

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

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## ORDER PO-3847-F

Appeal PA13-436

Ministry of Natural Resources and Forestry

May 25, 2018

**Summary:** This final order involves a review of the exercise of discretion by the Ministry of Natural Resources and Forestry to withhold records under section 15(a). In Interim Order PO-3817-I, the adjudicator permitted the affected party first nation to raise the discretionary exemption in section 15 (relations with other governments), although the ministry did not initially claim it. Upon concluding that section 15(a) could apply to the records at issue that related to negotiations between the province and the first nation regarding the harvesting of deer in a provincial park, the adjudicator ordered the ministry to exercise its discretion under section 15(a) because there had been no such exercise. In this final order, the adjudicator upholds the ministry's exercise of discretion under section 15(a), and she dismisses the appeal.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 15(a).

**Orders Considered:** Orders PO-3817-I and PO-3649-I.

### OVERVIEW:

[1] This final order concludes Appeal PA13-436, which was opened to address the issues raised by an access request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) to the Ministry of Natural Resources and Forestry (the ministry) for records related to a June 20, 2013 meeting between Ontario Parks and the

Haudenosaunee.<sup>1</sup> The request noted that the meeting related to “deer hunting in Short Hills [Provincial] Park” and sought correspondence arranging the meeting, minutes and notes of the meeting, and follow-up comments.

[2] In its initial decision, the ministry granted access to some of the responsive records in full, while withholding portions of other records under sections 14 (law enforcement), 18 (economic and other interests), 19 (solicitor-client privilege) and 21(1) (personal privacy). In a supplementary decision, the ministry withheld additional information under sections 18(1)(d) and (e). During mediation of the appeal, the appellant decided not to pursue access to certain information that had been withheld under sections 14, 18(1)(d) and 21(1), thereby narrowing the appeal’s scope. During the inquiry, the First Nation sought to raise the application of section 15 (relations with other governments), which is a discretionary exemption in *FIPPA* and one the ministry had not relied on to deny access.

[3] In the first interim order issued in Appeal PA13-436, Interim Order PO-3649-I, Adjudicator Cathy Hamilton partly upheld the ministry’s access decision. The adjudicator concluded that section 19 applied to the records for which it had been claimed and that section 18(1)(e) applied to only some of the records for which it had been claimed. The adjudicator upheld the ministry’s exercise of discretion under sections 18 and 19 and concluded that the public interest override did not apply. The adjudicator deferred her decision on the HWHA’s claim that the discretionary exemption in section 15 (relations with other governments) applied.

[4] After Interim Order PO-3649-I was issued, the adjudicator continued her inquiry into the appeal by seeking representations from the parties on the First Nation’s entitlement to raise the discretionary section 15 exemption in the circumstances of this appeal, as well as on the possible application of the exemption. The adjudicator received representations from the HWHA and the ministry and subsequently provided those representations to the appellant. Other affected parties were also given an opportunity to participate in the appeal, directly or indirectly.<sup>2</sup> Following the exchange of representations by participating parties, the appeal was transferred to me.

[5] In Interim Order PO-3817-I, I held that the circumstances of the appeal constituted one of those rare occasions where an affected party may raise a discretionary exemption, and I allowed the First Nation to raise section 15. I found that the information remaining at issue following Interim Order PO-3649-I met the

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<sup>1</sup> As noted in Interim Order PO-3817-I, the *FIPPA* institution is the ministry, but “Ontario Parks” and “Government of Ontario” may be used interchangeably, given the specific context. Similarly, I refer to the affected party as the First Nation or HWHA (Haudenosaunee Wildlife and Habitat Authority).

<sup>2</sup> The adjudicator notified a second affected party, Aboriginal Affairs and Northern Development Canada, but did not receive representations. During the inquiry, the ministry also indicated that it had consulted with the Ministry of Indigenous Relations and Reconciliation, the Ministry of Government and Consumer Services and Ministry of the Attorney General in preparing its representations.

requirements for exemption under section 15(a) of *FIPPA*, and that the public interest override in section 23 did not apply. In the result, I ordered the ministry to exercise its discretion under section 15(a), and to provide me with its decision on the exemption and reasons for its exercise of discretion. The ministry exercised its discretion under section 15(a) to withhold the records remaining at issue and provided representations explaining why it decided to do so. I provided the ministry's representations and a Supplementary Notice of Inquiry to the appellant to offer her an opportunity to comment on the ministry's exercise of discretion under section 15(a) to withhold the records. The appellant did not respond.

[6] In this final order, I uphold the ministry's exercise of discretion to withhold the records under section 15(a) of *FIPPA*.

## **RECORDS:**

[7] In Interim Order PO-3817-I, I concluded that the following records met the requirements for the application of section 15(a): pages 14-18 (duplicated at 87-91), 20-24, 30-31 (duplicated in 32-33), 34-36, 41 (in part), 44-45 (partially duplicated in 58 and 61), 60, 63-65, and 72-73.

