



**Information and Privacy
Commissioner/Ontario**

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

INTERIM ORDER PO-2070-I

Appeal PA-020096-1

Ministry of Public Safety and Security



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NATURE OF THE APPEAL:

The Ministry of Public Safety and Security (formerly the Ministry of the Correctional Services) (the Ministry), received a request for access to records “concerning a meeting held on Sunday, June 9, 1996, concerning the report of [named individual], Child Advocate, Entitled ‘Summary Report and Recommendations on the Management of Youth Transferred from the Bluewater Youth Centre Upon and Following Their Admission to Elgin Middlesex Detention Centre’, February 19, 1996”. Specifically, the requester sought access to all information and documentation concerning the above meeting, including the following:

1. The names of all those in attendance and confirmation of the following officials known to have been present: [11 names provided]
...
2. Copies of any and all documents prepared for the meeting, during the meeting or after the meeting, whether the author of the documents was in attendance or not. Such documents to include but not be limited to: personal notes, briefing papers, Issue notes, “talking points”, question and answers, reports, memos, minutes of the meeting E-mails and correspondence.

After clarifying the scope of the appeal with the appellant, the Ministry conducted searches and located 52 pages of responsive records in the following program areas:

Office of the Minister and Deputy Minister’s Office – former Ministry of the Solicitor General and Correctional Services;

Communications Branch – Ministry of the Solicitor General

Communications Branch – Ministry of Correctional Services

Legal Services Branch – Ministry of the Solicitor General and Ministry of Correctional Services (includes records currently held by external legal counsel)

Assistant Deputy Minister’s Office – Community and Young Offender Services (includes record holdings of the former Assistant Deputy Minister, Correctional Services Division) – Ministry of Correctional Services;

Operational Support and Standards Branch (includes record holdings of the Information Management Unit and the former Operational Support and Coordination Branch) – Ministry of Correctional Services.

The identified records consist of correspondence, briefing materials and handwritten notes. The Ministry stated that it was denying access to the records on the basis that they fall outside the scope of the *Act*, by virtue of section 65(6) of the *Act*.

This requester (now the appellant) appealed the Ministry’s decision.

During the mediation stage of this appeal, the appellant advised that, in his view, additional records responsive to his request should exist. The issue of the reasonableness of the search undertaken by the Ministry is therefore an issue in this appeal.

In response to the appellant's raising of the "reasonable search" issue, the Ministry took the following position:

The Ministry believes its records search was reasonable in the circumstances of the appellant's request. The Ministry is of the view that the content of the identified responsive records clearly confirms that such records fall outside the scope of the [Act] in accordance with section 65(6). There is no ambiguity in this respect. As such, the provisions of the [Act] do not apply. The Ministry believes that the reasonableness of the records search process should only be considered if the already identified records are determined to be subject to the Act.

Accordingly, the impact of my section 65(6) finding on the reasonableness of the Ministry's search is also an issue in this appeal.

After the appeal was transferred to the adjudication stage, I sent a Notice of Inquiry to the Ministry, outlining the facts and issues in the appeal and seeking written representations. In the course of preparing its representations, the Ministry conducted additional searches and located a one-page responsive record. The Ministry wrote to the appellant advising that this new record had been identified, and that access to it was being denied on the basis of section 65(6) of the Act. I have added this new record to the scope of the appeal.

The Ministry then sent its representations, including an attached affidavit relating to the search activities, and asked me to withhold portions of both the representations and the affidavit. After reviewing the Ministry's representations, I decided that it is necessary to proceed to the next stage of the inquiry process and to seek representations from the appellant on two issues: (1) the application of section 65(6); and (2) the impact of my section 65(6) decision on the reasonable search issue. I also decided that it is necessary to share the Ministry's representations with the appellant, subject to any valid confidentiality considerations. In addition, I decided not to proceed at this time with the substantive issue of whether the various search activities undertaken by the Ministry are adequate. Because the affidavit only relates to the substantive search issue, it does not need to be shared with the appellant at this time and I will not address it in this interim order.

