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December 9, 2021

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

**Re: Re-exercise of discretion by Ministry of Northern Development, Mines, Natural Resources and Forestry as required by Orders PO-4205-I, PO-4206-I, and PO-4207-I**

Dear Ms. Hamilton,

This letter constitutes the representations of the Ministry of Northern Development, Mines, Natural Resources and Forestry ("the ministry") in response to the above-noted Orders.

Given the similarity of Orders PO-4205-I, PO-4206-I, and PO-4207-I, the ministry is submitting one set of representations in response to all three Orders. The ministry consents to the disclosure of these representations to the appellants except for the highlighted portions which would reveal information contained in the Wildfire Investigation Report for which an exemption was claimed and upheld 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.

In Orders PO-4205-I, PO-4206-I, and PO-4207-I, the Adjudicator found that the body of the Wildfire Investigation Report (the Report) qualifies for the exemption contained in s.14(2)(a) of the Freedom of Information and Protection of Privacy Act (the Act). However, in these Orders the Adjudicator also found that the ministry did not consider all the relevant factors when it exercised its discretion to claim the exemption under s.14(2)(a). In particular, it was found that the ministry did not take into account the following factors:

- Is there a continuing public interest in the disclosure of the Report?
- Would disclosure of the Report promote public confidence in the ministry?

- Would non-disclosure of the Report undermine public confidence in the ministry?

The ministry has therefore re-exercised its discretion, taking into account the three factors above.

The ministry considered whether or not there is a continuing public interest in the disclosure of the Report. It is clear that there was a significant amount of public interest at the time of the fire and during the investigation, and also that the three appellants continue to seek its disclosure. However, from about the time that the ministry issued a press release in February of 2019 with respect to its investigation (described in the ministry's earlier representations), the ministry has not been aware of any ongoing interest from the public in the disclosure of the Report. As such, this factor does not give considerable weight either for disclosure or non-disclosure of the Report.

The ministry has also considered the two related questions set out above – that is, whether public confidence in the ministry would either be increased or undermined by either the disclosure or withholding of the Report. In its previous representations, the ministry made clear its view that disclosing the Report would not undermine public confidence in the ministry, but answering these other two questions is more speculative. The ministry submits that, on the one hand, the Report shows that an effective investigation was undertaken by it, including the retention of an expert, which would presumably promote public confidence in the ministry. On the other hand,

and for this reason, its disclosure might not prove to promote public confidence in the ministry. In terms of any potential negative impact on public confidence in the ministry from non-disclosure, the ministry submits that it conducts hundreds of fire investigations each year and that the ministry is viewed as experienced and skilled at conducting them, and the ministry is not generally questioned in this regard, and so the non-disclosure of this Report is not likely to call into question or undermine the public confidence in the ministry on that basis.

It may be that, in this regard, this case is similar to Order PO-3496 where it was argued that the 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 that case, an exemption under s.13 of the Act was at issue and was upheld.

Order PO-3904 – F also dealt with an investigation report, in relation to which an exemption was sought under s.14(2)(a). In that case the Ministry of the Attorney General submitted the following, which is set out in the Order:

The ministry submits that it is unclear whether the release of this particular report to this particular appellant would increase public confidence in the institution. That is, while the appellant herself might or might not gain greater confidence in the

work of the SIU were she granted access to the report, it is not certain what the impact of her opinion would be with respect to the general public's confidence in the institution.

In any event, as part of its re-exercise of discretion, the ministry has weighed the considerations (which the Adjudicator ordered it to consider in relation to the public interest/confidence) mainly against the purpose of the exemption contained in s.14(2)(a) and the interests that it seeks to protect. In this regard, the ministry submits that the purpose of s.14 of the Act is to maintain the integrity of investigations, public confidence in investigations, and to further or protect public assistance in investigative processes. It is the ministry's view that investigators should be free to give advice and make findings or recommendations in reports without fear of public reprisal, and similarly, such investigations may depend on assistance from persons who do not wish to be identified.

In addition, the ministry again considered, as one factor, 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. In this regard, the Ministry points out that, as in Order PO-3496 and PO-3904 – F, extensive and significant disclosure has already been made in this case, including the records that formed the basis for the Report (subject to any exemptions). The record that remains undisclosed is the body of the Wildfire Investigation Report, which is a record that squarely falls into the exemption provided for under s.14 of the Act and the purposes that this section is designed to protect. In other words, the ministry submits that a significant amount of information has been made available by the ministry and the exemption that has been claimed is applied in a way that is limited and specific (the personal information of the appellants is not at issue in this case).

