

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER PO-4230-F

Appeals PA19-00258 and PA19-00259

Ministry of Northern Development, Mines, Natural Resources and Forestry

January 28, 2022

Summary: This final order deals with whether the Ministry of Northern Development, Mines, Natural Resources and Forestry (the ministry) properly re-exercised its discretion in withholding the body and drafts of a ministry wildfire investigation report under section 14(2)(a) (law enforcement report) of the *Freedom of Information and Protection of Privacy Act* (the *Act*). In this final order, the adjudicator upholds the ministry's re-exercise of discretion and dismisses the appeals.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 14(2)(a) and 54(2).

OVERVIEW:

[1] This final order disposes of the remaining issue in these appeals, which is whether the Ministry of Northern Development, Mines, Natural Resources and Forestry (the ministry) properly re-exercised its discretion in deciding to withhold the body and drafts of a ministry wildfire investigation report under section 14(2)(a) of the *Act*.

[2] Two access requests were made to the ministry for the investigation report relating to a wildfire that occurred in the Parry Sound area with its attached films, electronic records, emails, plans, drawings, photographs, sound recordings, voicemails and DVDs, as well as drafts of the report and their covering emails. The fire, known as Parry Sound 33 (PS 33), was significant and garnered public attention. The requester is a member of the media.

[3] The ministry located records responsive to the request, the Wildfire Investigation Report, attachments, and its draft versions, and notified four third parties of the request. In the end, the ministry issued decisions to the requester denying access to the records in full, claiming the application of the discretionary exemption in section 14(2)(a) (law enforcement report) of the *Act* to all of them.

[4] The requester, now the appellant, appealed the ministry's decisions to the office of the Information and Privacy Commissioner/Ontario (the IPC). Appeal file PA19-00258 was opened, which deals with access to the final Wildfire Investigation Report and its attachments. Appeal file PA19-00259 was opened, which deals with access to the draft versions of the report. The drafts reports do not have the attachments.

[5] During the mediation of the appeal, the ministry issued a revised decision to the appellant disclosing six pages of the attachments to the final Wildfire Investigation Report.

[6] The appellant subsequently advised the mediator that he wished to proceed to adjudication to try to obtain access to the remaining records.

[7] The files were then transferred to the adjudication stage of the appeals process in which an adjudicator may conduct an inquiry under the *Act*. The adjudicator assigned to the appeals sought and received representations from the ministry and the appellant. Portions of the ministry's representations were withheld as they met the IPC's confidentiality criteria.¹ The files were then transferred to me to continue the adjudication of the appeal.

[8] In Interim Order PO-4206-I², I found that the body of the wildfire report and its drafts were exempt from disclosure under the discretionary exemption in section 14(2)(a), while the attachments were not. I also found that the ministry did not properly exercise its discretion in deciding to withhold the body of the report, both final and draft. In making my finding regarding the ministry's exercise of discretion, I stated:

Based on the ministry's representations on its decision to apply the discretionary section 14(2)(a) exemption, I am not satisfied that it considered all of the relevant factors in exercising its discretion. While I am not suggesting that the ministry exercised its discretion in bad faith, I am not satisfied that it exercised its discretion properly and took into account all relevant considerations. In particular, relevant factors for the ministry to consider are whether there is a continuing public interest in the disclosure of the report, whether the disclosure of the record would promote public confidence in the ministry and whether the non-disclosure of the record would undermine public confidence in the ministry. While the ministry says it took into account its opinion that the report would not

¹ Set out in Practice Direction 7 of the IPC's Code of Procedure.

² See also related Interim Orders PO-4205-I and PO-4207-I.

undermine confidence in the ministry, it does not appear to have taken into account these other factors. As a result, I will order the ministry to re-exercise its discretion.

[9] As a result, I ordered the ministry to disclose the attachments to the appellant, and to re-exercise its discretion with respect to the body of the report, both final and draft, as set out in Order provision 3, which states:

I order the ministry to re-exercise its discretion under section 14(2)(a) with respect to the wildfire investigation report and to provide the IPC with representations on its exercise of discretion within 30 days of the date of this order.

[10] The ministry maintained its decision to withhold the body of the report, both final and draft. I received representations from the ministry on its re-exercise of discretion and provided the appellant with a copy of those representations and the opportunity to respond. Portions of the ministry's representations on its re-exercise of discretion were withheld from the appellant, as they meet the IPC's confidentiality criteria. I also received representations from the appellant.

[11] For the reasons that follow, I uphold the ministry's re-exercise of discretion.

DISCUSSION:

[12] The sole issue is whether the ministry properly re-exercised its discretion in deciding to withhold the body of the wildfire investigation report, both final and draft, under section 14(2)(a) of the *Act*.

[13] The section 14(2)(a) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[14] In addition, the IPC may find that the institution 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, or it fails to take into account relevant considerations.

[15] In either case, an IPC adjudicator may send the matter back to the institution for an exercise of discretion based on proper considerations.³ I may not, however, substitute my own discretion for that of the institution.⁴

[16] Relevant considerations may include those listed below. However, not all those

³ Order MO-1573.

