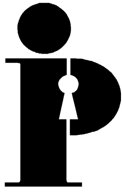

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2685

Appeal PA07-86

Ministry of Health and Long-Term Care

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services was the initial recipient of a two-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to copies, preferably in electronic format, of all emergency response plans filed by Ontario municipalities and ministries, and for Hazard Identification and Risk Assessment's (HIRA)'s completed and submitted by Ontario municipalities and ministries. The requester is a journalist and he stated that the requested information "is of utmost public interest and for that reason alone should be released."

The Ministry of Community Safety and Correctional Services then issued a decision letter advising the requester that it decided to transfer the second part of the request to each of the eleven individual ministries that had separately completed and submitted their respective HIRA's. One of those requests was transferred to the Ministry of Health and Long Term Care (the Ministry). That request and the subsequent decision of the Ministry is the subject of this appeal.

After receiving the request, the Ministry issued a decision letter identifying twelve responsive records. The Ministry provided complete access to one record and partial access to the remainder. The Ministry relied on the discretionary exemptions at sections 14 (law enforcement), 16 (prejudice the defence of Canada) and 20 (threaten safety or health) of the *Act*, to deny access to the portions it withheld.

The requester (now the appellant) appealed the decision.

During mediation, the appellant raised the possible application of the public interest override in section 23 of the *Act*. Accordingly, this was added as an issue in the appeal.

Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeal process.

I sent a Notice of Inquiry setting out the facts and issues in the appeal to the Ministry, initially. The Ministry filed representations in response to the Notice. I then sent a Notice of Inquiry, along with a copy of the complete representations of the Ministry, to the appellant. The appellant provided representations in response. I determined that the appellant's representation's raised issues to which the Ministry should be given the opportunity to reply. Accordingly, I sent the Ministry a letter enclosing the appellant's representations and inviting representations in reply. The Ministry provided reply representations.

BACKGROUND

Section 5.1(1) of the *Emergency Management and Civil Protection Act* (*Emergency Management Act*) requires every Minister of the Crown presiding over a ministry to develop and implement an emergency management program, including an emergency management plan. Section 5.1(2) of the *Emergency Management Act* provides that in developing an emergency management plan every Minister is required:

- to identify and assess hazards and risks to public safety that could give rise to emergencies, and

- to identify facilities and other elements of the infrastructure, for which they are responsible, that are at risk in an emergency.

The Ministry's HIRA is one of the records at issue in this appeal. It examines the probability of an occurrence of, and the likely consequences of, infectious disease hazards. These include:

a) diseases that are spread by droplet or contact,
b) airborne diseases,
c) foodborne and waterborne diseases,
d) zoonotic and vectorborne diseases, and
e) bloodborne diseases.

The Ministry submits that its HIRA also addresses risks or threats to health system infrastructure components which include healthcare facility overload, damage, loss or failure; inadequacies of medical supplies; and, shortages of health resources. The Ministry further submits that it also contains risk assessment rankings and, referencing a record at issue in the appeal, forward-looking Ministry priorities that are informed by the risk analysis set out in the HIRA.

RECORDS:

The withheld portions of the following records remain at issue in this appeal:

Record Number	Record	Exemptions Claimed
1	Hazard Identification and Risk Assessment (Excerpt from the Ministry's Emergency Response Plan)	Sections 14(1)(e) and (l), 20
3a	Droplet/Contact Spread Diseases (Appendix F of the Ministry's Emergency Response Plan)	Sections 14(1)(e) and (l), 16, 20
3b	Airborne Diseases (Appendix F of the Ministry's Emergency Response Plan)	Sections 14(1)(e) and (l), 16, 20
3c	Foodborne/Waterborne Diseases (Appendix F of the Ministry's Emergency Response Plan)	Sections 14(1)(e) and (l), 16, 20
3d	Zoonotic and Vectorborne Diseases (Appendix F of the Ministry's Emergency Response Plan)	Sections 14(1)(e) and (l), 16, 20
3e	Bloodborne Diseases (Appendix F of the Ministry's Emergency Response Plan)	Sections 14(1)(e) and (l), 16, 20

