



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

INTERIM ORDER PO-2016-I

Appeal PA-010080-2

Ministry of Health and Long-Term Care



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NATURE OF THE APPEAL:

This is an appeal from a decision of the Ministry of Health and Long Term Care (the Ministry), under the *Freedom of Information and Protection of Privacy Act* (the Act). An organization (the appellant) submitted a request to the Ministry for access to records relating to four named corporations and to two federal government agencies, in the following terms:

“...all documents that the Ministry has with regards to the following companies:

[named company “A”]

[named company “B”]

The Canadian Development Corporation

Ontario Development Corporation

Health Canada’s Health Protection Branch and /or Bureau of Biologics

Specifically, I am requesting:

Any documents, including but not exclusive of, submitted funding requests and proposals, business plans, special requests, and minutes of meetings that mention joint activities/projects/meetings of [named company “A”] and [named company “B”];

Any documents, including but not exclusive of, submitted funding requests and proposals, business plans, special requests, and minutes of meetings that mention joint activities/projects/meetings of [named company “A”] and The Canadian Development Corporation;

Any documents, including but not exclusive of, submitted funding requests and proposals, business plans, special requests, and minutes of meetings that mention joint activities/projects/meetings of [named company “A”] and the Ontario Development Corporation;

Any documents, including but not exclusive of, submitted funding requests and proposals, business plans, special requests, and minutes of meetings that mention joint activities/projects/meetings of [named company “A”] and Health Canada’s Health Protection Branch and /or Bureau of Biologics;

Any documents, including but not exclusive of, submitted funding requests and proposals, business plans, special requests, and minutes of meetings that mention joint activities/projects/meetings of [named company “B”] and The Canadian Development Corporation;

Any documents, including but not exclusive of, submitted funding requests and proposals, business plans, special requests, and minutes of meetings that mention joint activities/projects/meetings of [named company “B”] and the Ontario Development Corporation;

Any documents, including but not exclusive of, submitted funding requests and proposals, business plans, special requests, and minutes of meetings that mention joint activities/projects/meetings of [named company "B"] and Health Canada's Health Protection Branch and /or Bureau of Biologics;

The period for which I am seeking all these documents is January 1, 1980 to December 31, 1986 inclusive."

The Ministry responded by indicating that it had conducted a search in its Public Health Branch and had located several hundred records, including correspondence, reports and briefing notes. The Ministry advised that it was denying access to all of the responsive records on the basis of the exemptions at sections 13(1) (advice to government), 14(1) (law enforcement), 15 (intergovernmental relations), 17 (third party commercial information), 19 (solicitor-client privilege) and 21 (personal privacy) of the *Act*. The Ministry also stated the following:

"...section 14, the law enforcement exemption applies to all the records. Section 14 is relevant as a result of the long-standing criminal investigation by the RCMP into the possible wrongdoing in the Canadian blood system during the period 1980-1990".

By letter dated February 27, 2001, the appellant appealed the Ministry's decision to this office.

After the filing of this appeal, and during mediation of the appeal through this office, a number of events occurred. On August 27, 2001, the Ministry issued a supplementary decision letter. In this letter, the Ministry advised that the records deal exclusively with named company "A" and that records relating to the other organizations referenced in the request were not located, nor any records dealing with this company's relationship with these other entities. The Ministry indicated that the search period was from 1970 to 1990. The Ministry also stated that

the Records Management Branch of the Ministry no longer retained any records after their transfer to the Archives of Ontario. Accordingly, the Appellant may wish to address its request to the Archives or to the Ministry of the Attorney General from which this Ministry had obtained the records found to be responsive to the request.

Finally, the scope of the search was exclusively among the documents in the possession of the Legal Services Branch of this Ministry.

On August 29, 2001, the Ministry sent an index of records to the appellant and to the mediator. The index lists 1,257 records, citing exemptions for most of the records. Some of the records have been marked as being non-responsive to the request.

In the Ministry's index of records, three additional exemptions were claimed that were not raised in the original decision letter, sections 12, 18 and 22(a).

In the Report of Mediator, all of the exemptions relied on by the Ministry are noted as issues in dispute. Further, the Report indicates that the reasonableness of the search for responsive records is also an issue, as is the ability of the Ministry to raise new discretionary exemptions late in the process, and the responsiveness of certain records.

I decided to bifurcate my inquiry and deal initially with two issues: the applicability of section 14(1) of the *Act*, and the reasonableness of the Ministry's search for responsive records. I decided on this process since it was possible that my determinations of these issues would resolve most or all of the issues in this appeal.