⁴ See section 54(2).

listed will necessarily be relevant, and additional unlisted considerations may be relevant:⁵

- 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 and 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, and
- the historic practice of the institution with respect to similar information.

Representations

[17] The ministry⁶ submits that it re-exercised its discretion, taking into account whether there is a continuing public interest in the disclosure of the report, whether disclosure of the report would promote public confidence in the ministry, and whether non-disclosure of the report would undermine public confidence in the ministry.

[18] The ministry further submits that it is clear that there was a significant amount of public interest at the time of the fire and during the investigation and that the appellant continues to seek the disclosure of the report, both final and draft. However, the ministry argues, since it issued a press release about the wildfire investigation, it has not been aware of any ongoing interest from the public in the disclosure of the report. As a result, the ministry concludes, this public interest factor does not give considerable weight either for or against the disclosure of the report.

⁵ Orders P-344 and MO-1573.

⁶ The ministry provided joint representations for Interim Orders PO-4205-I, PO-4206-I and PO-4207-I, which share the wildfire investigation report in common.

[19] Taking the other two factors into account, that is, the public confidence factors, the ministry's position is that disclosing the report would not undermine public confidence in it. However, the ministry goes on to argue that, on the one hand, the report shows that an effective investigation was undertaken by it, including the retention of an expert, which would presumably promote public confidence in the ministry. On the other hand, the ministry submits, the disclosure of the report might not prove to promote public confidence in the ministry. Concerning the non-disclosure of the report having any negative impact on the public's confidence in the ministry, it submits that it conducts hundreds of fire investigations each year and that it is viewed as experienced and skilled at conducting them and is not generally questioned in this regard. The ministry submits that, as a result, the non-disclosure of the report is not likely to call into question or undermine the public confidence in it.

[20] In support of its position on the public confidence issue, the ministry relies on Order PO-3904-F, which dealt with an investigation report, which the Ministry of the Attorney General (MAG) withheld under section 14(2)(a). In that appeal, MAG submitted the following, which was set out in the Order:

The ministry submits that it is unclear whether the release of this particular report to this particular appellant would increase public confidence in the institution. That is, while the appellant herself might or might not gain greater confidence in the work of the SIU were she granted access to the report, it is not certain what the impact of her opinion would be with respect to the general public's confidence in the institution.

[21] The ministry further argues that it weighed the considerations which I ordered it to consider in relation to the public interest/confidence factors against the purpose of the exemption in section 14(2)(a) and the interests that it seeks to protect. In this regard, the ministry submits that the purpose of section 14 of the *Act* is to maintain the integrity of investigations, public confidence in investigations and the further or protect public assistance in investigative processes. The ministry's position is that investigators should be free to give advice and make findings or recommendations in reports without fear of public reprisal. Similarly, the ministry submits, such investigations may depend on assistance from persons who do not wish to be identified.

[22] The ministry goes on to submit that it again considered the purposes of the *Act* including that information should be available to the public, individuals should have a right of access to their own personal information, exemptions should be limited and specific and the privacy of individuals should be protected. The ministry also submits that extensive and significant disclosure has already been made in this case, including the records that formed the basis for the report and that the body of the report falls squarely within the exemption in section 14(2)(a), to the extent that the exemption was applied in a limited and specific manner.

[23] The ministry further submits that the report is focused on who started that particular fire and if anyone committed an offence under the *Forest Fire Prevention Act*, rather than the broader concerns raised by the appellant such as the affected landscape, climate change issues or even fire suppression processes or efficacy.

[24] In addition, the ministry submits that it took other factors into consideration when re-exercising its discretion such as:

- Its historical practice with respect to these types of reports. At times it has disclosed wildfire investigation reports. The decision in this case was based on the investigative and evaluative content of the report, the number of parties interviewed and referred to and the sensitivity that stems from that, and
- The fact that the report does not describe or shed light on the ministry's wildfire fighting regime given that its approach to fighting or suppressing the fire is not dealt with in the report, except to a small extent where the topic comes up in a way that is incidental to the carrying out of the investigation into the cause of the fire.

[25] Concerning the draft versions of the report, the ministry notes that, as is the case with the final report, my interim order found the drafts met the three-part test to qualify as a report under section 14(2)(a) of the *Act*. The ministry also argues that its re-exercise of discretion applies equally to the draft versions of the report.

[26] In conclusion, the ministry states:

As part of this re-exercise, the ministry has put its mind to the various relevant factors – particularly the three ordered by the Adjudicator – and carefully considered the requests by the appellants⁷ and the particular record in question. In weighing the relevant factors, and for the reasons described above, the ministry finds in favour of exercising this discretionary exemption. In other words, the ministry finds – taking into account the nature, purpose and content of the Report – in favour of applying the exemption, being of the view that the purpose of the exemption in the context of this Report has more weight than the benefits of disclosing the Report, even considering the three public interest/confidence factors as required in the recent Orders, the purposes of the *Act*, and the sympathetic circumstances of some of the appellants. .

