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

ORDER PO-2583

Appeal PA-060182-1

Ministry of Natural Resources

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NATURE OF THE APPEAL:

The requester submitted a request to the Ministry of Natural Resources (the Ministry) under the *Freedom of Information and Protection of Privacy Act (the Act)* for access to copies of the following information:

> … full disclosure pertaining to enclosed search warrant including all notes, documents and steps taken relating to the investigation of my case before, during, and after search warrant from Ministry of Natural Resources.

The Ministry located 15 responsive records and granted full access to three of them. The Ministry granted partial access to nine records and withheld three records in full. Where access was denied in full or in part, the Ministry stated in its decision letter that it relied on sections 49 (discretion to refuse requester's own information) and 14 (law enforcement) of the *Act*.

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

During mediation, the Ministry clarified that it was relying on section 49(b) (invasion of privacy) and 14(1)(c) (investigative techniques) of the *Act* to deny access to the records at issue. The Ministry also verified that it intended to deny access to pages 00062-00066, identified as the Crown Counsel Brief, pursuant to section 19 (solicitor-client privilege) of the *Act*, which, although not claimed in the decision itself, was identified on the index of records that was provided to the appellant. The Ministry also indicated during mediation that certain portions of the records were not responsive to the request. The Ministry advised further that several pages of the records were not provided to the Commissioner's Office, as they had been ordered sealed by the Court.

Following discussions with the mediator, the appellant indicated he was not pursuing access to those records withheld pursuant to section 19 of the *Act*. The appellant indicated further that he was not interested in pursuing records or portions of records that were non-responsive to the request. The appellant requested that the mediator contact affected parties to seek their consent to disclosure where information was denied pursuant to section 49(b) of the *Act*.

The mediator contacted affected parties to seek consent where there was contact information available. Where the mediator received consent the Ministry agreed to release responsive records that were denied pursuant to section 49(b) of the *Act*. Based on the additional disclosure, the appellant advised that he was no longer pursuing access to those records to which section 49(b) of the *Act* had been claimed.

Also during mediation, the appellant indicated that there were errors in the records that he had received. As a consequence, the Ministry sent the appellant a correction request form to complete and this issue was resolved.

Further mediation could not be effected, and the file was forwarded to the adjudication stage of the process. As a result of mediation, the sole issue identified in the Mediator's Report was the application of section 14(1)(c) of the *Act* to certain records or parts of records.

I decided to seek representations from the Ministry, initially.

On review of the file, however, it was not clear whether the issues pertaining to the sealed records had been resolved. Consequently, I instructed a staff person from this office to contact the appellant to determine whether he was interested in pursuing this issue or whether he was satisfied with the mediator's explanation of the matter. The appellant indicated that he wished to be certain that the records the Ministry asserted were covered by the sealing order, were, in fact, those that were identified in that order. I therefore included this as an issue in this appeal.

Further, it appeared that the remaining records at issue may contain references to the appellant. Accordingly, I included the possible application of section 49(a) (discretion to refuse requester's own information) as an issue in this appeal, to be read in conjunction with section 14(1)(c) of the *Act*.

The Ministry submitted representations in response. In doing so, the Ministry provided a copy of its representations that could be shared with the appellant and a copy that also contained confidential information, which were not to be shared with the appellant. After reviewing the confidential submissions, I agreed with the Ministry's request that they remain confidential. I provided the appellant with a copy of the Ministry's non-confidential submissions along with a copy of the Notice of Inquiry.

The appellant's attention was directed to the fact that the Ministry had raised a number of exemptions not previously claimed by it in its decision letter or clarified during mediation. In particular, the Ministry claimed that the exemptions in sections 14(1)(e), (g) and (l) apply in the circumstances. In addition, the Ministry made submissions on the application of section 49(b) to some of the information at issue in the records. The Ministry did not explain why it was raising these additional discretionary exemptions under section 14(1). Nor did it explain why I should consider them at this late stage in the process (after the 30 day deadline for the claiming of new discretionary exemptions). The appellant was invited to comment on this in his submissions.