Record Number	Record	Exemptions Claimed
3f	Risk Assessment Grid and Ministry Priorities (Appendix F of the Ministry's Emergency Response Plan)	Sections 14(1)(e) and (l), 16, 20
4a	Healthcare Facility Damage, Loss or Failure (Appendix G of the Ministry's Emergency Response Plan)	Sections 14(1)(e), (i) and (l), 16, 20
4b	Healthcare Facility Capacity Overload (Appendix G of the Ministry's Emergency Response Plan)	Sections 14(1)(e), (i) and (l), 16, 20
4c	Shortage/Inadequacy of Medical Supplies (Appendix G of the Ministry's Emergency Response Plan)	Sections 14(1)(e), (i) and (l), 16, 20
4d	Shortage of Health Human Resources (Appendix G of the Ministry's Emergency Response Plan)	Sections 14(1)(e), (i) and (l), 16, 20

I will now address the exemptions claimed by the Ministry, dealing first with the discretionary exemptions at sections 14(1)(e), (i) and (l) of the *Act*.

LAW ENFORCEMENT

Sections 14(1)(e), (i) and (l) read:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required; or
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

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.)].

In the case of section 14(1)(l), to demonstrate that the specified harm "could reasonably be expected" to occur, 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.) (*Ontario Ministry of Labour)*].

Similarly, in the case of "health and safety" related exemptions such as sections 14(1)(i), 16 and 20, which use the words "could reasonably be expected to", the standard of proof is that the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, it must be demonstrated that the reasons for resisting disclosure are not frivolous or exaggerated [Order MO-1832].

In regard to section 14(1)(e), a person's subjective fear, while relevant, may not be sufficient to establish the application of the exemption [Order PO-2003].

The term "person" in section 14(1)(e) is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization [Order PO-1817-R].

The Ministry submits that the evidentiary standard established in *(Ontario Ministry of Labour*) should also be applied to section 14(1)(l). I do not agree. Although this is a law enforcement exemption, it is not of the same nature as the "health and safety" related exemptions such as sections 14(1)(e) and (i), 16 and 20. In my view the evidentiary standard established for sections 14(1)(e) and 20 in *(Ontario Ministry of Labour*) does not apply to section 14(1)(l).

Representations of the Ministry

The Ministry submits that the severed portions of the records at issue expose Ontario's vulnerabilities in respect of human health, disease and epidemics, and health services during emergencies. The Ministry submits that the greatest risk from releasing the withheld portions of the records would be from terrorists or others who seek to cause intentional harm to Ontarians and to Ontario's healthcare infrastructure. Disclosure of the severed portions of the records at issue, the Ministry says, could prejudice the defence of Canada and be injurious to the prevention and suppression of sabotage and terrorism. The Ministry states that the information at issue is not publicly available.

The Ministry explains that, in several instances, the severed portions of the records differentiate between risks relating to natural occurrences of the identified hazards, and risks relating to "human intended occurrences (e.g. Bioterrorism attacks)." The Ministry also explains that severed portions of some of the records at issue consist of rankings of the possibility of the identified hazard occurring ("P-Scores") and of the potential consequences of these hazards ("C-Scores"). It submits that the P-Scores and C-Scores applied to different types of public health hazards, and to different types of health system-related emergencies, quantify Ontario's exposure to these various hazards. The Ministry submits that disclosing the P-Scores and C-Scores relating to health care facility damage, capacity overload, shortages of medical supplies and shortages of health human resources could expose vulnerabilities and preparedness gaps in the health care system to would-be terrorists. This would allow them to plan attacks that would have the maximum disruptive impact on the province's health care system thereby compromising the health care that Ontarians receive. In particular, the Ministry says that individuals who wanted to carry out terrorist acts could exploit the gaps in preparedness to identify which type of Bioterrorrist attack would cause the most surprise and harm.

