



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **INTERIM ORDER MO-1461-I**

**Appeal MA-010044-1**

**The New City of Hamilton**



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## **NATURE OF THE APPEAL:**

The City of Hamilton and Region of Hamilton-Wentworth (now the New City of Hamilton - the "City") received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of an audiotape of a telephone call placed by an individual to the Fire Department on October 31, 2000.

The City gave notice to the individual who made the telephone call (affected person) and denied access to the audiotape pursuant to section of the *Act*. The City relied on the factors listed in sections 14(2)(e), 14(2)(f) and 14(2)(h) in support of the exemption claim.

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

In his appeal letter, the appellant raised the issue of the application of the public interest override provided by section 16 of the *Act*.

I sent a Notice of Inquiry seeking representations initially to the City and the affected person. Both of these parties provided representations in response.

## **ISSUE:**

The affected person has asked me to withhold all of his representations from the appellant. The purpose of this interim order is to rule on the affected person's confidentiality request.

## **DISCUSSION:**

### **Sharing of representations procedure**

The Notice of Inquiry cover letter to the affected person states:

The representations you provide to this office may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in the attached document entitled *Inquiry Procedure at the Adjudication Stage*. Please refer to this document when preparing your representations.

The Inquiry Procedure document states:

#### *Adjudicator initiates inquiry*

The Adjudicator will initiate an inquiry by sending a Notice of Inquiry to the party bearing the initial onus, as determined by the Adjudicator. The Notice of Inquiry sets out the issues in the appeal and seeks representations on these issues.

#### *First party submits representations*

The first party then has **three weeks** to submit representations. In its representations, the first party must indicate clearly, and in detail:

1. Which information in the representations, if any, the party wishes the Adjudicator to withhold from the second party; and
2. Its reasons for this request (see confidentiality criteria below).

The document later sets out the criteria for withholding representations, as follows:

The Adjudicator may withhold information contained in a party's representations where:

- (a) disclosure of the information would reveal the substance of record claimed to be exempt or excluded;
- (b) the information would be exempt if contained in a record subject to the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act*; or
- (c) the information should not be disclosed to the other party for another reason.

For the purposes of paragraph (c) above, the Adjudicator will apply the following test:

- (i) the party communicated the information to the IPC in confidence that it would not be disclosed to the other party; and
- (ii) confidentiality must be essential to the full and satisfactory maintenance of the relation between the IPC and the party; and
- (iii) the relation must be one which in the opinion of the community ought to be diligently fostered; and
- (iv) the injury to the relation that would result from the disclosure of the information would be greater than the benefit thereby gained for the correct disposal of the litigation.

### **The affected person's confidentiality request**

The affected person addressed the confidentiality of representations issue as follows:

[The affected person] opposes the disclosure of any part of the July 30 submission. [The affected person] relies upon section 41(13) of the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) which states as

follows in reference to representations made to the Commissioner during an appeal:

#### Representations

- (13) The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

[The affected person] asserts the clear confidentiality protection afforded by this provision in the *Act*. As noted in our July 30 submission, [the affected person] is presently involved in two other proceedings with his Employer, [the organization]. First, [the affected person] is involved in a grievance arbitration with [his former employer] arising from [the former employer's] decision to terminate his employment. Second, [the former employer] has filed a suit in defamation against [the affected person]. The information requested in the instant matter is directly related to those two proceedings.

We have no doubt that [the former employer] will attempt to use any information obtained in this process against [the affected person] in the other two proceedings. As a result, we assert our right to have the submission remain confidential.

#### **Findings**

To the extent that the affected person's position appears to be based on the Commissioner's lack of authority to make a decision to share the representations of one party with another, I would draw the affected person's attention to the reasons of Mr. Justice Cosgrove in *Ontario (Solicitor General and Minister of Correctional Services) v. Ontario (Information and Privacy Commissioner)* (June 3, 1999), Toronto Doc. 103/98 (Ont. Div. Ct.) in an order granting the Commissioner's sealing order as asked. In refusing to extend the sealing order to the Ministry's non-confidential representations in that case (and four others heard at the same time), Mr. Justice Cosgrove said the following in regard to section 52(13), the provincial equivalent of section 41(13) of the *Act*:

I have engaged counsel in discussions on sections 52(13) and [55(1)] of the *Act*. I am, with respect, unable to agree that these sections (in the context of the whole legislation) support the proposition that it was intended that representations be excluded. I have concluded that the *Act* does not warrant the sealing of the representations. . . .

This principle shall apply unless representations are otherwise ruled confidential by the Commissioner.

It is clear that the Divisional Court does not consider that section 41(13) has the effect on the confidentiality of the representations in the matter before me as advanced in the affected person's representations, and that the court agreed that decisions on the confidentiality of representations should be made by the Commissioner.

Having reviewed the affected person's representations and the confidentiality request as set out above, I find that portions of the affected person's representations fall within confidentiality criteria "a". Specifically, I find that disclosure of one passage on page 1 and one passage on page 2 of the representations would reveal the substance of the record which is claimed to be exempt.

The balance of the information in the representations consists of generalized assertions of law and/or argument, as well as information which is clearly known to the appellant in the circumstances. I find that this information does not fall within the confidentiality criteria as set out above.

In his representations, the affected person requested that I order that the affected person's representations not be used by any party in any court or any other proceeding. The affected person cites section 41(10) of the *Act* in support of this request. Section 41(10) of the *Act* states:

- (10) Except on the trial of a person for perjury in respect of his or her sworn testimony, no statement made or answer given by that or any other person in the course of an inquiry by the Commissioner is admissible in evidence in any court or any inquiry or in any other proceedings, and no evidence in respect of proceedings before the Commissioner shall be given against any person.

In this interim decision, the only issue before me is whether the affected person's representations should be shared with the appellant in this appeal. Section 41(10) of the *Act* addresses the issue of the use of the representations in other proceedings, and it is up to the court or adjudicative body referred to in section 41 (10) to make a determination of this nature should the issue arise at a future date.

## **PROCEDURE:**

I have attached to the copy of this interim order that is being sent to the affected person a copy of the affected person's representations. The highlighting indicates the passages that I will not provide to the appellant. I intend to send the affected party's representations, with the exception of the highlighted information, to the appellant, together with a Notice of Inquiry, no earlier than **September 7, 2001**.

Original Signed By: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

August 24, 2001 \_\_\_\_\_