The purpose of this interim order is to rule on the Ministry's request that I not share certain portions of its representations that relate to the two issues that will now proceed to the next stage of the inquiry process.

SHARING OF REPRESENTATIONS

Sharing of representations procedure

IPC Practice Direction 7 provides a detailed description of the relevant procedures with regard to the sharing of representations. It reads, in part:

General

2. 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

3. 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.
4. 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

5. 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
 - (b) the information would be exempt if contained in a record subject to the *Act*; or
 - (c) the information should not be disclosed to the other party for another reason.
6. 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;
 - (ii) confidentiality is essential to the full and satisfactory maintenance of the relation between the IPC and the party;
 - (iii) the relation is 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 is greater than the benefit gained for the correct disposal of the appeal.

The Divisional Court has upheld these procedures (see the unreported decision in *Toronto District School Board v. Cropley* (October 15, 2002), Toronto Doc. 200/02, regarding Order MO-1521-I).

The Ministry's position

In the cover letter accompanying its representations, the Ministry objects to disclosing certain identified portions of the representations. The Ministry explains:

The Ministry is of the view that this confidential information satisfies [the Commissioner's] criteria for withholding information as outlined in part 5(a) of the Practice Direction on Sharing of Representations. Specifically, the Ministry submits that release of the confidential information would reveal the substance of a record that is claimed to be excluded in accordance with section 65(6) of [the *Act*].

The Ministry is also of the view that this confidential information satisfies [the Commissioner's] criteria for withholding information as outlined in Part 5(b) of the Practice Direction on Sharing of Representations. Specifically, the Ministry submits that the confidential information in and of itself could constitute an excluded record in accordance with section 65(6) of [the *Act*].

The confidential information has been supplied to the IPC for the sole purpose of adjudicating the appeal. Release of this confidential information to the appellant would be injurious to the relationship between [the Commissioner] and the Ministry.

The Ministry subsequently sent me a second letter, expanding on the reasons for requesting that portions of the representations not be shared. These reasons focus on criterion (a).

Findings

General

Criteria (a) and (b), outlined above, speak to situations where disclosure of information in representations would either reveal the substance of a record claimed to be *exempt*, or would be *exempt* if contained in a record subject to the *Act*. In the case before me, I am not dealing with exemption claims. Rather, the reason the Ministry has denied access is that, in its view, all responsive records, even those that may exist but have not yet been located, are excluded from coverage under the *Act*. In the circumstances of this appeal, I accept that confidentiality criteria (a) and (b) can apply, by analogy, to the exclusions under section 65(6) in the same manner as they would if I were dealing with any of the various exemptions in Part II of the *Act*.

Criterion (a)

For confidentiality criterion (a) to apply in the context of this appeal, disclosing the information in the identified portions would have to reveal the substance of a record claimed to be excluded from the *Act*.

The Ministry takes the position that it has adequately described the records in a portion of the representations it agrees to share and, “that additional disclosure of such information to the appellant would reveal the substance of records that are deemed to be excluded”. The Ministry points to Interim Order PO-1956-I in support of its position, where Adjudicator Laurel Cropley stated that:

The inquiry process must not be allowed to be used as a “back door” means of obtaining the very information sought.

Having reviewed the proposed severances identified by the Ministry, I note that certain portions on page 7 and 11 include quotations taken from one of the records. I find that if these portions are disclosed, they would clearly reveal the substance of one or more of the identified records, and that these two portions of the Ministry’s representations satisfy the requirements of criterion (a) and should not be shared with the appellant. I also find that disclosing one word that appears on pages 7, 10 and 11 of the representations could reveal the substance of one or more records, and that this word should also be severed on the basis of criterion (a).

As far as the other proposed severances are concerned, they consist of a general description of the nature of the identified records, and I do not accept the Ministry’s position that disclosing this information would reveal the actual substance of any specific record.