## **DISCUSSION:**

### **Should the ministry's exercise of discretion under section 15(a) be upheld?**

[8] Upon concluding that the First Nation could raise the discretionary exemption in section 15 and that section 15(a) applied to the records at issue, I returned the matter to the ministry for an exercise of discretion. I stated:

[72] There remains an outstanding matter with the exercise of discretion under section 15(a) in light of my conclusion that the records at issue qualify for exemption from disclosure on that basis. In the usual course, after making a finding that a discretionary exemption applies, the adjudicator must then determine whether the institution exercised its discretion under the particular exemption and, if so, whether that exercise of discretion should be upheld.

[73] In this appeal, it is clear that the MNRF did not exercise its discretion under section 15(a) because it had concluded that it could not claim the exemption. There may be parallels between the reasons given by the MNRF for its exercise of discretion under section 18 [footnote omitted] and reasons for an exercise of discretion under section 15(a) that could be inferred from the available evidence. However, the reality is that there is no direct evidence of the exercise of discretion under section 15(a) by the ministry before me. Section 54(2) of the *Act* precludes me

from substituting my own discretion for that of the institution. Similarly, in my view, I am also precluded from inferring evidence of an exercise of discretion that the ministry simply did not make under section 15(a).

[74] An institution's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. Since I have permitted section 15 to be raised by the First Nation, and I have found that section 15(a) applies and that the public interest override in section 23 does not, I will send this matter back to the MNRF to exercise its discretion under section 15(a) for the purpose of making a decision whether or not to withhold the undisclosed records.

[75] Upon exercising its discretion, the ministry is asked to provide me with representations explaining how it has exercised its discretion under section 15(a). The representations should identify what considerations the ministry decided were relevant under section 15(a) in the circumstances of this appeal.

[9] In the interim order, I also set out a list of the considerations generally applied to a review of the exercise of discretion by an institution, noting that additional unlisted considerations could also be relevant.<sup>3</sup> The list of relevant considerations includes:

- 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 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

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<sup>3</sup> Orders P-344 and MO-1573.

- 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.

### ***Ministry's representations***

[10] The ministry's representations begin with the statement that the finding in Interim Order PO-3817-I that section 15(a) applies to the records is consistent with the legislative and policy intent that informed the expansion of the protections in section 15 to "Aboriginal communities" with the passing of the new section 15.1 exemption.

[11] According to the ministry, it took numerous considerations into account in its decision to withhold the records under section 15(a). The ministry submits that it considered the following factors to be relevant to the exercise of discretion:

- Releasing the records would harm the anticipated future negotiations with the HWHA about subsequent hunts in Short Hills Provincial Park by discouraging the sharing of documents and open discussion between the ministry and the HWHA;
- Releasing these records could undermine ongoing and future negotiations with the HWHA more generally;
- Releasing the records could also compromise ongoing and future negotiations with other first nations with whom the provincial government continues to negotiate;
- Other records or portions of records were disclosed to the appellant by the ministry's original access decision;
- The release of these particular records would not materially add to the debate around issues of public safety related to the Short Hills Provincial Park deer harvest and would not, therefore, increase public confidence in the ministry's operations;
- The ministry is unaware of there being a sympathetic or compelling need for the appellant to receive the information;
- The passage of time since the appellant first submitted the request in 2013 has not significantly altered the relevance of the considerations related to the impact of releasing the records on ongoing or future negotiations with first nations, as set out in the first three bullet points, above; and

- These are records that the IPC has determined (in Interim Order PO-3817-I) qualify for exemption under section 15(a) of *FIPPA*.

[12] The ministry submits that after balancing the listed considerations with the purpose of section 15(a), it concluded that the factors that weighed against disclosure outweighed those considerations that may have favoured disclosure of the records. Finally, the ministry notes that section 15.1 of *FIPPA* is now in force (which it was not at the time of Interim Order PO-3817-I) and it submits that section 15.1 would now apply and be claimed if the ministry were to receive an access request for these same records in the future.

[13] As noted, the appellant did not respond to the request for submissions on the ministry's representations regarding the exercise of discretion under section 15(a).

### ***Analysis and findings***

[14] The exercise of discretion by an institution must be made in full appreciation of the facts of the appeal, and upon proper application of the relevant principles of law in the specific case.<sup>4</sup> My responsibility is to ensure that the institution exercises its discretion in accordance with the *Act*.

[15] As I observed in Interim Order PO-3817-I, section 54(2) of *FIPPA* precludes me from substituting my own discretion for that of an institution. However, I do have the authority to order an institution to reconsider the exercise of discretion if the evidence leads me to conclude that discretion has not been exercised properly.<sup>5</sup>

[16] In the previous section, I set out the factors that are typically considered in reviewing an institution's exercise of discretion. As the appellant did not provide representations to challenge the ministry's exercise of discretion, there is no suggestion, or evidence, that the ministry erred in exercising its discretion, that it acted in bad faith or for an improper purpose, or that it considered irrelevant factors in choosing to withhold the information at issue under section 15(a). Rather, based on the ministry's representations, I am satisfied that it properly exercised its discretion and that it considered factors that were appropriate in doing so.