Because a criminal investigation by the Royal Canadian Mounted Police (the RCMP) was cited by the Ministry as the basis for applying the section 14(1) exemption under the *Act*, I also decided to notify the RCMP and provide it with the opportunity of making representations on the issues raised by section 14(1) at this stage of my inquiry.

In the Notice of Inquiry which was sent to the Ministry and to the RCMP, I summarized the facts and issues raised by the appeal and invited them to make representations on these. Among other things, I specifically requested that if the parties were relying on documentary evidence, such as court orders, that I be provided with a copy of such evidence. I also requested that if a party was unable to provide this evidence, it explain to me why it was unable to do so. Further, with respect to the issue of the reasonableness of its search, I asked the Ministry to provide its evidence in affidavit form.

In response to the Notice of Inquiry, the RCMP provided brief representations in which it indicated that it does not object to the release of the records which are the subject of this inquiry.

The Ministry also provided representations to me. Subsequently, I wrote to the Ministry, giving it a further opportunity to provide representations on certain matters and stating, among other things:

By this letter, I am requesting once again that the Ministry provide this information about the search for records in **affidavit** form, by no later than **March 15, 2002**. **Please note that if the Ministry does not do not do so, it may not have a further opportunity to make submissions or provide evidence on this issue, and I may decide that it has not provided sufficient evidence to meet its onus.**

Further, I note that the Ministry states in its representations, under the title "ISSUE "B" REASONABLENESS OF SEARCH":

...the respondent wishes to supplement its letter of August 27, 2001 from the undersigned to [named individual], Mediator, but reserves its rights to make further representations on this issue.

Please be advised that the present stage of this appeal is the Ministry's opportunity to make **all** of its representations on the issue of the reasonableness of

the search. I have given the Ministry a further opportunity to provide information in the form of an affidavit. If there are additional representations the Ministry wishes to make on the issue of the reasonableness of the search, which have not already been provided, these must also be provided to me by no later than March 15, 2002.

Finally, the Ministry has requested that its representations not be shared with the appellant, "as doing so may cause the ministry to be in violation of the court order". I ask that the Ministry provide me with its submissions on why its representations on the issue of the reasonableness of the search (and its affidavit, if one is submitted in response to this letter) should not be shared with the appellant. These submissions should refer to the criteria found in Practice Direction Number 7 for the withholding of representations, and should refer to each part of the representations and affidavit that the Ministry does not wish to be shared.

[all emphases in original]

The Ministry has replied to the above, and has provided me with an affidavit describing the search for records responsive to the request.

DISCUSSION:

Since the Ministry has asked me not to provide the appellant with a copy of its representations or affidavit regarding the reasonableness of its search, the purpose of this interim order is to rule on this request.

SHARING OF REPRESENTATIONS

Sharing of representations procedure

IPC Practice Direction 7 provides a detailed description of the relevant procedures with regards to the sharing of representations, including affidavits. That Practice Direction states:

General

The Adjudicator may provide representations received from a party to the other party or parties, unless the Adjudicator decides that some or all of the representations should be withheld.

Request to withhold representations

A party providing representations shall indicate clearly and in detail, in its representations, which information in its representations, if any, the party wishes the Adjudicator to withhold from the other party or parties.

A party seeking to have the Adjudicator withhold information in its representations from the other party or parties shall explain clearly and in detail the reasons for its request, with specific reference to the following criteria.

Criteria for withholding representations

The Adjudicator may withhold information contained in a party's representations where:

- (a) disclosure of the information would reveal the substance of record claimed to be exempt or excluded;
- (b) the information would be exempt if contained in a record subject to the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act*; or
- (c) the information should not be disclosed to the other party for another reason.

For the purposes of paragraph (c) above, the Adjudicator will apply the following test:

- (i) the party communicated the information to the IPC in confidence that it would not be disclosed to the other party; and
- (ii) confidentiality must be essential to the full and satisfactory maintenance of the relation between the IPC and the party; and
- (iii) the relation must be one which in the opinion of the community ought to be diligently fostered; and
- (iv) the injury to the relation that would result from the disclosure of the information would be greater than the benefit thereby gained for the correct disposal of the litigation.

In the case before me, it is only necessary to consider the application of Practice Direction 7 to the Ministry's representations and affidavit on the issue of the reasonableness of its search, since it is on that issue that I intend to seek the representations of the appellant at this stage.

