ORDER PO-2712

Appeal PA07-36

Ministry of Community Safety and Correctional Services

NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) 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 Assessments (HIRA)'s completed and submitted by Ontario municipalities and ministries. The requester is a journalist who stated that the requested information "is of utmost public interest and for that reason alone should be released."

The requester subsequently clarified with the Ministry that with respect to the first part of his request, he was seeking access to the most current emergency response plans for all Ontario municipalities and ministries on file at Emergency Management Ontario. With respect to the second part of his request, the appellant clarified that he is not seeking access to the provincial HIRA which examines 37 hazards in the Province of Ontario.

After extending the time to respond to the request under section 27(1) of the *Act*, the Ministry issued a decision letter advising that:

- As emergency response plans filed under the *Emergency Management and Civil Protection Act* (*EMCPA*) are publicly available, the discretionary exemption at section 22(a) of the *Act* (information publicly available) applied to them.

- Emergency Management Ontario is not a repository for the HIRA's of municipalities.

- It was transferring the second part of the request to each of the eleven individual ministries that had separately completed and submitted their respective HIRA's.

- It was granting partial access to its own HIRA, relying on the discretionary exemptions at sections 14(1)(e) (endanger life or physical safety), 14(1)(i) endanger security of a building, 14(1)(l) (facilitate unlawful act or hamper control of crime), 16 (prejudice the defence of Canada) and 20 (threaten safety or health) of the *Act*, to deny access to the responsive portions it withheld.

- Certain pages of the HIRA were being withheld because they were non-responsive to the request.

The requester (now the appellant) appealed the Ministry's decision.

During mediation and after reviewing a website that the Ministry had cited in its decision letter, the appellant agreed not to pursue a claim for emergency response plans filed by Ontario municipalities. As a result, access to that information and the application of the section 22(a) discretionary exemption is no longer at issue in the appeal. Also during mediation, the appellant confirmed that he is only seeking access to the withheld responsive portions of the Ministry's HIRA and is appealing the Ministry's claim that the exemptions at sections 14(1)(e), 14(1)(i), 14(1)(l), 16 and 20 apply to that information. He agreed that he would not pursue the portions of the Ministry's HIRA that the Ministry identified as non-responsive to the request. As a result, that information is also no longer at issue in this appeal. Finally, during mediation the appellant

maintained his position that there is a "compelling public interest in the disclosure of the record", thereby raising the possible application of the "public interest override" provision at section 23 of the *Act*. 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. The Ministry asked that a portion of its representations not be shared due to confidentiality concerns. I then sent a Notice of Inquiry, along with a copy of the non-confidential representations of the Ministry, to the appellant. The appellant provided representations in response. I determined that the appellant's representations 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 *EMCPA* 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 *EMCPA* 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 examines the potential risks and analysis of the following five hazards that were assigned to it by Order in Council:

a) building and structural collapse,
b) explosion and structural fire,
c) space object crash,
d) terrorism, and
e) civil disorder.

It explains that its HIRA is the foundation for the Ministry's separate Emergency Management Plan.

RECORD:

The only record at issue in this appeal is the Ministry's HIRA dated September 1, 2005.

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

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].

Representations of the Ministry

The Ministry explains that its HIRA consists of a summary, a description of the five assigned hazards, an analysis of the hazards geographically and by type, a ranking of the hazards qualitatively in a risk analysis matrix and the identification of recommendations and priorities. The Ministry submits that its HIRA also incorporates an Ontario Provincial Police (OPP) worksheet that:

- addresses various procedures and available OPP resources for addressing the hazards and related events;
- identifies the probability of risks and the consequences of various occurrences on a geographic basis as well as indicating the OPP systems in place to deal with them;
- tabulates the identified hazards against geographic region, probability of occurrence, consequences, severities, community impacts, response capabilities, steps available for mitigation and prevention;
- contains remarks relating to preparedness; and,
- reveals the relative geographic strength of various OPP and other emergency response operations.

The Ministry submits that the responsive portions of the OPP Worksheet discuss in considerable detail aspects of each of the hazards from the perspectives of impact to the community and OPP core business, response capabilities, mitigation and prevention as well as preparedness. In addition, the hazards are discussed and ranked according to their probability, consequence and severity. Revealing this information, the Ministry says, would provide the opportunity for ill intentioned groups or individuals to take advantage of any identified geographic disparities in emergency preparedness or to act in identified higher risk areas.

The Ministry submits that all of the information it withheld is not of a general or publicly available nature, but constitutes cautiously compiled Ministry risk assessment evaluations and rankings setting out various consequences and priorities. Furthermore, the Ministry submits that some of the severed portions provide an itemization of vulnerable populations, significant critical infrastructure, as well as identifying potential or present gaps in preparedness and response capacity. The Ministry submits that the nature of the portions of the record at issue themselves identify a system or procedure of emergency response because of the included ranking of the probability and consequences of each of the hazards. The Ministry asserts that the release of this information would be tantamount to the release of information about current and proposed provincial response systems.

The Ministry submits in particular that the gap analysis contained in the record discusses the presence and capability of various established emergency response teams in the province, which includes Chemical Biological Radiological and Nuclear (CBRN) teams, Heavy Urban Search and Rescue (HUSAR) teams and Provincial Emergency Response Teams (PERT). The Ministry submits that because the potential strengths and weaknesses of these teams to deal with particular hazards is discussed in its HIRA, disclosure of the record would endanger the security of various systems in place.

