



**Information and Privacy
Commissioner/Ontario**

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

INTERIM ORDER PO-2013-I

Appeal PA-010194-2

**Ministry of Public Safety and Security (Formerly the
Ministry of the Solicitor General)**



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BACKGROUND AND NATURE OF THE APPEAL:

On August 28, 1998 I issued Order P-1608. On page 6 of that order I made the following statement:

In response to my request for additional details regarding [the Deputy Minister's] affidavit, I received subsequent correspondence from the Deputy Minister regarding searches of the files relating to the named individual. The Deputy Minister advised me that there were a total of 147 records contained in the four files of the named individual

The Ministry of Public Safety and Security (formerly the Ministry of the Solicitor General) (the Ministry), which was also the institution in Order P-1608, received a subsequent request under the *Freedom of Information and Protection of Privacy Act* (the Act), from a different requester, for access to “the 147 records referred to on page 6 [of Order P-1608].”

The Ministry located the responsive records, which actually consisted of 163 rather than 147 records. The requester was provided with access to a number of these records, in whole or in part, and denied access to the remaining records or partial records on the basis of one or more of the following exemptions contained in the Act:

- section 12(1) (Cabinet records)
- section 13(1) (advice or recommendations)
- section 14(1) (law enforcement)
- section 15 (relations with other governments)
- section 18(1) (economic and other interests of Ontario)
- section 19 (solicitor-client privilege), and
- section 21(1) (personal privacy).

The requester, now the appellant, appealed the Ministry's decision.

During mediation, the Ministry issued a revised decision letter to the appellant, stating that it was transferring 44 records to the Minister Responsible for Native Affairs and three records to the Ministry of the Attorney General, on the basis that “those ministries have custody and control of the responsive records.” The appellant did not appeal the Ministry's transfer decision, and these 47 records are not at issue in this appeal.

Also during mediation, the Ministry provided the appellant with an index describing the remaining 116 responsive records and identifying the relevant exemption claims. The Ministry also agreed to grant access to additional records or partial records, and the appellant, in turn, advised that he was no longer pursuing access to certain of the records.

Mediation did not resolve the issues pertaining to the remaining records, and the file was transferred to the adjudication stage. I decided to send a Notice of Inquiry initially to the Ministry, setting out the facts and issues and providing the Ministry with the opportunity to provide written representations. In the cover letter accompanying the Notice, I stated:

The representations you provide to this office may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in the attached document entitled *Inquiry Procedure at the Adjudication Stage*. Please refer to this document when preparing your representations.

The attached document summarizes the policies and procedures contained in *Practice Direction 7* that was implemented in 1999 and subsequently included in this office's *Code of Procedure*, published in August 2000.

The Ministry provided written representations in response to the Notice. The representations dealt with a number of issues identified in the Notice, and included a one-paragraph statement regarding the sharing of representations with the appellant.

Upon receipt of the representations, I reviewed them to ascertain whether further representations from the appellant were necessary. After completing my review, I determined that the appeal should proceed to the next stage of the inquiry process, in order to address fairness considerations and to enable the appellant to respond to the position put forward by the Ministry on the issues. I also determined that, with certain severances necessary in order to address the confidentiality criteria outlined in *Practice Direction 7*, much of the Ministry's representations could be shared with the appellant.

A representative of this office advised the Ministry of my position on the sharing issue and, following subsequent discussions, I identified for the Ministry the portions that I felt should be treated confidentially, in accordance with *Practice Direction 7*.

I received a subsequent letter from the Ministry on April 30, 2002, which stated: "As you know, the Ministry objects to [its representations] being released." The letter goes on to identify six specific portions of the representations that it has "particular concerns" about sharing. The rest of the Ministry's April 30 letter deals only with the six specific portions.

DISCUSSION:

Sharing of representations procedure

The *Inquiry Procedure at the Inquiry Stage* outline and *Practice Direction 7* provide a detailed description of the relevant procedures with regard to the sharing of representations. *Practice Direction 7* 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 a record claimed to be exempt;
- (b) the information would be exempt if contained in a record subject to the *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 section (c) above, the Adjudicator will apply the following test:

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

The Ministry's confidentiality request

The Ministry asks me to withhold all of the representations for the following reason:

The [Ministry] is providing these submissions in confidence to the Information and Privacy Commission (the "Commission"), in accordance with subsection

52(13) and section 55 of the [Act]. As such, the Ministry is opposed to the disclosure of these submissions, or the content of these submissions, to the appellant or any other party. The Ministry submits that the inherent sensitivity and confidentiality of the submissions, and the amount of personal information contained in them should also prevent them from being disclosed. In the event that the Commission proposes to disclose the submissions, the Ministry requests prior notification of this disclosure and that it is afforded the opportunity of being heard in respect of this request.

