



**Information and Privacy
Commissioner/Ontario**

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

FINAL ORDER PO-2088-F

Appeal PA-010194-2

Ministry of the Solicitor General



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NATURE OF THE APPEAL:

This is my final order, dealing with the outstanding issues in Appeal No. PA-010194-2. All other issues were addressed in Interim Order PO-2054-I, my November 8, 2002 letter to the parties regarding the Ministry's reconsideration request, and Reconsideration Order PO-2086-R.

BACKGROUND AND NATURE OF THE APPEAL:

The appellant submitted a request to the Ministry of the Solicitor General (now the Ministry of Public Safety and Security) (the Ministry), under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "the 147 records referred to on page 6 [of Order PO-1608]."

Order PO-1608 resulted from a request by a different requester for "records by [a named employee] ... sent and received from Sept 1/95 to Sept 15/95 relating to the Emergency Planning for Aboriginal Issues Interministerial Committee and/or Ipperwash Provincial Park". In the body of that order, which dealt with the nature of the searches conducted for responsive records, I made the following statement:

In response to my request for additional details regarding [the Deputy Minister's] affidavit, I received subsequent correspondence from the Deputy Minister regarding searches of the files relating to the named individual. The Deputy Minister advised me that there were a total of 147 records contained in the four files of the named individual

The Ministry (which was also the institution in PO-1608) identified the responsive records, which actually consist of 163 documents. The Ministry provided the appellant with access to a number of records, in whole or in part, and denied access to the remaining records or partial records on the basis of a number of the exemptions contained in the *Act*. One of the exemptions claimed by the Ministry was section 15 (relations with other governments).

The appellant appealed the Ministry's decision.

After conducting an inquiry, I found that certain records or portions of records did not qualify for exemption and, pursuant to Provision 1 of Interim Order PO-2054-I, I ordered the Ministry to disclose these records to the appellant.

I reserved my decision on a small number of records, specifically, pages 364-374, 376-379, and 236-243 (and the duplicate of this record being pages 270-277). I explained my reasons for doing so in Interim Order PO-2054-I as follows:

Pages 364-374 consist of minutes of a March 1, 1996 negotiation session attended by representatives of the federal government and a native band. Page 364 also indicates that two documentary filmmakers were in attendance at the meeting. The Ministry states that no provincial representatives attended the meeting. Page 363, which has been disclosed to the appellant, is a fax cover sheet indicating that pages 364-379 were forwarded from one Ministry staff person to another, but there is no indication on the exempt pages or in the Ministry's representations to explain how or why these minutes came into the custody of the Ministry.

I have determined that page 375 qualifies for exemption under section 14(2)(a) so will not discuss it further here.

As far as pages 364-374 and 376-379 are concerned, I have decided to defer my finding regarding the application of section 15 in order to provide the federal government with an opportunity to provide representations on the records. It is clear from the contents of these pages that the interests of the federal government, and not the provincial government, are being discussed and although the Ministry's representations would not, in my view, be sufficient to support the section 15(a) or (b) exemption claims, in fairness, the federal government is unaware that these records are at issue in this appeal and it should be notified and provided with an opportunity to provide input.

...

Pages 236 and 238 are fax cover sheets, the first transmitting a cover letter from a federal government lawyer to a lawyer in the Ministry of the Attorney General (page 237); and the second attaching the letter and attachments sent by the international organization to the federal government. Neither fax page includes any indication that the attachments contain confidential information, and page 238 includes a notation that the documents are "UNCLASSIFIED", which I again take to indicate that they do not contain sensitive information. Similarly, pages 237 and 239, which are the front pages of correspondence, do not include any express reference to confidentiality, nor does the content of the records appear to contain sensitive or confidential information. However, for the same reasons outlined above with respect to pages 364-374 and 376-379, I have decided to defer my finding regarding the application of section 15(c) in order to provide the federal government and the international organization with an opportunity to provide representations on the records. It is clear from the contents of these pages that the interests of the federal government and the international organization, and not the provincial government, are being discussed and although the Ministry's representations would not, in my view, be sufficient to support the section 15(c) exemption, in fairness, the federal government and the international organization are unaware that these records are at issue in this appeal and they should be notified and provided with an opportunity to provide input.

I also found in Interim Order PO-2054-I that there was a compelling public interest in the disclosure of certain records. In that regard, the possible application of the public interest override in section 23 of the *Act* to the remaining records continues to be a potential issue in this appeal.

On November 1, 2002, I sent a Supplementary Notice of Inquiry to the federal government, inviting representations on the section 15(a), (b) and (c) claims, and to the international organization for the section 15(c) claim. I also invited these parties to provide representations on the application of section 23.

I received representations from the federal government, but not from the international organization.

RECORDS:

The records remaining at issue in this appeal are pages 364-374, 376-379 and 236-243, as described above in the quotation from Interim Order PO-2054-I.