Furthermore, the Ministry submits that some of the severed portions of the record analyse hazards and risks to identified buildings, infrastructure and systems. The Ministry asserts that the severed portions of the record also serve to outline the current system of emergency preparedness. These include the geographic locations of response and tactical teams and the composition of those teams in ways which are intended to inform the analysis of any shortcomings in emergency preparedness. Disclosure of such information, the Ministry submits, could be reasonably expected to endanger the security of buildings and the emergency preparedness systems.

The Ministry submits that:

> This is particularly so in the context of the records at issue, which deal with the subject matter of terrorism, civil disorder, building and structural collapse, as well as fire and explosion threats. Hazards such as terrorism and civil disorder are human-caused, and various forms of terrorism and civil disorder can pose threats to the safety and welfare of the citizens of Ontario. That vulnerabilities addressed in the HIRA were revealed would be to permit advantage to be taken of real or perceived weaknesses in the physical and protective systems in place. Hazards such as terrorism are a continuing threat, as noted by CSIS and Department of Justice sources. [reference omitted] Further the nature of the information addressing the variety of hazards, and the identification of hazards and vulnerabilities from various perspectives could be seen to be providing a more comprehensive view informing the nature of advantages that could be taken against Ontarians with respect to emergency management as a whole.

…

> The severances tend to identify a hierarchy of hazards in terms of their probability and severity, linked to the additional resources necessary and the planning required to address the hazards. Among the hazards identified is terrorism and civil disorder hazards. The HIRA deals with the geographic ranking of probability and consequences of the hazard.
>
> …As the portions of the record remaining at issue speak to gaps in preparedness, and various commentators relate that terrorist activities can take advantage of such "gaps". Further, in the context, disclosure of the portions of the record remaining at issue, notably those dealing expressly with terrorism and civil disorder, but also to a degree evident in all of the risk and hazard identification, and analysis present in the Ministry's HIRA, could reasonably be expected to be injurious to the detection, prevention or suppression of terrorism, espionage or sabotage. Indeed, where vulnerabilities by accident or nature are identified in various infrastructure, they may be likewise vulnerable to more deliberate acts.

The Ministry submits that there is a reasonable basis for concluding that the disclosure of the records remaining at issue could be expected to endanger the physical safety of persons in that such disclosure would reveal specific weaknesses in response capabilities with references to specific locations, specific groups of people, and specific response capabilities.

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, the appellant submitted 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.

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*. Adjudicator Swaigen wrote:

> 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. As already noted, the Divisional Court has stated that, 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.)].
>
> 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 these statements of principle. In my opinion, with one exception, the withheld responsive 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, with one exception, I am satisfied that the Ministry has provided sufficient evidence to establish a reasonable basis for believing that the type of endangerment contemplated by section 14(1)(e) will result from disclosure of that information and that disclosure could reasonably be expected to cause the harms contemplated by section 14(1)(l).

I do not draw the same conclusion with respect to the responsive information severed from page 26 (also marked by the Ministry as page 29) of the record. Although the Ministry's representations are silent on which exemption(s) are claimed for this severance, the severed copy of the record the Ministry provided to this office indicates that the discretionary exemption at section 14(1)(l) has been claimed to apply to it. In my view, however, the information contained in that severance would be obvious to someone familiar with the context in which it appears and lacks the degree of specificity that can be reasonably expected to either 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. As no other discretionary exemptions are claimed for this information, and in my view no mandatory exemptions would apply, I shall order that the information severed from page 26 (also marked by the Ministry as page 29) be disclosed to the appellant.

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

Accordingly, it is not necessary for me to determine whether the information I have not ordered disclosed 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 the public interest in the disclosure of the information relating to provincial emergency preparedness has already been addressed as a result of its disclosing a large portion of its HIRA to the appellant and the public availability of the Ministry's emergency

response plan, which is incorporated into its HIRA. The Ministry further submits that the nature of its HIRA favours a public interest in non-disclosure of the portions it withheld.

Analysis and Findings

I have carefully considered the submissions on the public interest in disclosing the information that I have found to be subject to sections 14(1)(e) and (l). 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). In my view there is, in fact, a compelling public interest in non-disclosure of the information that I have found to be subject to those discretionary exemptions.

Therefore, I conclude that there is no compelling public interest in the disclosure of the information that I have found to fall within the section 14(1)(e) and (l) discretionary exemptions and that section 23 has no application in these circumstances.

EXERCISE OF DISCRETION

Introduction

The exemptions in sections 14(1)(e) and (l) 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 it considered the following factors in its considerations:

- the future harm to activities related to the evaluation of risks and emergency planning;
- the confidentiality of information in some instances is necessary for public safety and security;
- 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 provided partial access to the record; 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 to withhold the information that I have found to fall under the sections 14(1)(e) and (l) exemptions.

ORDER:

1. I order the Ministry to disclose to the appellant the withheld portion of page 26 (also marked by the Ministry as page 29) of the record by sending it to the appellant by **October 2, 2008 but not before September 26, 2008**.

2. In all other respects I uphold the Ministry's decision.

3. In order to verify compliance with provision 1 of this order, I reserve the right to require the Ministry to provide me with a copy of the information ordered to be disclosed to the appellant.

August 28, 2008

Steven Faughnan
Adjudicator