In its April 30 letter, the Ministry briefly expands its reasons with respect to the six specific portions of the representations, taking the position that disclosure of these portions would disclose personal information of identifiable individuals. Although I am constrained from describing the Ministry's position in detail, its brief reasons focus on the particular subject matter and circumstances of the request, and the possible consequences of the disclosure of personal information.

Analysis

General

The Ministry's main argument is a fundamental one. Essentially, the Ministry takes the position that sections 52(13) and 55(1) of the *Act* preclude the application of the policies and procedures established by this office for the sharing of representations in the context of an inquiry under section 52. Taken to its logical conclusion, the Ministry's position appears to be that if it submits representations and asks that they be kept confidential, they cannot be shared unless the Ministry consents. I do not accept this position.

Section 55(1) sets out a general confidentiality requirement for the Commissioner and her staff as follows:

The Commissioner or any person acting on behalf of or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their powers, duties and functions under this or any other Act.

In my opinion, this provision cannot be read as imposing an absolute requirement of confidentiality. To do so would preclude the Commissioner from discharging other statutory and common law responsibilities, and that clearly cannot have been the intent of the legislature in establishing the appeal system in the *Act*. For example, how could the Commissioner issue orders disposing of the issues raised in an appeal (section 54), with the requisite degree of reasoning expected by the parties and the courts, without making reference to at least some information that came to her knowledge in performing the duties of an adjudicator under the *Act*? Or, at the earlier stage of the inquiry process, how could the Commissioner provide an institution with an adequate explanation of the basis of the appellant's appeal without, at least in some

instances, including some information provided by an appellant, regardless of whether the appellant consents?

Section 52(13) of the *Act* specifically addresses the issue of access to representations by the parties to an appeal. It states:

The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is *entitled* to be present during, to have access to or to comment on representations made to the Commissioner by any other person. [my emphasis]

The specific wording of section 52(13) indicates that parties to an appeal do not have an entrenched entitlement to see or comment on the representations of others. As several court decisions have indicated, it does not prohibit the Commissioner from deciding that representations, or portions of them, ought to be exchanged to ensure procedural fairness. In *Gravenhurst (Town) v. Ontario (Information and Privacy Commissioner)*, [1994] O.J. No. 2782 (Div. Ct.), decided under the *Act's* municipal counterpart, the Court stated (at par. 1):

The nature of the process under review ... requires the maintenance of confidentiality. There can be no hearing in the usual sense and the statute limits access to representations [under the municipal *Act's* equivalent of section 52(13)]. In considering the procedure adopted by the Commissioner, this court should accord curial deference in light of the difficult circumstances faced by the Commissioner *subject, of course, to the overriding concerns of procedural fairness.* [my emphasis]

Similarly, in *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, [1998] O.J. No. 5015 (Div. Ct.), the Court denied a motion seeking to stay an oral hearing, stating that “the relevant parties have no right to be present during the representations of others but the Commissioner may choose to permit them or direct them to be present.” In reaching this conclusion, the Court cited with approval the interpretation given to section 52(13) by former Commissioner Sidney B. Linden in Order 164. The former Commissioner was dealing with an argument that, because of section 52(13), he was “without the authority to order the exchange of the representations by the parties.” He stated:

I agree that the words "no person is entitled" to see and comment upon another person's representations means that no person has the *right* to do so. In my view, the word "entitled", while not providing a right to access to the representations of another party, does not prohibit me from ordering such an exchange in a proper case. Subsection 52(13) does not state that under no circumstances may I make such an order; it merely provides that no party may insist upon access to the representations.[emphasis in original]

And in *Ontario (Solicitor General and Minister of Correctional Services) v. Ontario (Information and Privacy Commissioner)* (June 3, 1999), Toronto Docs. 103/98, 330/98, 331/98, 681/98, 698/98 (Ont. Div. Ct.), the Court declined to seal the representations of the parties, in the context of the Commissioner's Record of Proceedings in an application for judicial review. The Court stated:

I have engaged counsel in discussions on sections 52(13) and [55(1)] of the *Act*. I am, with respect, unable to agree that these sections (in the context of the whole legislation) support the proposition that it was intended that representations be excluded. I have concluded that the *Act* does not warrant the sealing of the representations. ...

This principle shall apply unless representations are otherwise ruled confidential by the Commissioner.

The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) describes the rationale for providing the oversight body with discretion to deny parties full access to all proceedings and documents used in the inquiry process as follows (page 360):

The tribunal should have the capacity to compel the production of documents and should be permitted to examine such documents in the absence of either party. In situations where the government could not fairly present its reasons for withholding a document in the presence of the applicant, the tribunal should be *permitted* to entertain submissions from the government in the absence of the applicant. [my emphasis]

As the Williams Commission and the courts make clear, processing an appeal under the *Act* raises unique confidentiality concerns, such as ensuring that the contents of a record at issue are not disclosed during an appeal. These concerns are the underlying policy basis for section 52(13), and the process outlined in *Practice Direction 7*, particularly its confidentiality criteria, were drafted to ensure that these unique confidentiality considerations are addressed in any decision by the Commissioner to share the representations of one party with another.