With respect to the Ministry's submissions regarding the application of section 49(b), as I noted above, the appellant no longer wishes to pursue information withheld under this exemption and it is, therefore, not at issue in this appeal. The appellant was advised that there was no need for him to respond to this portion of the Ministry's representations as I have removed all personal information of individuals other than the appellant from the scope of the appeal in accordance with the appellant's express intention to do so.

RECORDS:

The index provided by the Ministry does not number the records sequentially. For ease of discussion, I have allocated a record number to each record identified in the index, starting from page 00001. The records remaining at issue consist of the following:

Record 5 - Page 000026	E-mail
Record 6 - Pages 000027-000031	Plan
Record 7 - Portions of pages 000034, 000035, 000036, 000039	Information
Record 15 - Portions of pages 000076, 000077	Notes

According to the Ministry, portions of Record 7 have not been identified as records at issue in this appeal as they have been ordered sealed by the Court. This will be addressed below under the heading "Records at Issue".

DISCUSSION:

RECORDS AT ISSUE

The first question to be addressed concerns certain portions of Record 7. What impact does the sealing order of the Court have on records that are responsive to the request but subject to the sealing order. Secondly, what is the Commissioner's authority to deal with them?

The issue, simply stated, is whether the order sealing the portions of Record 7 affects my authority to review the decision made under the *Act* by the Ministry regarding these portions of the record, which is, effectively, to remove them from the scope of the request and appeal. Two decisions of this office are instructive in addressing this issue.

In Order M-53, former Commissioner Tom Wright addressed the issue as follows:

> It is my view that before dealing with the substantive issues arising in these appeals, I must address the preliminary issue of the effect, if any, of the two orders issued by Mr. Justice McGarry on my authority to review the decisions made under the *Act* by the Police. This is the sole issue that will be addressed in this order.
>
> …
>
> Generally speaking, persons who are not parties to a particular court action are not bound by an order of the court arising in the action. *McCully v. Maritime United Farmers' Co-op Ltd.* (1928) 54 N.B.R. 322 (C.A.). However, both the common law and the Ontario Rules of Civil Procedure provide that an injunctive order or judgment may be enforced against a non-party.
>
> An injunctive order is a judgment or order requiring a person to do an act, (other than the payment of money), or to abstain from doing an act. One method of enforcement against a person refusing or neglecting to obey an injunctive order or judgment is by an application for a determination that the person who is not obeying the order is in contempt of court.

The Ontario High Court, in *Canada Metal Co. Ltd. v. Canadian Broadcasting Corp. et al. (No. 2)* (1975) 48 D.L.R. (3d) 641, 4 O.R. (2d) 585 at p. 603, sets out the general rules governing contempt of injunctive court orders:

> 1) "An order for an injunction must be implicitly observed and every diligence must be exercised to observe it to the letter": Halsbury's Laws of England, 3rd ed., vol. 21, p. 433, para. 915.
>
> 2) The respondents were obliged to obey not only the letter, but also the spirit of the injunction: *Grand Junction Canal Co. v. Dimes* (1849) 17 Sim. 38, 60 E.R. 1041; Halsbury's Laws of England, **ibid** p.434, para. 919; *Attorney General v. Great Northern R. Co.* (1850) 4 De G. & Sm. 75, 64 E.R. 741.
>
> 3) Knowledge of the existence of an injunction is sufficient to obligate persons to obey it, and the order need not have been issued and entered in order to bind persons having knowledge of it: Halsbury's Laws of England, **ibid** p.433, para 914.
>
> 4) **Persons who are not parties to an action and who are, therefore, not named as being bound by the injunction, still must abide by it if they know of the substance or nature of the injunction and it is not necessary that the words "person or persons having notice of this order" be contained in the terms of the injunction in order for it to bind them**: *Re Tilco Plastics Ltd. v. Skurjat et al.*; *A.G.Ont. v. Clark et al.*, [1966] 2 O.R. 547, [1967] 1 C.C.C. 131, 57 D.L.R. (2d) 596 ... [emphasis added]

Therefore, it appears to me that persons who are not parties to, but who have knowledge of an injunctive order must obey the order.