The Ministry's confidentiality request

In the cover letter to its initial representations, the Ministry requested that they not be shared with the appellant, "as doing so may cause the ministry to be in violation of the court order, the details of which are set out in the representations." In the representations, the Ministry refers to a court order sealing a matter before the courts. Despite the reference to setting out the "details" of the court order, no particulars of the order are provided, such as its specific provisions, the date of the order, the name of the judge, or the court file number. Neither has the Ministry provided me with a copy of the order, nor (despite being requested to do so in the Notice of Inquiry) given any reason why the order itself may not be produced. I am thus left with little

guidance as to how the sharing of its representations will cause the Ministry to be in violation of that order.

In its subsequent letter enclosing the affidavit describing the search for records, the Ministry addresses the issue of the sharing of its representations in a slightly different manner. It now states that:

[a]s to the matter of sharing of the representations and enclosed affidavit with the appellant, I caution that an order made to the Ministry by your office may cause the Ministry, your office and the appellant to be in violation of the *sealed* court order for the reasons set out in the submissions. [emphasis added]

It appears that the Ministry is now asserting that the court order referred to earlier, which sealed a matter before the courts, is itself sealed. But even if this were the case, I am still left with little information about how that order conflicts with the disclosure of the Ministry's representations to the appellant.

Further, as the Ministry has not specifically addressed the criteria for withholding representations, as set out in Practice Direction 7, I have had to infer its position on the application of those criteria from the assertions in its submissions.

Findings

As I have indicated above, my findings below relate only to the Ministry's representations, including the affidavit, in relation to the reasonableness of its search. The representations and the affidavit describe the steps taken by the Ministry to respond to the request, including the areas within the Ministry where records were located, the directions given to those conducting the search, the general volume of records located and how they were reviewed.

Criterion (a) – reveal substance of a record claimed to be exempt

The Ministry has not submitted that the information in its representations would reveal the substance of a record claimed to be exempt, and on my review of them, I find that this criterion does not apply. The representations on the reasonableness of the search do not reveal the substance of the records at issue and, at most, describe where they were found and how they were determined to be responsive.

Criterion (b) – information would be exempt if contained in a record

The Ministry has not submitted that the information in its representations would be exempt if it were contained in a record, and on my review, I find that this criterion also does not apply.

Criterion (c) - information should not be disclosed for any other reason

The Ministry has not made any specific reference to this criterion, but I infer from its assertions that it seeks to have me apply it.

As discussed above, the Ministry takes the position that the sharing of its representations with the appellant would cause it (as well as this office and the appellant) to be in violation of a court order. As a general matter, the Ministry's concern about breaching a court order is a serious one, which ought not to be taken lightly. In Order M-53, former Commissioner Tom Wright decided against the continuation of an appeal where to order partial or full disclosure of a record may well constitute contempt of an order that he found to have general injunctive effect. In that appeal, the terms of the order were placed before him for his consideration, and submissions made as to the legal effect of those terms.

The existence of a court order prohibiting the disclosure of the information in the Ministry's representations would likely weigh strongly in favour of withholding those representations. The difficulty in the appeal before me is that I have very little evidence to support the Ministry's position and in particular, very little evidence about the order said to prohibit the disclosure of the representations. Virtually the only evidence I have about the order is the general assertion that it "seals" a matter before the courts. I have no information linking that order to the information in the representations, which describe how the Ministry searched for records. I therefore do not have a sufficient basis for understanding how the sharing of that information could be in violation of a court order. Further, I have been given no case law, statutory authority, rule of the courts or any other legal authority supporting the Ministry's position on the sharing of these representations.

On the other hand, I must consider that I am bound by the principles of natural justice and procedural fairness, which require me to notify a party of the case it must meet. In this case, the appellant is entitled to know, within reasonable bounds, the Ministry's information and position on the issue of the reasonableness of its search.

Given my findings on the lack of evidence or authority to support the Ministry's position, I find that the balance weighs in favour of disclosing its representations on the reasonableness of its search to the appellant.

PROCEDURE:

I have attached to the Ministry's copy of this interim order a copy of its representations and affidavit relating to the issue of the reasonableness of its search, in the form in which they will be sent to the appellant. I intend to send this information, along with a Notice of Inquiry, to the appellant no earlier than **June 6, 2002** for the purpose of seeking representations from the appellant.

Original signed by:
Sherry Liang
Adjudicator

May 23, 2002