

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-4328

Appeal PA20-00598

Ministry of Agriculture, Food and Rural Affairs

December 20, 2022

**Summary:** The Ministry of Agriculture, Food and Rural Affairs (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information about the species and numbers of certain animals at a research facility contained in a certain form used by the ministry. The ministry issued an access decision granting partial access to the information at issue, withholding the name of the owner of the research facility, the certificate number, and the signatory to the form.

The third party owner of the research facility appealed the ministry's access decision and attempted to raise the application of the discretionary exemptions in sections 14(e), (i) and (l), and 20 to information about certain species of animals located at the research facility.

In this order, the adjudicator finds that the third party appellant is not permitted to raise the application of the discretionary law enforcement exemptions in sections 14(e), (i) and (l), and 20 (danger to safety or health), and upholds the ministry's decision.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 14(e), (i) and (l), and 20.

**Orders Considered:** Orders PO-1787, P-1137, and R-980015.

### OVERVIEW:

[1] This order concerns whether a third party is permitted to raise the application of discretionary exemptions not claimed by an institution. The request at issue in this

appeal is for information in a form about the species and numbers of certain animals located at a research facility.

[2] The Ministry of Agriculture, Food and Rural Affairs (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* for:

All records that research institutions submit to Ministry of Agriculture, Food and Rural Affairs for the document titled "Total Animals Used for Research/Teaching/Testing in a Research Facility" during 2017.

The relevant period for the request is the 2017 reporting year.

[3] After identifying a responsive record relating to the request, the ministry notified a third party under section 28(1) of the *Act* to obtain its views regarding disclosure of the record. Following third party notification, the ministry issued a decision granting partial access to the record. Access to the withheld information was denied pursuant to sections 14(1)(e) (endanger life or safety) and 14(1)(i) (security), and 20 (danger to safety or health) of the *Act*.

[4] The third party, now the third party appellant (or the appellant), appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (the IPC) to disclose information about certain animal species in the record, and a mediator was appointed to explore the possibility of resolving the issues.

[5] During mediation, the appellant provided consent to the release of parts of the record to the requester.

[6] After receiving the consent from the appellant, the ministry provided the requester with partial access to the parts of the record that were subject to the appellant's consent.

[7] After reviewing the record, the requester advised the mediator that she wished to pursue access to the remaining part of the record subject to this third party appeal. The requester did not file her own appeal of the ministry's partial access decision; therefore, information withheld by the ministry is not at issue in this appeal (i.e. the name of the owner of the research facility, the certificate number, and the signatory to the form).

[8] The appellant advised the mediator that it objects to the disclosure to the requester of information about certain species of animals housed at the appellant's research facility. Its position was that this information should be withheld pursuant to the sections cited by the ministry in its decision letter (sections 14(1)(e) and (i), and 20), as well as section 14(1)(l) (facilitate commission of an unlawful act) of the *Act* which was not cited by the ministry.

[9] The requester contended that there is a compelling public interest in the disclosure of the record as described at section 23 of the *Act*.

[10] The parties were unable to resolve the issues under appeal through the process of mediation. Accordingly, the file was referred to adjudication, where an adjudicator may conduct an inquiry.

[11] I decided to conduct an inquiry and I sought the appellant's and the requester's representations, which were shared in accordance with the IPC's *Practice Direction 7*.

[12] In the inquiry, I decided to consider whether the third party appellant is permitted to raise the application of discretionary exemptions when the ministry did not.

[13] I advised the parties that if I decide that the appellant is allowed to raise the discretionary exemptions at sections 14(1)(e), (i) and (l), and 20, I will then consider the application of these exemptions to the information at issue in the record.

[14] In this order, I find that the third party appellant is not permitted to raise the application of the discretionary exemptions in sections 14(e), (i) and (l), and 20. Therefore, I order disclosure of the information at issue in the record.

## **RECORD:**

[15] The record at issue is an Animal Use Data Form (the form), identified by the ministry as Record 5. At issue are the names and numbers of certain species of animals housed at the appellant's research facility in 2017, as contained in the form.

