



**Information and Privacy  
Commissioner/Ontario**

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

# **INTERIM ORDER PO-1956-I**

**Appeals PA-000409-1 and PA-010013-1**

**Ministry of Tourism, Culture and Recreation**



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## **NATURE OF THE APPEAL:**

The appellant submitted a seven-part request to the Ministry of Citizenship, Culture and Recreation, now the Ministry of Tourism, Culture and Recreation (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the Act). The Ministry separated the requests and gave each one a request number. Of the seven requests, only Request Numbers 00-024 and 00-026 are at issue in this appeal.

### **Request Number 00-024**

The appellant asked for a copy of an independent audit done by a named consultant with respect to "Operations and Policy of the Archaeology Unit, Heritage & Libraries Branch" of the Ministry.

### **Request Number 00-026**

This request was for the written response of Ministry staff to the documentation submitted by the appellant entitled *Report to the Red Tape Commission Respecting the Policies and Conduct of the Ontario Ministry of Citizenship, Culture & Recreation, Heritage and Libraries Branch, Heritage Operations*.

The Ministry located records responsive to both requests and denied access to them on the basis that they fell outside the scope of the Act pursuant to paragraphs 1 and 3 of section 65(6). The appellant appealed the Ministry's decision on the grounds that the requested records were completed by or for the Ministry in direct response to its complaint and that they were, therefore, not prepared for the purpose of labour relations. The appellant also notes that since submitting its complaint to the Ministry, it has received no response to any of the allegations or concerns expressed in the complaint.

This office opened Appeal Number PA-000409-1 to address the issues with respect to Request Number 00-024 and Appeal Number PA-010013-1 to deal with Request Number 00-026. Because the parties are the same and the issues in both appeals are similar, I have joined them together for the purpose of this inquiry.

I decided to seek representations from the Ministry, initially, and provided it with a Notice of Inquiry setting out the facts and issues in the appeal. The Ministry submitted representations in response. I then determined that the appellant should be given an opportunity to respond to the Ministry's representations.

At this point, as a result of concerns expressed by the Ministry, I notified one of its employees as an affected person. This individual submitted representations in response, which I provided to the Ministry along with a supplementary Notice of Inquiry. The Ministry submitted supplementary representations in response.

## **ISSUE:**

The Ministry initially requested that I withhold its original representations from the appellant in their entirety. However, upon further consideration, the Ministry agreed to share portions of

them. The Ministry indicated that none of its supplementary representations should be shared with the appellant.

I essentially agreed with the Ministry's amended confidentiality request insofar as the actual content of the representations are concerned and confirmed with the Ministry that specific portions of the representations would not be shared with the appellant. However, I was of the view that the evidence to which the confidentiality request applied is central to the issue that I must decide at inquiry. I therefore advised the Ministry that I would include a paragraph identifying the nature of the Ministry's argument in the Notice of Inquiry that I intended to send to the appellant. The Ministry objects to the inclusion of this paragraph in the Notice of Inquiry and requests that nothing relating to this portion of its representations be shared with the appellant.

With respect to the affected person's representations, I decided that, although they should not be shared with the appellant, I would similarly summarize the main points made in them in the Notice of Inquiry. An Adjudication Review Officer contacted the affected person to obtain his views regarding this approach. The affected person agreed to the inclusion of the summary that I had prepared in the Notice. However, he objected to the inclusion of one sentence of the summary I prepared relating to the Ministry's representations and requested that this sentence be deleted from the Notice.

Following receipt of the Ministry's supplementary representations, I decided that, although they would not be shared with the appellant, I would summarize the Ministry's argument. Given the Ministry's position on this issue generally, I assume that it will object for the same reasons.

The purpose of this Interim Order is to rule on these confidentiality requests. To be clear, I have agreed to share the Ministry's representations with the appellant in accordance with its revised request for confidentiality, and the affected person has agreed to the inclusion of the paragraph I drafted which summarizes his representations. This interim order will only address the question of whether I will include a paragraph, which has already been drafted and provided to the Ministry and the affected person, plus one additional paragraph which summarizes the Ministry's supplementary representations, in the Notice of Inquiry that is to be sent to the appellant.