[17] In particular, I find the following aspects of the ministry's exercise of discretion in this situation to be indicative of a good faith consideration of relevant factors: the purpose of the exemption, the specific nature of the information and its connection to the parties, the public interest, and the disclosure that has otherwise been provided to the appellant.

[18] To begin, the ministry considered the purpose of the section 15(a) exemption.

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<sup>4</sup> Order MO-1287-I.

<sup>5</sup> Order 58.

Section 15 recognizes that the Ontario government and its institutions will create and receive records in the course of their relations with other governments. The value of intergovernmental contacts and the importance of protecting these working relationships is embodied by section 15(a).<sup>6</sup> Here, I accept the ministry's submission that withholding the records that remain at issue is consistent with the legislative and policy intent that informed the expansion of the protections in section 15 to the working relationships with first nations with the enacting of section 15.1 of *FIPPA*.<sup>7</sup> About the amendment, I stated the following in Interim Order PO-3817-I:

[44] As of the date of this order, the new section 15.1 has not been proclaimed and is not yet in force. However, these amendments clearly stand as the legislative recognition that relations between first nations and the provincial government are to be considered "intergovernmental" for the purposes of *FIPPA* and *MFIPPA*. On the passing of Bill 127, Commissioner Brian Beamish stated: "The amendments recognize the important status of our Aboriginal communities and provide them with the same rights as other governments under these acts."

[19] In this context, therefore, I find that the ministry's evidence that it exercised its discretion in accordance with the purpose of the exemption to provide support for a conclusion that legitimate considerations influenced the decision.

[20] Next, based on my review of the withheld information, I also accept that the nature of it is such that there is no sympathetic or compelling need for its disclosure to the appellant or to the public, generally. I agree with the ministry that the disclosure of this particular information would not significantly contribute to the discussion of the public safety issues around the deer harvest in Short Hills Provincial Park.

[21] Conversely, the ministry's representations on its exercise of discretion highlight an additional relevant consideration of the extent to which this information is sensitive to the HWWA. Here, I accept that the ministry considered both the possible public interest in the disclosure of the information *and* the governmental interests that would be protected by its non-disclosure. I note that the First Nation provided evidence of the harm to ongoing and future negotiations that could be expected, if the information were to be disclosed. This was evidence I accepted in Interim Order PO-3817-I in concluding that the information qualified for exemption under section 15(a). In my

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<sup>6</sup> Orders PO-2247, PO-2369-F, PO-2715 and PO-2734.

<sup>7</sup> As proclaimed into force on March 9, 2018, section 15.1(1) of *FIPPA* states that: "A head may refuse to disclose a record where the disclosure could reasonably be expected to, (a) prejudice the conduct of relations between an Aboriginal community and the Government of Ontario or an institution; or (b) reveal information received in confidence from an Aboriginal community by an institution. Footnote 20 in Interim Order PO-3817-I noted that "Bill 127 received Royal Assent on May 17, 2017. Schedule 13 of the bill amends *FIPPA* (with similar amendments to section 9 of *MFIPPA* in Schedule 20) by creating section 15.1. Subsection (2), not set out above, defines 'Aboriginal community'."

view, the ministry's submissions about exercising its discretion to withhold the information under section 15(a) demonstrate its awareness that protecting the information is closely connected with ensuring the integrity and functionality of its working relationship with the HWHA.<sup>8</sup> Again, this highlights the purpose of the exemption in section 15(a), which is to protect the relationship itself to promote effective negotiations between the provincial government and the Haudenosaunee on this specific matter, but also with other first nations in other situations (although clearly, the exemption of information must be determined on a case-by-case basis). Here, I accept as valid the ministry's submission that the passage of time did not weigh in favour of disclosure of the remaining June 2013 meeting records, given its view that the potentially negative impact of disclosure on the relationship did not seem lessened by the age of the information.

[22] Finally, I find that the ministry also considered a relevant factor in recognizing that it had disclosed other records to the appellant. I accept that the partial disclosure afforded the appellant by the ministry's access decision, and the further disclosure through Interim Order PO-3649-I, serves as recognition of *FIPPA*'s important purpose of ensuring that information should be available to the public and that exemptions from the right of access should be limited and specific.

[23] In sum, therefore, I am satisfied that the ministry's explanation for its exercise of discretion to withhold the remaining records under section 15(a) demonstrates that it considered relevant factors. As a result, I am now in a position to conclude this appeal. Therefore, I uphold the ministry's decision to deny access to pages 14-18 (duplicated at 87-91), 20-24, 30-31 (duplicated in 32-33), 34-36, 41 (in part), 44-45 (partially duplicated in 58 and 61), 60, 63-65, and 72-73 under section 15(a) of *FIPPA*.

**ORDER:**

I uphold the ministry's decision to withhold the records under section 15(a), and I dismiss the appeal.

Original Signed by: \_\_\_\_\_  
Daphne Loukidelis  
Adjudicator

\_\_\_\_\_ May 25, 2018

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<sup>8</sup> The HWHA's explanation of its related concerns about the effect of disclosure of information about the deer harvest were set out at paragraphs 36 and 37 of Interim Order PO-3817-I.