The Board submits that the orders of Mr. Justice McGarry are injunctive in nature. I agree. The orders are injunctive in that they require production of the record by the Windsor Police Department and restrict dissemination of the record to that necessary for litigating the issues before the court.

In my view, since I have had notice of the court orders, I am bound by them and may do nothing in processing these appeals which would render the orders ineffectual. In the normal course of an appeal, procedural fairness requires that some degree of disclosure be made to the parties of the type of record at issue. It is also my view that my jurisdiction to review the decisions of the Police, which is

> derived from the *Municipal Freedom of Information and Protection of Privacy Act*, is not affected by the court orders. However, in practical terms, the court orders restrict how these appeals may be processed.
>
> Disclosure of the nature of the record to the parties in the course of conducting my inquiry cannot be made. As well, if I were to find that the exemptions claimed by the parties resisting disclosure do not apply to the record, either in whole or in part, I may not order unconditional disclosure of the record. To order partial or full disclosure of the record or to refer to the record in any way which would reveal its content, in my view, may well constitute contempt of court. Simply stated, for the purposes of processing these appeals, I am not prepared to test the contempt waters.
>
> Although the appeals could be held in abeyance, pending the outcome of the court action, the nature of the matter being litigated is such that its conclusion may not result in the lifting or variation of the court orders. Thus, I may never be in a position to deal unrestrictedly with the record at issue. For these reasons, it is my view that no practical purpose would be served in proceeding with these appeals at this time.

In Order PO-2069-I, former Adjudicator Sherry Liang addressed the sufficiency of evidence with respect to an institution's claim that the records at issue in that appeal had been sealed by the Court:

> Although it is not abundantly clear, I understand the Ministry's position to be that it is unable to make representations on the application of section 14(1), or any of the exemptions claimed, because of the existence of a search warrant which remains "under execution". I understand its position to be that it is unable to make representations because in doing so, the result would be the identification of the records covered by the warrant. Further, I understand the Ministry's position to be that if it identifies the records covered by the warrant during the course of this appeal, it risks being found in contempt of court.
>
> The Ministry also refers to Order M-53…
>
> The situation before me is not dissimilar to that discussed in Interim Order PO-2016-I in this appeal, in which I stated:
>
> > 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.

As in Interim Order PO-2016-I, I find that the Ministry's concern about breaching a court order is a serious one, which ought not to be taken lightly. If the Ministry were unable to make submissions (and therefore could not participate meaningfully in this appeal) because of the terms of a court order, this would be a serious concern relevant to whether natural justice can be met in this appeal. The dilemma here, as in Interim Order PO-2016-I, is that I have very little evidence before me to support this contention. The evidence before me is simply the assertion that there is a search warrant, that the warrant and information are sealed by court order, and that the warrant "remains under execution". I have no information about the terms and context of the court order, and no case law, statutory authority, or other legal authority, which establishes that the Ministry would be in violation of any such order by making representations in this appeal on the application of section 14(1).

The Ministry appears to be concerned that the mere revelation of which records are subject to the search warrant would place it in violation of the court order. Again, I have no evidence or legal authority, which permits me to reach this conclusion. I have not been provided with any court order on any aspect of this matter, or any other legal authority allowing me to understand the breadth of that sealing order.

…

> I note that since the *MacIntyre* decision, the *Criminal Code* has been amended to provide specifically for sealing orders on information relating to the issuance of a warrant (section 487.3). Those provisions allow for an application to terminate a sealing order or vary any of its terms or conditions. Although (assuming that these provisions apply) it is open to the Ministry to make such an application, I have no information before me suggesting that the Ministry has taken any steps in this direction, and no submissions on the application of these provisions to the appeal before me.
>
> I find, therefore, that there is an insufficient basis to conclude that this situation parallels the circumstances dealt with in Order M-53, nor have I been provided with sufficient information to justify a conclusion that the Ministry is incapable of making representations in support of its position that section 14(1) applies to exempt the records at issue.