Before I begin, it should be noted that this is a very unusual situation. In most cases, an adjudicator will decide unilaterally what information to provide to the parties during an inquiry and, without consultation, include that information in the Notice of Inquiry. Because of the nature of the Ministry's concerns, however, and recognizing the care that must be taken in not infringing the privacy of a third party, I decided to proceed with caution and to explore the concerns expressed by the Ministry, and ultimately the affected person.

## DISCUSSION:

### Sharing of representations procedure

The Notice of Inquiry cover letter to the Ministry and 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 Ministry's and affected person's confidentiality requests**

In its initial request for confidentiality, the Ministry stated that the representations should not be shared because of the sensitive nature of the information (criterion (c), above) and because the representations contain information that would likely be exempt if contained in a record subject to the *Act* (criterion (b), above). During discussions between the Adjudication Review Officer and the Ministry, the subject paragraph was provided as an alternative to the sharing of the representations themselves. The Ministry clarified its position regarding the disclosure of *any* information relating to the issue, stating that the "mere mention" of the argument would constitute an unjustified invasion of the affected person's privacy.

As I indicated above, because of the Ministry's concerns, I decided to notify the affected person. In the covering letter to the affected person, I outlined the nature of the issue raised by the Ministry and the discussions between it and this office in this regard. I then asked the affected person to provide his views on this issue. In order to permit the affected person to fully appreciate the extent of the proposed reference, I set out the actual wording that I would use in the Notice of Inquiry.

The affected person provided representations in response to the Notice and letter that I sent to him. In them, the affected person expresses certain views relating to the records that were requested and the application of section 65(6) to them, but does not specifically comment on the sharing of certain information in the Notice of Inquiry.

The affected person's representations were shared with the Ministry because of their bearing on the application of the exclusion in section 65(6). After reviewing them, the Ministry continues to stand firm in its objection to the inclusion of the subject paragraph in the Notice of Inquiry.

At my request, the Adjudication Review Officer contacted the affected person one final time to determine whether or not he objected to the inclusion of this paragraph in the Notice. He is not concerned, in general, with the inclusion of the paragraph, but does object to one sentence. He believes that the appellant might draw adverse inferences from it which, he states, would in all likelihood be incorrect.

## **FINDINGS**

Looking at the confidentiality criteria noted above, I must decide whether this information would be exempt if contained in a record subject to the *Act* or whether it should be withheld for any other reason.

Under section 2(1) of the *Act*, personal information is defined, in part, as "recorded information about an identifiable individual". The information in the subject paragraph identified above, as well as in the additional paragraph I intend to include summarizing the Ministry's supplementary representations is very general in nature, but it does reveal something about the affected person. On this basis, I find that it does contain the affected person's personal information.

The protection of privacy is one of the fundamental principles of the *Act* (as set out in section 1) and the Ministry's concerns about breaching its employee's privacy through the access process, including the sharing of representations, are generally valid. At this point, it should be noted that the appellant's complaint relates directly to the affected person. The appellant knows this. The appellant knows the records relate to the affected person. Moreover, the affected person has no objection to the appellant knowing his views regarding disclosure of the records, nor is he concerned about the fact that he is identified as the affected person in this inquiry. Finally, it is not insignificant that the particular sentence to which the affected person objects reflects the very heart of the Ministry's argument, as does the paragraph summarizing the Ministry's supplementary representations.

I accept the Ministry's position that the situation itself is very sensitive – it involves a complaint made against one of its employees and a request for information relating to the manner in which the complaint was dealt with. However, as I noted above, the information at issue is very general. In both paragraphs, it relates to an *argument* made by the Ministry as opposed to a description of evidence presented to support the argument. In view of the relationship between the parties, it is unlikely that the appellant would not foresee certain implications relating to or arising from his complaint. Further, the comments made by the affected person, taken as a whole, do not appear to indicate a concern about what is said, but by how it is said.

Finally, in *Gravenhurst (Town) v. Ontario (IPC)*, [1994] O.J. No. 2782, the Divisional Court commented on the inquiry procedures that were in place at that time:

The nature of the process under review ... requires the maintenance of confidentiality. There can be no hearing in the usual sense and the statute limits access to representations (s.41(13)) [of the Municipal Act; Section 52(13) of the *Act*]. In considering the procedure adopted by the Commissioner, this court should accord curial deference in light of the difficult circumstances faced by the Commissioner **subject, of course, to overriding concerns of procedural fairness.** (emphasis added)

In this decision, the Divisional Court, while recognizing that the *Act* places constraints on the type of hearing the Commissioner's office must conduct and the degree of disclosure permitted, nevertheless stated that concerns of procedural fairness are "overriding". Similarly, the Divisional Court stated in *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 at 781:

The inquiry process is specialized and unique. It may be conducted in private. The commissioner is given inquisitorial or investigatory powers as well as the power to examine under oath. The procedure for participation by affected persons is governed by s. 52(13) which states ...