The Ministry further submits that its concerns about Bioterror attacks against Ontarians and other attacks that could compromise Ontario's health care infrastructure, are reasonable. It submits that in 2001, the United States experienced a Bioterror attack where anthrax spores were dispersed by mail to government institutions and media outlets. The Ministry submits that as Ontario's experience with the 2003 outbreak of Severe Acute Respiratory Syndrome (SARS) demonstrates, unanticipated infectious disease outbreaks can affect the health and safety of Ontarians directly, through exposure to disease, and indirectly, through strains on the province's health care system, such as hospital closures and facility quarantines that could compromise the care that Ontarians receive.

The Ministry writes that:

> While it is impossible to predict the exact nature of the harms that would result if the records were disclosed, the Ministry submits that it is reasonable to expect that the severed information would be extremely beneficial to terrorists or others that would cause intentional harm to Ontarians. As [this Office] recently stated in Order MO-2011:
>
> > "Because it is impossible to anticipate the myriad ways in which individuals with criminal intent can cause certain types of emergencies and take advantage of others, it is necessary to be cautious about what information is disclosed in the context of emergency planning processes."
>
> The Ministry submits that this reasoning is directly applicable in the present appeal, as severed information relates directly to the likelihood and consequences of public health emergencies, and vulnerabilities in Ontario's health care system in the event of emergencies.

The Ministry's concern is not that the appellant will misuse any information, but rather that any disclosure of the severed information is, in accordance with a long line of orders of this office, "disclosure to the world."

Representations of the appellant

The appellant's representations focus on the public interest in disclosure of the withheld information. He submits that access to the withheld information would allow third parties, such as the media, to examine emergency preparedness plans and assess their adequacy. The appellant submits that this would actually prevent harm. In support of this position he included with his representations a listing from a website showing examples of United States media examining emergency preparedness plans and assessing their adequacy.

In addition, the appellant writes:

> The public, I submit, already has a good idea of the kinds of threats or hazards our society faces today and the Ministry acknowledges this in releasing identified hazards. The question that I suppose you must ponder is, does the public have a right to know the probability of a certain kind of threat or hazard, as calculated by our government, and whether there are preparedness gaps that need plugging? Is it better to inform the public of the likelihood of a certain threat or hazard or keep it from them? Is it better for the public to know what their government and its departments have done or not done to identify such risks and hazards?
>
> In other words, is a public examination of what our government has done in this area a compelling enough reason?
>
> There are compelling examples throughout history, where, in hindsight, the public may have been better served by governments had information been shared earlier on and/or acted upon, rather than withheld. I won't begin to list them here, but the 9/11 attacks in the U.S. is a prime example, as explored in the 9/11 Commission report. Here is a link to chapter 8 (http://www.9-11commission.gov/report/911Report_Ch8.pdf), from which the below excerpt originates:
>
>> In sum, the domestic agencies never mobilized in response to the threat. They did not have direction, and did not have a plan to institute. The borders were not hardened. Transportation systems were not fortified. Electronic surveillance was not targeted against a domestic threat [citation omitted]. State and local law enforcement were not marshalled to augment the FBI's efforts. The public was not warned.

> The terrorists exploited deep institutional failings within our government.

Reply Representations of the Ministry

The Ministry submits in reply that the references the appellant provided relate to the examination of substantive government emergency preparedness plans, government capacity to respond to emergencies and spending issues, rather than the type of information at issue in this appeal. It points out that the withheld portions of the records contain specific risk assessments (and, the Ministry submits, in the case of Record 3f, high level descriptions of the Ministry's emergency preparedness priorities). Furthermore, the Ministry submits that the excerpt from the report referenced by the appellant also does not relate to the type of information at issue in this appeal. Rather, it refers to specific measures that could have been taken to address particular threats instead of ranking threats by their likelihood of occurrence.

The Ministry also submits that the main body of the Ministry's Emergency Response Plan, containing the type of information referred to in some of the references the appellant provided, is available on the Ministry's website. The Ministry submits in this regard that it has already given the appellant access to information that describes the nature of the threats identified in its HIRA and the methodology that it employed in identifying these threats. It submits that it has attempted to provide the appellant with as much information as possible to facilitate public discourse while withholding only that information that could be of assistance to potential terrorists.