[27] The appellant provided background information regarding the circumstances of the fire. Specifically, the appellant submits that construction crews working in a remote forest in extreme tinder dry conditions on a First Nation industrial windfarm development sparked a fire with their all terrain vehicle working deep in the forest. The

⁷ See note 6.

appellant further submits that the fire devastated a vast tract of land on the eastern shores of Georgian Bay, resulting in the decimation of the forest, wildlife, numerous homes and cottages, forcing the evacuation of thousands of people over many weeks. He further argues that the province spent millions to fight the fire, and that no one was charged or fined and, therefore, no one was held accountable for igniting the fire. The appellant goes on to state that individuals he interviewed recounted numerous fires sparked at the site in the days before PS 33 and that despite provincial warnings of extreme forest fire hazard, the massive industrial development deep in the forest continued unabated. In addition, the appellant submits that the investigation report is the only official examination of the incident.

[28] The appellant submits that the ministry's re-exercise of discretion is an "abject failure" and that the ministry did not weigh the public interest in the disclosure of the wildfire investigation report, and was also silent on the fact that a major media organization⁸ continues to request this report based on wide-ranging public interest questions. In particular, the appellant's position is that the ministry has failed to provide credible evidence of any harms to public confidence in the ministry that could arise from the release of the report. The appellant goes on to state:

Further, I contend the Ministry's refusal to release the report arises from a conflict of interest. Release of this report would attract media attention. The Ministry would face scrutiny. Media coverage of the Ministry's handling of this case might reflect poorly on the forest fire prevention regime. . .

Whether "bad faith, or improper purpose" it appears the Ministry is withholding the record, using its exemptions under the *Act*, offering no real justification, in a self-serving act of shielding itself from scrutiny.

[29] The appellant then articulates his position regarding the purpose of the exemption in section 14(2)(a), which I upheld in Interim Order PO-4206-I. He submits that the intent of section 14 is to prevent harm to law enforcement, and that the ministry has provided no specific evidence of any risk. Further, he submits that the ministry has argued that its investigators must be free to make findings and recommendations free from public reprisal. In the appellant's view, public scrutiny of the report is not the same as public reprisal.

[30] He also counters the ministry's argument that investigations may depend on assistance from individuals who do not wish to be identified. He submits that there are mechanisms available to law enforcement including providing confidential informer status, or anonymity or severing individuals' names within investigative reports. The appellant states:

⁸ As previously stated, the appellant is a member of the media.

The Ministry simply relies on the fact the record originated from a law enforcement investigation, without offering any substantive justification or evidence of potential harm to justify withholding the record in this case.

[31] In addition, the appellant submits that the ministry has conceded it has released these types of reports to the public previously, but inexplicably is withholding it in this case.

[32] Lastly, the appellant provided links to a news story he published related to the fire, which has two pieces of video embedded in it, which help capture the fire's destruction and the impact it had on one family.

Analysis and finding

[33] As previously stated, the sole issue in this final order is whether the ministry properly re-exercised its discretion under section 14(2)(a) as ordered to do so in Interim Order PO-4206-I. The issue as to whether the exemption in section 14(2)(a) applies to the wildfire investigation reports, both final and draft, was decided in Interim Order PO-4206-I and is not at issue in this final order. As noted above, the appellant has argued that the ministry's section 14(2)(a) exemption claim was not substantiated and the ministry should have claimed other exemptions to protect the names of specific individuals in the report. However, the application of section 14(2)(a) is not the issue before me in this final order.

[34] I further note that, with respect to an institution's exercise of discretion, an IPC adjudicator may send the matter back to the institution for an exercise of discretion based on proper considerations.⁹ I may not, however, substitute my own discretion for that of the institution.¹⁰ In Interim Order PO-4206-I, I specifically ordered the ministry to take into consideration re-exercising its discretion in whether there is a continuing public interest in the disclosure of the report, whether disclosure of the report would promote public confidence in the ministry, and whether non-disclosure of the report would undermine public confidence in the ministry.

[35] Based on the ministry's representations, I am satisfied that it properly re-exercised its discretion because it took into account relevant considerations, including the considerations set out in Interim Order PO-4206-I, and did not take into account irrelevant considerations. I am satisfied that the ministry considered the possible public interest in the disclosure of the record, both final and draft, as well as the privacy interests of the personal information of individuals contained in the records. I also note that the ministry disclosed some records to the appellant. In addition, further records have been disclosed to the appellant as a result of Interim Order PO-4206-I. I find that in re-exercising its discretion, the ministry took into consideration the purposes of the Act, including the principle that exemptions from the right of access should be limited

⁹ Order MO-1573.

¹⁰ See section 54(2).

and specific. I further find, despite the appellant's assertions, that the ministry re-exercised its discretion neither in bad faith nor for an improper purpose. There is no evidence that is the case. Consequently, for all of these reasons, I uphold the ministry's re-exercise of discretion under section 14(2)(a) to the body of the wildfire investigation report, both final and draft.

ORDER:

I uphold the ministry's re-exercise of discretion and dismiss the appeals.

Original Signed by: _____
Cathy Hamilton
Adjudicator

_____ January 28, 2022