The section 65(6) exclusion in the *Act* applies to records collected, prepared, maintained or used by an institution in relation to certain specific activities. The activities themselves are described in the statutory provision, and in order to qualify for exclusion, an institution must establish that the records at issue relate to one or more of these activities. In my view, the remaining proposed severances in this appeal form part of the Ministry’s argument in support of its position that the records relate to the activities outlined in section 65(6). Although one record is referred to by number, the representations do not refer to its content and, in my view, disclosing the other proposed severances would not reveal the substance of this or any other record.

I also find that the remaining proposed severances contain evidence and argument that is central to the issue I must decide in the inquiry. Adjudicator Cropley faced a similar situation in Interim Order PO-1956-I. After reviewing two Divisional Court cases that dealt with the inquiry process under the *Act* (*Gravenhurst (Town) v. Ontario (IPC)*, [1994] O.J. No. 2782, and *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767), Adjudicator Cropley stated:

Through these decisions, the Divisional Court has confirmed that the Commissioner’s statutory duty of confidentiality is not absolute, but must be balanced with its common law duty of fairness, in particular, the duty to notify a

party of the case it must meet. As a party to these proceedings, the appellant is entitled to know, within reasonable bounds, the case that he has to meet.

I concur. In the case before me, I have a duty to ensure that the appellant is given adequate notice of the case he has to meet in responding to the Ministry's application of section 65(6). In so doing, my task is somewhat more straightforward than the one Adjudicator Cropley faced in Interim Order PO-1956-I. In her case, Adjudicator Cropley was considering confidentiality criterion (b) in circumstances that raised significant privacy issues. Her challenge was to find the appropriate balance between providing the appellant with an adequate level of disclosure while at the same time withholding portions of representations that might contain exempt personal information if included in a record. The "back door" concerns expressed by Adjudicator Cropley, and referred to by the Ministry in the present appeal, related to the need to ensure that disclosing information to the appellant did not reveal personal information about an affected person that was both unintended and unnecessary in order to ensure fairness.

I face no such challenge in the present appeal. The Ministry's arguments in this case focus primarily on criterion (a), where different interests are at stake. My challenge is to ensure that the substance of any specific record is not revealed through the disclosure of the Ministry's representations. I find that this can be achieved by withholding the portions of pages 7, 10 and 11 referred to above, and that all other parts of the Ministry's representations can be shared,

Accordingly, with the exception of the portions of the Ministry's representations described above, I find that the Ministry has failed to establish the requirements of confidentiality criterion (a).

Criterion (b)

For confidentiality criterion (b) to apply in the context of this appeal, I must find that the information in the proposed severance would be excluded if contained in a record subject to the *Act*.

The quotation from the Ministry's letter, above, is the only argument made in support of criterion (b). In my view, it simply re-states the criterion and is not sufficient to establish its requirements. Again, I would point out that the proposed severances in this case, with the exception of those that meet the requirements of criterion (a), consist of generalized descriptions of the type of records identified by the Ministry, in language commonly used in decision letters issued under the *Act*. Various provisions under Part II of the *Act* impose obligations on institutions to make decisions in response to access requests; to identify the basis upon which access is denied; and to provide the requester with details sufficient for the requester to identify the records at issue (see, for example section 26 and 29). These obligations apply whether access is being denied on the basis of an exemption or an exclusion. In my view, the proposed severances identified by the Ministry contain this type of descriptive information, and I find that the Ministry has failed to establish the requirements of criterion (b) for these parts of its representations.

Criterion (c)

The Ministry's only submissions on criterion (c) are contained in the quoted portion of the Ministry's letter, which are inadequate to establish this criterion. On the basis of these representations and my review of the proposed severances in the context of criterion (c), I find that it has no application in the circumstances of this appeal.

PROCEDURE:

I have attached to the Ministry's copy of this interim order a copy of its representations 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 **November 29, 2002** for the purpose of seeking representations from the appellant.

Original signed by:
Tom Mitchinson
Assistant Commissioner

November 15, 2002