The Ministry was asked to comment on this issue in light of the approaches taken in the above-noted orders. The Ministry was also asked to provide the necessary evidence to establish the existence of a court order, the breadth of the order and the records encompassed by it, and to attach a copy of the sealing order to its representations.

The Ministry was also asked to explain why the nature of the records cannot be identified and why the records cannot be provided to this office. In the alternative, the Ministry was invited to enclose a copy of the records held under the sealing order with its submissions.

The Ministry addressed this issue in its confidential representations. I have reviewed the Ministry's confidential representations regarding the sealing order of the Court and the records to which it pertains, and I find that the Ministry has provided sufficient evidence to establish that this situation parallels the circumstances dealt with in Order M-53.

As was the case in Order M-53, since I have notice of the Court order, I am bound by it and may do nothing in processing these appeals which would render the orders ineffectual. Moreover, disclosure of the nature of the record to the appellant in the course of conducting my inquiry cannot be made. I have no evidence before me to indicate that the Court order might be lifted or varied. Thus, I may never be in a position to deal unrestrictedly with the record at issue. For these reasons, it is my view that no practical purpose would be served in proceeding with these portions of Record 7 at this time. Accordingly, I have decided to remove these pages of Record 7 from the scope of the appeal on the basis that they are subject to the Court's sealing order.

PERSONAL INFORMATION

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

The records all pertain to an investigation by the Ministry into alleged hunting offences under the *Fish and Wildlife Act*. As part of that investigation, a search warrant was obtained and fish and

moose meat was seized from the appellant's residence and those of other individuals. I find that the records at issue all contain the personal information of the appellant. Some of them also contain the personal information of other identifiable individuals that were involved in the investigation.

LAW ENFORCEMENT/DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Section 47(1) of the *Act* gives individuals a general right of access to their personal information held by a government body. Section 49 provides a number of exceptions to this general right of access, including section 49(a), which reads as follows:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> (a) if section 12, 13, **14**, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information; [emphasis added]

In this appeal, the Ministry relies on section 49(a) in conjunction with the discretionary exemptions in sections 14(1)(c), (e), (g) and (l), which state:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

General principles

The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

> "law enforcement" means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and

(c) the conduct of proceedings referred to in clause (b)

The term "law enforcement" has been found to apply in the following circumstances:

- a municipality's investigation into a possible violation of a municipal by-law [Orders M-16, MO-1245]
- a police investigation into a possible violation of the *Criminal Code* [Orders M-202, PO-2085]
- a children's aid society investigation under the *Child and Family Services Act* [Order MO-1416]
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997* [Order MO-1337-I]

The term "law enforcement" has been found *not* to apply in the following circumstances:

- an internal investigation to ensure the proper administration of an institution-operated facility [Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.)]
- a Coroner's investigation under the *Coroner's Act* [Order P-1117]
- a Fire Marshal's investigation into the cause of a fire under the *Fire Protection and Prevention Act, 1997* [Order PO-1833]

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

Except in the case of section 14(1)(e), where section 14 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers'*

Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 (C.A.)].

In the case of section 14(1)(e), the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.)].

It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

Representations

The Ministry submits that records relating to or including the Operations Plan, Officers note, and other records relating to the search and investigation are exempt under the law enforcement exemptions in sections 14(1)(c), (e), (g) and (l). The Ministry argues that the disclosure of these records would interfere with the gathering of intelligence information and would reveal how the Ministry conducts large scale law enforcement operations.

The Ministry relies on the reasoning contained in Order P-745 in which Adjudicator Anita Fineberg made certain findings respecting the application of section 14(1)(e) to a "security plan" relating to a cull of deer planned for a provincial park. She found that:

> In its representations, the Ministry explains that the techniques contained in the Plan, the purpose of which is to diffuse violent situations, are used by the Ontario Provincial Police and other ministries to deal with demonstrations. The Ministry submits that the effectiveness of these techniques would be severely limited if they were disclosed. If those intent on violence were aware of the procedures used to diffuse or avoid violent situations, they could take steps to counter those techniques. The Ministry states that if this should occur, the risk of harm to either Ministry staff acting as law enforcement officers or to members of the public who are directly involved in, or who witness the incident, becomes significant.
>
> I have reviewed the representations of the Ministry and the contents of the record. I accept the submissions of the Ministry that the proactive approach set out in the Plan has successfully prevented violent confrontations in the past. The success of the Plan is attributable to the fact that it accurately predicts the actions of certain parties and sets out the procedures to deal with them. The Ministry indicates that, because of its success in 1993, the Plan will be used as a model for similar plans in the future.
> I agree with the position of the Ministry that the effectiveness of the Plan will be lost should it be disclosed. I also accept its submissions on the relationship