In Order M-381, whether or not there was a compelling public interest under s.16 of the Municipal Freedom of Information and Protection of Privacy Act was being considered in relation to an Investigation Report and other records. In that case, it was held that, "a significant factor to be considered in determining the relevance of section 16 is the degree of public disclosure which has already taken place concerning this matter" and on that basis, no compelling interest was found which outweighed the purpose of the exemption. Because of this finding in relation to s.14 of MFIPPA (invasion of privacy), it was found not to be necessary to consider the law enforcement exemption that was claimed.

The ministry has also considered the sympathetic circumstances of the appellant in Order PO-4205-I and those persons represented by the association in Order PO-4207-I. While the ministry has considered the serious difficulties faced by such persons, the fact remains that the Report itself is focused on who started a particular fire and if anyone committed an offence under the FIPA, rather than on the broader concerns raised by these appellants such as the affected landscape, climate change issues, or even fire suppression processes or efficacy.

As a result of the appellants' representations as set out in the three Orders, the ministry also re-considered some of the factors which it previously took into account when initially exercising its discretion as to whether or not to claim s.14(2)(a) for the Report (these factors were described in the ministry's earlier representations):

- In response to PO-4207-I, the ministry states that it did take into account its historical practice of releasing similar information, or not, and submits that it does, at times, release Wildfire Investigation Reports. Its decision in this case remains based on the investigative and evaluative content in this Report, the number of parties interviewed and referred to and the sensitivity that stems from that, and the  
The ministry also considered that public assistance would potentially be discouraged if the Report were to be disclosed.
- The other alleged factors which this appellant indicates motivated the exercise of the ministry's discretion are false.
- With respect to the appellant in Order PO-4206-I, the ministry again submits that the Report does not describe or shed light on the ministry's wildfire fighting regime since the ministry's approach to fighting or suppressing the fire is not dealt with in the Report, except to a small extent where the topic comes up in a way that is incidental to the carrying out of the investigation into the cause of the fire.

The appellant in PO-4206- I is seeking draft versions of the Report, which are substantially similar to the final Report. Like the final version of the Report, they also meet the three-part test to qualify as a report under to s.14(2)(a) of the Act, in that they contain a formal summary and analysis of detailed information, were prepared as part of an investigation into a possible violation of the Forest Fires Prevention Act and that, in this regard, the ministry is a law enforcement institution which has the function of enforcing and regulating compliance with a law (the Forest Fires Prevention Act). Some of the drafts are very similar to the final version of the Report, with the exception that certain parts of the final version have been fleshed out somewhat. Some of the drafts contain more information in the initial section of the Wildfire Investigation Report, but the information that was removed from that section in the final version of the Report is largely found in the Investigation Summary by one of the ministry's Conservation Officers (which forms part of the Report). In these drafts, later portions of the Report are also fleshed out in the final version. In any case, the re-exercise of the discretion by the ministry, and these representations, apply equally to the draft versions of the Report as to the final version of it.

The ministry's previous decision that s.14(2)(a) was applicable to the Report was upheld in the Orders (but for the attachments), so what remains is for it to re-exercise its discretion as ordered. As part of this re-exercise, the ministry has put its mind to the various relevant factors – particularly the three ordered by the Adjudicator – and carefully considered the requests by the appellants and the particular record in question. In weighing the relevant factors, and for the reasons described above, the ministry finds in favour of exercising this discretionary exemption. In other words, the ministry finds – taking into account the nature, purpose and content of the Report – in favour of applying

the exemption, being of the view that the purpose of the exemption in the context of this Report has more weight than the benefits of disclosing the Report, even considering the three public interest/confidence factors as required in the recent Orders, the purposes of the Act, and the sympathetic circumstances of some of the appellants. The ministry asks that its re-exercise of discretion with respect to the body of the Report (both the final and draft versions) be upheld.

If you require any further information from the ministry, please do not hesitate to contact me.

Sincerely,

Karen Inselsbacher  
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Natural Resources & Forestry  
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