[16] Not at issue in this appeal is the information in the form that the ministry has withheld from disclosure, namely, the appellant's name, certificate number, and the name and signature of the appellant's representative who signed the form.

## **DISCUSSION:**

**Should the third party appellant be permitted to raise the discretionary exemptions in sections 14(1)(e), (i) and (l), and 20 to the information at issue in the form?**

[17] The third party appellant takes the position that the discretionary exemptions in sections 14(1)(e), (i) and (l), and 20 apply to certain information in the form that the ministry decided to disclose.

[18] Some exemptions in the *Act* are mandatory; if a record qualifies for exemption under a mandatory exemption, the head of an institution "shall" refuse to disclose it.

However, a discretionary exemption uses the word “may” and in choosing that language, the Legislature expressly contemplated that the head of the institution retains the discretion to claim (or not) such an exemption to support its decision to deny access to a record.

[19] A number of past orders have considered the issue of whether a party other than the institution can claim a discretionary exemption.<sup>1</sup> Generally, where a third party raises the possible application of a discretionary exemption, the adjudicator must consider the situation before her in the context of the purposes of the *Act* to decide whether the appeal might constitute the “most unusual of circumstances” in which such a claim should be allowed.

### ***Representations***

[20] The parties were asked to provide representations on whether the third party appellant should be permitted to raise the discretionary exemptions in sections 14(1)(e), (i) and (l), and 20 to the information at issue in the record.

[21] The appellant provided both confidential and non-confidential representations in this appeal. In its non-confidential representations, the appellant states that it is a privately- owned biotechnology company involved in the distribution and manufacturing of research and diagnostic products for the life science community. The appellant has a licensed research facility that houses various species of animals and the existence of the facility is not publicly known. The appellant produces products that are vital for the diagnosis of disease and quality control of vaccines.

[22] The appellant relies on previous IPC Orders that have stated that, where an institution chooses not to apply a discretionary exemption from disclosure such as those in sections 14(1) and 20 of *FIPPA*, a third party affected by disclosure of the information can only raise the exemption before the IPC in “the most unusual of cases.”<sup>2</sup> It states:

In Order M-430, the IPC noted that such unusual cases will include situations in which the release of a record would “seriously jeopardize the rights of a third party.”

In Reconsideration Order R-980015, the IPC considered the submission of a third party who argued that “the Commissioner's office has an inherent obligation to ensure that all persons potentially affected by an order of disclosure of information are made a party to the inquiry and are given the right to make submissions on disclosure.” The third party [in that reconsideration order] also submitted that:

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<sup>1</sup> See Orders MO-2635, MO-2792, P-1137, PO-1705, PO-3489, PO-3512, PO-3841, and PO-4084.

<sup>2</sup> The appellant refers to Order P-1137.

The exemption under section 20 is one of those relatively rare instances where the person who is in the better position to make full and informed submissions is the affected party and not the head of the institution. Who is likely to have the most information and be better motivated to advance the arguments on danger to safety of an individual than the individual [his/her]self.

The IPC went on to find that, because the records at issue identified the third party as an individual who had spoken out against a violent organization, the third party had "obvious concerns" for their health and safety that were sufficient to warrant consideration of their argument that section 20 of FIPPA should apply.

Finally, in Order PO-1787, the IPC noted that the reasoning in Reconsideration Order R- 980015 applies to the exemptions at both sections 20 and 14(1)(e) of FIPPA, as they both deal with situations where disclosure could reasonably be expected to threaten the safety or health of an individual. In that Order, the IPC allowed a third party to raise the exemptions because he had "expressed concerns about potential danger to his physical safety" and the release of the requested information could have enabled an aggressive and violent individual to contact the third party.

[23] The appellant submits that the case at hand mirrors the orders cited above, since if its location is revealed its workers and owners would be vulnerable to physical harm at the hands of aggressive animal rights activists. The appellant, therefore, submits that it should be permitted to raise the exemptions in sections 14(1)(e) and 20 of *FIPPA*.