> between the disclosure of the Plan and the danger to the life or physical safety of the Ministry staff acting as law enforcement officials and/or other individuals, such as those involved in the herd reduction or protesters or witnesses to the event.
>
> Accordingly, I am satisfied that the Ministry has provided sufficient evidence to establish a clear and direct linkage between disclosure of the record and the alleged harms. Therefore, section 14(1)(e) of the *Act* applies to exempt the Plan from disclosure.

The Ministry goes on to add:

> Furthermore revelation of the techniques would facilitate the commission of an unlawful act or hamper the control of crime. Not only would the release of [these] records reveal law enforcement techniques and endanger the physical safety of officers, as described above, their disclosure would reveal the techniques by which the Ministry executes search warrants. Revelation and the study of this information could enable wrong doers to develop techniques or schemes to thwart the effectiveness of such searches. As a result, the Ministry would not be able to or would be hampered in its ability to conduct searches and recover evidence. Such a result would erode the Ministry's ability to obtain convictions; thus facilitating the commission of [an] unlawful act and/or hampering the control of crime or unlawful act[s].

The Ministry has provided additional detailed submissions on this issue in its confidential representations, however, because of the nature of the information and the consequences of disclosure, I am not able to discuss them in this order.

The appellant did not submit representations.

Findings

Section 14(1)(c)

The undisclosed records, or parts of records, describe the procedures and techniques used by the Ministry in obtaining and executing a search warrant. The records contain a great deal of detail about the manner in which the Ministry went about achieving the result they did in this situation. In my view, the records remaining at issue in this appeal relate directly to the investigation and behind the scenes activities of a law enforcement nature. As such, I find that the undisclosed records, or part of records, fall within the ambit of the exemption in section 14(1)(c). In particular, I find that:

- Record 5, outlines in detail how the search warrant was to be executed by the Police and Ministry staff, is properly exempt from disclosure under section 14(1)(c) as its disclosure

could reasonably be expected to reveal certain investigative techniques and procedures currently in use in law enforcement.

- Record 6 is a copy of the Ministry's Operational Plan for the execution of the search warrant. In my view, this document qualifies for exemption under section 14(1)(c) as its disclosure could reasonably be expected to reveal investigative techniques currently in use by the Ministry in enforcing its mandate. The record describes in detail the methods employed by the Ministry in obtaining evidence and information when executing a search warrant in the circumstances.

- The withheld portions of Records 7 and 15 contain information of a similar character to that in Records 5 and 6 and I am satisfied that their disclosure could reasonably be expected to reveal investigative techniques and procedures within the meaning of section 14(1)(c).

Discretion

The Ministry did not submit specific representations regarding its exercise of discretion under sections 49(a) and 14. However, I note that the Ministry has disclosed a considerable amount of information to the appellant in response to his request. It is apparent that the Ministry has turned its mind to the particular needs of this appellant, recognizing that the records contain his personal information. Moreover, based on the submissions overall, and in particular, those submitted in confidence, I am satisfied that the Ministry has taken relevant considerations into account in exercising its discretion not to disclose the remaining information in the records. Accordingly, I find that the records and parts of records remaining at issue in this appeal are properly exempt under section 49(a) of the *Act*, in conjunction with section 14(1)(c).

Because of these findings, it is not necessary for me to consider the other exemptions claimed by the Ministry, or the issues that arose in relation to those exemptions that were raised late in the appeals process.

ORDER:

I uphold the Ministry's decision to withhold the records and parts of records remaining at issue.

Original signed by: May 30, 2007
Laurel Cropley
Adjudicator