In my view, therefore, I have the power to decide whether and the extent to which representations should be shared among the parties, provided that the confidentiality criteria in *Practice Direction 7* are adequately considered and applied. My decision in this regard is not dependent on the consent of any party, including the Ministry in this appeal.

Confidentiality criteria

Although the Ministry's representations on this issue do not deal specifically with the various criteria outlined in *Practice Direction 7* as requested, based on the information I have received from the Ministry, it would appear that it is not identifying criterion (c) as relevant in the

circumstances. Based on the representations and evidence I have received, I have concluded that criterion (c) does not apply.

The Ministry's position would appear to relate most directly to criterion (b), but it might also touch on the requirements of criterion (a), so I will address both.

criterion (b)

Under criterion (b), information included in representations is treated confidentially and not shared with another party in an appeal if that information would be exempt if contained in a record subject to the *Act*. No specific exemption claim with potential application has been identified by the Ministry, but it would appear to be concerned that disclosure of the six identified portions would identify an individual, thereby falling within the scope of the definition of "personal information" in section 2(1), and that this disclosure would constitute an unjustified invasion of privacy under section 21(1) of the *Act*.

It is clear that the personal information exemption in section 21(1) has no application unless the record at issue contains information that falls within the scope of the definition of "personal information". No individual is named in any of the six identified portions. However, each portion refers to a specific record or records, some of which have already been disclosed in part to the appellant. Because of this partial disclosure, care must be exercised in ensuring that any information contained in the six identified portions of the representations could not be combined with information already disclosed to the appellant and thereby linked back to an individual already identified. Given the nature of the information contained in the relevant records and corresponding representations, if it is linked to an identified individual, it would fall within the scope of the definition of "personal information" and might, depending on my consideration of all relevant facts, circumstances and argument from the parties, potentially qualify for exemption under section 21(1).

However, this argument only applies if the information at issue is "personal information", and that question comes down to a question of identifiability. If the six portions of the Ministry's representations can be severed in a manner which does not disclose any information that would or could, when combined with the information already disclosed, link the content of these portions to any identifiable individual, they do not meet the definition of "personal information", and confidentiality criterion (b) does not apply. In my view, severing in order to de-personalize the six identified portions is possible in the circumstances of this appeal.

It would appear to me that the Ministry may be confusing the disclosure of the six portions of its representations with disclosure of the severed contents of the records they refer to. If the records themselves can be identified through disclosure of the representations, I accept the Ministry's position that, in one instance, this might link the content of this portion to an individual already identified in the previously disclosed portions of a record. However, given the number of records at issue in this appeal which are subject to the section 21(1) exemption claim, the generalized nature of the content of the six portions of the representations, once severed, and the

absence of sufficient evidence or argument from the Ministry to establish the required linkage, I am not persuaded that disclosure of any of these six portions would identify any individual.

Therefore, I find that the requirements of criterion (b) have not been established.

criterion (a)

For confidentiality criterion (a) to apply, disclosing the information in the six identified portions would have to reveal the substance of a record claimed to be exempt under the *Act*.

Neither the Ministry's initial representations nor the April 30 follow-up letter addresses this criterion. I have independently reviewed the six identified portions of the Ministry's representations and the records they refer to. In my view, absent any linkage to an identifiable individual, disclosing the six identified portions would not reveal the content of the records in any meaningful sense. The six portions, once severed, contain reference only to generalized policing activities widely known by the public. In my view, they do no more than elaborate in a general way on the category of the definition of "personal information" identified by the Ministry as relevant to these particular records, which clearly does not qualify as confidential information.

For these reasons, I find that confidentiality criterion (a) has also not been established.

In summary, I find that none of the six portions of the Ministry's representations, once severed, fall within any of the confidentiality criteria outlined in *Practice Direction 7*. Further, I find that these portions of the representations are directly relevant to the Ministry's position that the records they refer to qualify for exemption under section 21(1) of the *Act*, and that fairness requires that the appellant be made aware of the basis of the Ministry's arguments in this regard in order to have the opportunity to address them in submitting his own representations.

For these reasons, I have decided that the Ministry's representations, including the six portions identified in the April 30 letter, as severed by me in order to address confidentiality considerations, should be shared with the appellant. The Ministry's April 30, 2002 letter to me should not be shared.

PROCEDURE:

I have attached a copy of the Ministry's representations to its copy of this interim order. The portions I have highlighted indicate the passages that I will withhold from the appellant. I intend to send the attached material, with the exception of the highlighted portions, to the appellant, together with a Notice of Inquiry, not earlier than **May 16, 2002**.

Original Signed By: _____

May 2, 2002

Tom Mitchinson
Assistant Commissioner