Analysis and Findings

In Order MO-2011 Adjudicator John Swaigen addressed a claim by the City of Ottawa that portions of its Vulnerability Analysis Report (VAR) prepared in accordance with the requirement of the *Emergency Management Act*, were exempt under sections 8(1)(e) and (l) of the *Municipal Freedom of Information and Protection of Privacy Act* (*MFFIPA*), the municipal equivalent of sections 14(1)(e) and (l) of the *Act*. After setting out the portion of his decision quoted earlier above, Adjudicator Swaigen wrote:

> Nevertheless, this does not relieve an institution claiming these exemptions from its onus to establish a reasonable basis for believing that endangerment will result from disclosure. What must be protected to prevent the claimed section 8 harms is information that can be reasonably expected to either facilitate creation of the risks or hazards, facilitate the commission of crimes after an emergency has occurred, or impede the ability of law enforcement and other officials to respond to the emergency.
>
> Not all the information that the City wishes to withhold falls within these categories. For example, information about the methodology used to determine the kinds of hazard to which the City is vulnerable; the types of natural and human-made events that may occur; and many of the consequences of these

> events, is largely innocuous or would be obvious to anyone who reads a newspaper, listens to the news, or watches television programs and movies. For example, the City argues that even disclosure of the types of events that may occur is problematic. However, the possibility of earthquakes, ice storms, floods, toxic spills, train derailments, bomb threats, and other hazards and risks, as well as many of their consequences, are public knowledge. For example, see the paper found at tab 9 of the full VAR, which the City argues must be kept confidential, but which is available on a Government of Canada website, and see the paper prepared by Mark Freiman supplied to me by the City, both of which outline these hazards and acknowledge well-known "gaps in preparedness". Moreover, the City has already disclosed much of this information to the appellant in other documents (for example, page 4 of the Five Year Emergency Response Program Action Plan).
>
> *On the other hand, other information such as the ranking of hazards, specific facilities at risk, the specific manner in which a human-created event may be expected to happen, and weaknesses in the response capacity of public agencies, for example, could reasonably be expected to facilitate the harms contemplated by sections 8(1)(e), (i) and (l) in some cases. …* [My emphasis]

I agree with this statement of principle. In my opinion, the withheld information at issue in this appeal relates to the ranking of hazards, the specific manner in which a human-created event may be expected to happen and its potential ramifications, and weaknesses in the response capacity of public agencies. In this case, I am satisfied that the Ministry has provided sufficient evidence to establish a reasonable basis for believing that endangerment under section 14(1)(e) will result from disclosure and that disclosure could reasonable be expected to cause the harms contemplated by section 14(1)(l).

As a result, I find that the discretionary exemptions at sections 14(1)(e) and (l) apply to the withheld information.

Accordingly, it is not necessary for me to determine whether the information also qualifies for exemption under section 14(1)(i), or for that matter, sections 16 and/or 20 of the *Act*.

PUBLIC INTEREST IN DISCLOSURE

The appellant raises the possible application of the "public interest override" at section 23 which reads:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

In *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259 (application for leave to appeal granted, November 29, 2007, File No. 32172 (S.C.C.)), the Ontario Court of Appeal held that the exemptions in sections 14 and 19 are to be "read in" as exemptions that may be overridden by section 23. On behalf of the majority, Justice LaForme stated at paragraphs 25 and 97 of the decision:

> In my view s. 23 of the *Act* infringes s. 2(b) of the *Charter* by failing to extend the public interest override to the law enforcement and solicitor-client privilege exemptions. It is also my view that this infringement cannot be justified under s. 1 of the *Charter*. … I would read the words "14 and 19" into s. 23 of the *Act*.

In order for section 23 to apply, two requirements must be met: first, a compelling public interest in disclosure must exist; and secondly, this compelling public interest must clearly outweigh the purpose of the exemptions (Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused [1999] S.C.C.A. No. 134 (note)).