**These unusual powers and procedure may attract judicial scrutiny on natural justice grounds ...** (emphasis added)

Through these decisions, the Divisional Court has confirmed that the Commissioner's statutory duty of confidentiality is not absolute, but must be balanced with its common law duty of fairness, in particular, the duty to notify a party of the case it must meet. As a party to these proceedings, the appellant is entitled to know, within reasonable bounds, the case that he has to meet.

In my view, these are all relevant considerations in determining whether disclosure of the information would constitute an unjustified invasion of privacy. Moreover, I find that all of these considerations weigh in favour of disclosure of the personal information in the subject paragraphs.

In balancing these considerations against the sensitivity of the overall situation to which the records relate and the affected person's concerns that the information in one sentence of the paragraph could somehow be misconstrued or used against him in some way, I find that the balance weighs in favour of disclosure. The integrity of the inquiry process and the principles of natural justice and procedural fairness require that the appellant be placed in a position to know the case to be met. In my view, the inclusion of the subject paragraphs is an appropriate compromise in respecting the affected person's privacy interests and confidentiality expectations while at the same time satisfying the principles of procedural fairness.

On the basis of the above, although I accept that the references in the paragraph relate to the affected person, in the circumstances they would not constitute an unjustified invasion of

privacy. Accordingly, they would not be exempt if contained in a record subject to the *Act* (under criterion (b)).

I appreciate the affected person's concerns about one sentence in the paragraph relating to the Ministry's original representations. However, in my view, they are more appropriately dealt with under criterion (c).

To meet the test under criterion (c), the Ministry and/or the affected person must establish that the information was communicated in confidence, this confidentiality must be essential to the relationship between this office and the Ministry, the community must believe that the relation between the Ministry and this office should be fostered, and the injury to the relationship from disclosure would be greater than the benefit gained

In any inquiry under the *Act* involving requests for information relating to identifiable individuals, there will most likely be, by necessity, some disclosure of information about that individual (unless, perhaps, the institution refuses to confirm or deny the existence of records under either section 21(5) or 14(3) of the *Act*). The degree of information sharing, clearly, must be weighed against the fairness of the process in allowing parties to make effective representations on the issues. The inquiry process must not be allowed to be used as a "back-door" means of obtaining the very information sought. Nor should it permit curiosity seekers to obtain information about other individuals to which they would not otherwise be entitled. In my view, these principles, if applicable in the circumstances, provide a reasonable basis for withholding information under criterion (c).

In the circumstances of this inquiry, however, I find that they are not applicable to the information at issue. The Ministry's concerns are exaggerated and not supportable in light of the knowledge that the appellant already has relating to the overall situation, and because of the affected person's own actions in this inquiry.

With respect to the sentence to which the affected person objects, I agree that, as I had worded it, there is some ambiguity in meaning. I have, therefore, amended it to better reflect the meaning I intend. Having done that, I find that there is no reasonable basis to conclude that it could be misconstrued or that adverse conclusions could be drawn from it. As I indicated above, it relates to an argument as opposed to evidence presented in support of the argument. Further, even if the appellant were to draw its own conclusions from it, consistent with my discussion above in respect of criterion (b), this argument goes to the heart of the Ministry's claim and in fairness the appellant must be provided with an opportunity to address it.

As a result, I will provide the appellant with a copy of the Notice of Inquiry, which includes my summaries of the Ministry's and affected person's representations.



**PROCEDURE:**

I have attached to the Ministry's and affected person's copies of this interim order a copy of the first three pages of the Notice of Inquiry that I intend to send to the appellant. I have also attached to the Ministry's copy of this interim order, for complete clarity, a copy of its representations in the form in which they will be sent to the appellant. The highlighted portions of these representations will not be shared with the appellant. I intend to send this information to the appellant no earlier than **October 23, 2001** for the purpose of seeking representations from the appellant.

Original signed by :  
Laurel Cropley  
Adjudicator

October 9, 2001