[24] The appellant also submits that it should be permitted to raise the exemptions in sections 14(1)(i) and 14(1)(l), and 20 as disclosure could reasonably be expected to also jeopardize the appellant's property and leave the appellant's workers and owners vulnerable to the commission of unlawful acts by aggressive animal rights activists.

[25] The appellant submits that the circumstances at hand should also be considered an unusual occasion warranting third party submissions on the applicability of sections 14(1)(e), (i) and (l), and 20 because there is a public value component to the appellant's work contributing to the diagnosis of disease and vaccine quality control. It further submits that if its location becomes identifiable due to disclosure of the information at issue in the record, there is a reasonable fear that extreme activist groups will disrupt the appellant's important work.

[26] The requester opposes a finding that the appellant is permitted to raise the discretionary exemptions under sections 14(1)(e), (i) and (l), and 20. She submits that the appellant's location cannot now, and will not after disclosure of the information at issue in the record, be identified. She states that the whole point of redacting the name

of the facility, the certificate number and signatories from the record is to protect the identity and location of the facility and she does not contest those redactions.

[27] The requester states that the number and species of animals provided are aggregate numbers and that there is no information provided in these forms as to what happens to the animals. She provided details, with reference to the information in the records already disclosed, as to how she could not, and would not, be able to identify the third party appellant's name or location.

[28] In reply, the appellant submits that if it was disclosed that the appellant keeps a certain types of unique animals it would be possible to identify and locate the appellant even if its name and certificate number are withheld. It states that even if the requester poses no risk of harm, the information at issue in the record will also be available to extremist animal rights groups that pose a serious risk to the safety of research facilities in Canada and abroad.

[29] In sur-reply, the requester states that the request was not made regarding a specific facility where the location of animals used for research was known.

### ***Findings***

[30] The IPC has considered whether to permit the raising of discretionary exemptions by parties that are not institutions under *FIPPA* in previous orders and has determined that third parties should only be permitted to raise discretionary exemptions in rare circumstances.

[31] In Order P-1137, referred to by the appellant, the adjudicator considered whether an affected party may raise a discretionary exemption when it was not claimed by the institution which received the request for access to information. She stated:

The *Act* includes a number of discretionary exemptions within sections 13 to 22 which provide the head of an institution with the discretion to refuse to disclose a record to which one of these exemptions would apply. These exemptions are designed to protect various interests of the institution in question. If the head feels that, despite the application of an exemption, a record should be disclosed, he or she may do so. In these circumstances, it would only be in the most unusual of situations that the matter would come to the attention of the Commissioner's office since the record would have been released.

The *Act* also recognizes that government institutions may have custody of information, the disclosure of which would affect other interests. Such information may be personal information or third party information. The mandatory exemptions in sections 21(1) and 17 of the *Act* respectively are designed to protect these other interests. Because the Office of the Information and Privacy Commissioner has an inherent obligation to

ensure the integrity of Ontario's access and privacy scheme, the Commissioner's office, either of its own accord, or at the request of a party to an appeal, will raise and consider the issue of the application of these mandatory exemptions. This is to ensure that the interests of individuals and third parties are considered in the context of a request for government information.

Because the purpose of the discretionary exemptions is to protect institutional interests, it would only be in the most unusual of cases that an affected person could raise the application of an exemption which has not been claimed by the head of an institution. Depending on the type of information at issue, the interests of such an affected person would usually only be considered in the context of the mandatory exemptions in section 17 or 21(1) of the *Act*.

[32] I agree with and adopt the reasoning of the adjudicator in Order P-1137. In my view, the circumstances before me do not amount to one of the "most unusual of cases" that an affected party - in this case the appellant - can raise the possible application of a discretionary exemption not relied on by the ministry.