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564]. A public interest is not automatically established where the requester is a member of the media [Order M-773].

In Order P-984, Adjudicator Holly Big Canoe discussed the first requirement referred to above:

> "Compelling" is defined as "rousing strong interest or attention" (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act*'s central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

If a compelling public interest is established, it must be balanced against the purpose of any exemptions which have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption [See Order P-1398].

In Order PO-2014-I former Assistant Commissioner Tom Mitchinson explained that in certain circumstances the public interest in non-disclosure of records should be considered. He wrote:

> This responsibility to adequately consider the public interest in both disclosure and non-disclosure of records in the context of a section 23 finding was also

> pointed out by the Divisional Court in *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636. Before upholding my decision to apply the public interest override in section 23 and order the disclosure of certain peer review reports on the operation of Hydro facilities, the court in that case stated that it needed to first satisfy itself that ".. in deciding as to the existence of a compelling public interest [I took] into account the public interest in protecting the confidentiality of the peer review process". Once satisfied that I had, the court upheld my section 23 finding.
>
> In my view, the issue of whether there is a compelling public interest in disclosure of records is highly dependent on context. Certain key indicators of compellability can be identified, but each fact situation and each individual record must be independently considered and analysed on the basis of argument and evidence presented by the parties.

The appellant submits that access to the withheld information would allow third parties, such as the media, to examine emergency preparedness plans and assess their adequacy. This, the appellant says, would provide a benefit to the public.

The Ministry submits that it has already given the appellant access to information that describes the nature of the threats identified in its HIRA and the methodology that it employed in identifying these threats. It submits that it has attempted to provide the appellant with as much information as possible to facilitate public discourse, while withholding only that information that could be of assistance to potential terrorists.

Analysis and Findings

I have carefully considered the submissions on the public interest in disclosing the withheld information. In my view, the sensitivity of the information and the potential harm that could arise from its disclosure lead me to conclude that there is no compelling public interest that would override the application of sections 14(1)(e) and (l) and there is, in fact, a compelling public interest in non-disclosure of the withheld information.

Therefore, I conclude that there is no compelling public interest in the disclosure of the withheld information.

EXERCISE OF DISCRETION

Introduction

The sections 14(1)(e) and (l) exemptions are discretionary and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, I may determine whether the Ministry failed to do so.

I may also find that the Ministry erred in exercising its discretion where, for example:

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In all these cases, I may send the matter back to the Ministry for an exercise of discretion based on proper considerations [Order MO-1573].

Relevant considerations

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- 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
  - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person

- the age of the information
- the historic practice of the institution with respect to similar information

Although the appellant made no specific submissions on the Ministry's exercise of discretion he submits generally that this information ought to be disclosed.

The Ministry submits that it took all relevant factors into account when exercising its discretion. It submits that the following factors "weighed heavily" in its considerations:

- the risk that disclosure of the severed portions of the records could potentially result in death or severe bodily harm to individuals, and the fact that the Ministry's exemption claims have been specifically driven by public health and safety concerns;
- the records are from 2005 and as such, the risk analyses and priorities identified in the records are recent and still relevant;
- the Ministry has only severed a very small amount of information from the records, and has disclosed the vast majority of the responsive records to the requester; and
- the information is not personal information relating to the requester.

In my opinion, based upon my review of the representations and the records, the Ministry took into account relevant considerations and did not consider irrelevant ones. In exercising its discretion, I also find that the Ministry applied section 10(2) of the *Act* in a proper manner and reasonably disclosed as much of the records as possible without disclosing material which is exempt [See, in this regard the decision of the Divisional Court in *Ontario (Ministry of Finance) v. Ontario (Assistant Information and Privacy Commissioner)* [1997] 102 O.A.C. 71]. I will not, accordingly, disturb its exercise of discretion on appeal.

ORDER:

I uphold the decision of the Ministry.

Original signed by: June 25, 2008
Steven Faughnan
Adjudicator