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.

Big Canoe goes on to point out that 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 in question. Similarly, 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.²³ Moreover, it has been found that s.23 does not apply to address what is essentially a private rather than a public interest;²⁴ property damage caused by fire has been found to be a private rather than public interest.²⁵

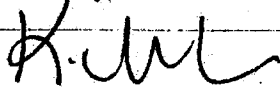
In this case, disclosure of the record in question will not shed any light on the operations of government.²⁶ In addition, the facts contained in the Wildfire Investigation Report are likely accessible separate and apart from the record in question, which comprise a report prepared in the course of a law enforcement investigation by an agency that has the function of enforcing and regulating compliance with a law and should thus be protected as contemplated in clause 14(2)(a) of the Act (for example, a request could be made for the documents underlying, or collected or made in support of the Report). In other words, even without disclosure of the Report in question, the underlying facts may be available and it is possible for members of the public to question, scrutinize, or criticize government for the actions that it has taken or not taken with respect to PS 33 – and accordingly it is the Ministry's position that there is no compelling public interest in the disclosure of the Report.

Conclusion

The Ministry submits that, acting in good faith and taking into account the relevant factors, including whether or not there is a compelling public interest in the disclosure of the document, it decided to claim the discretionary exemption provided for in clause 14(2)(a) of the Act to deny access to the Wildfire Investigation Report. This Report contains the analyses and conclusions of the Enforcement Branch and the Aviation, Forest Fire and Emergency Services Branch, which jointly prepared it during the course of law enforcement - in this case, an investigation into the cause(s) of a fire that could have led to proceedings in a court in which a penalty or sanction could be imposed pursuant to the FFPA.

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

Sincerely,



Karen Inselsbacher
Counsel
Legal Services Branch

²³ Order M-773; Order PO-3496

²⁴ Ontario v. Criminal Lawyers' Association [2010] 1 SCR 815

²⁵ Order M-389

²⁶ Order P-984