[33] The record at issue is the ministry's completed two-page Animal Use Data Form. The appellant does not want the ministry to disclose to the requester the information in the form that lists the names and numbers of certain species of animals housed at the appellant's facility and has appealed that decision. This information is found under the sub-heading "Total Numbers of Animals (excluding dogs and cats) used in 'Research' In 2017". Other species information in the form under this sub-heading has already been disclosed.

[34] The appellant's position is that by disclosing that a certain species of animals listed in the form are located in the appellant's research facility, the requester and other members of the public would be able to locate the appellant's facility and it would be a target for animal rights activists. As such, the appellant, as a third party, claims that it should be allowed to claim the application of the discretionary exemptions in sections 14(1)(e), (i) and (l), and 20 that the ministry did not claim.

[35] Based on my review of the information and the parties' representations, especially the appellant's confidential representations, I disagree with the appellant's claim that the information at issue in the record could be used to identify the appellant's location.

[36] I have considered and reject the appellant's claim that by identifying the species at issue in the record, an individual would be able to ascertain who the appellant is and where it is located. In making this finding, I have taken into account the references cited by the appellant and the entirety of its representations, including the confidential portions.

[37] The appellant has made specific reference to Order PO-1787, as well as Reconsideration Order R-980015 cited therein. In Order PO-1787, at issue was the name, title, firm name and address of a named lawyer who had had represented a company whom the requester perceived had not treated him fairly.

[38] In Order PO-1787, the adjudicator found that disclosure of the information at issue, the lawyer's name, and their firm name and address, would allow the requester (the appellant) to know the lawyer's identity and precise location. Both the institution on that appeal and the lawyer named in the request had concerns about the potential danger to the lawyer's own physical safety. The records in that appeal included documentation of the appellant's aggressive and violent behaviour against those whom he perceived had not treated him fairly, such as the lawyer named in the request. In that appeal, the adjudicator allowed the lawyer to raise the application of the section 14(1)(e) discretionary exemption.

[39] In this appeal, unlike in Order PO-1787, I find that disclosure of the information at issue in the record could not reasonably expected to identify the name and location of the appellant. Specifically, I find that disclosure of the information at issue in the record, which is information about the names and numbers of certain species of animals housed at the appellant's research facility, could not reasonably be expected to allow the appellant's name and location to be ascertained.

[40] I would have considered letting the appellant raise the sections 14(1)(e), (i) and (l), and 20 exemptions if it were even arguable that they could apply, given that there are third party interests potentially at play.<sup>3</sup> In my view, even though the sections 14(1)(e), (i) and (l), and 20 exemptions are partly designed to protect the interests of third parties, in my view there is no reasonable prospect that they could apply to the information at issue in this appeal as I have found that the location of the appellant's facility cannot be ascertained from disclosure of the information at issue in the record.

[41] I find that the appellant has not established that there are most unusual of circumstances that provide a basis for a finding that the appellant should be permitted to raise the discretionary exemptions in sections 14(1)(e), (i) and (l), and 20 when they have not claimed by the ministry. In the absence of any extraordinary, unusual or rare circumstances, I find that this discretion must be left to the institution.<sup>4</sup>

[42] Accordingly, I am not permitting the appellant to raise the application of the sections 14(1)(e), (i) and (l), and 20 exemptions and I will not consider the application of these exemptions further in this order.

[43] As the ministry has not claimed any discretionary exemptions in relation to the information at issue, and because no mandatory exemptions apply, I will uphold the ministry's decision and dismiss the appeal. Because the information will be disclosed

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<sup>3</sup> See Order PO-3917.

<sup>4</sup> See Order PO-4075.



pursuant to the ministry's decision, it is therefore unnecessary for me to consider whether the public interest override in section 23 applies to allow the disclosure of this information to the requester.

**ORDER:**

1. I uphold the ministry's decision to partially disclose the record to the requester and the appeal is dismissed.
2. I order the ministry to disclose the record to the requester in accordance with its access decision by **January 30, 2023** but not before **January 25, 2023**.

Original signed by: \_\_\_\_\_  
Diane Smith  
Adjudicator

December 20, 2022 \_\_\_\_\_