The Ministry claims the exemptions in sections 15(a) and (b) for pages 364-374 and 376-379, and section 15(c) for pages 236-243 (270-277).

DISCUSSION:

Section 15 of the *Act* reads as follows:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
- (b) reveal information received in confidence from another government or its agencies by an institution; or
- (c) reveal information received in confidence from an international organization of states or a body thereof by an institution,

and shall not disclose any such record without the prior approval of the Executive Council.

Section 15(a)

In order for a record to qualify for exemption under section 15(a), the Ministry must establish that:

- 1. the records relate to intergovernmental relations, that is relations between an Ministry and another government or its agencies; and
- 2. disclosure of the records could reasonably be expected to prejudice the conduct of intergovernmental relations.

(Reconsideration Order R-970003)

Section 15(b)

For a record to qualify for exemption under section 15(b), the Ministry must establish that:

1. the records reveal information received from another government or its agencies; and
2. the information was received by the Ministry; and
3. the information was received in confidence.

(Order 210)

Section 15(c)

To qualify for exemption under section 15(c), the Ministry must establish that:

1. the records reveal information received from an international organizations of states of a body thereof; and
2. the information was received by the Ministry; and
3. the information was received in confidence.

The words “could reasonably be expected to” appear in the preamble of section 15, as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated “harms”. In the case of most of these exemptions, including section 15, in order to establish that the particular harm in question “could reasonably be expected” to result from disclosure of a record, the party with the burden of proof must provide “detailed and convincing” evidence to establish a “reasonable expectation of probable harm” (see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.)).

Pages 236-243 (270-277)

I quoted the Ministry’s representations on pages 236-243 in Interim Order PO-2054-I as follows:

[These pages] contain correspondence sent by [an international organization] through the Federal Government, which the Ministry respectfully submits ought to be interpreted as having been provided in confidence by both [the international organization] and the Federal Government. It is submitted it was never written for public dissemination, and it was intended for fact gathering and investigation purposes only, and is of a highly sensitive nature. Some of the facts in [the international organization’s] correspondence are incorrect, such as Revealing this Record might therefore embarrass [the international organization]. It might

further embarrass the Federal Government who provided it to the Ministry arguably in contemplation of it not being subject to further disclosure.

As noted earlier, the international organization did not respond to my Supplementary Notice of Inquiry. The federal government did, but its representations do not deal with pages 236-243, other than to acknowledge that these pages are included within the scope of the Supplementary Notice.

I found in Interim Order PO-2054-I that the Ministry's representations would not be sufficient to support the section 15(c) exemption claim. Having received no substantive representations from either the federal government or the international organization in this regard, I find that I have not been provided with evidence sufficient to establish that pages 236-243 were received by the Ministry in confidence from the international organization either directly or through the federal government. Therefore, I find that pages 236-243 (and duplicate pages 270-277) do not qualify for exemption under section 15(c) of the *Act* and should be disclosed to the appellant.

Pages 364-374 and 376-379

The Ministry made the following general representations regarding the application of sections 15(a) and (b) to a number of records, including pages 364-374 and 376-379:

... disclosure of the [pages] would jeopardize the integrity of Ontario's intergovernmental relations with Canada. Ontario's relationship with Canada is an ongoing one, both generally, with respect to their long-term interactions and specifically, with respect to the [Kettle and Stoney Point] Band. It could reasonably be expected that if the records were to be disclosed, Canada would be less willing to disclose such records in the future to Ontario, which in turn could delay the resolution of land claims disputes, and other matters involving First Nations. Obviously, this could have a chilling effect on Ontario's relations with other levels of government if it were to become known that its legislation did not enable it to keep its records confidential.

The Ministry further submits that the expectation of prejudice to its intergovernmental relations with Canada is reasonable, given that Canada has taken the position that prejudice would result, in the request for other records created pursuant to disputes and negotiations with other First Nations, and considered in previous orders. [The Ministry then refers to Orders P-630 and P-730].

The Ministry's specific representations on pages 364-374 and 376-379 are as follows:

This Record is minutes of a meeting that took place on March 1, 1996. The meeting was attended by representatives of the federal government, and the Band, but was not attended by any provincial government officials.

In its representations, the federal government states:

At this point it is unclear who provided pages numbered 364-374 and 376-379 to Ontario. From the pages themselves it appears the source was the Ontario Provincial Police (OPP). We have checked our records to see if we have these documents and whether we ever provided copies to the province. I have been advised, that a review of the files of [two federal government departments] indicates that [these departments] have copies of pages 364-369 and 373-374. However they do not have copies of pages 370-372 and 376-379 and therefore could not have provided those pages to Ontario. Furthermore, [the departments] have located no evidence that either department provided the pages they do have to the province.

With specific reference to section 15(a), the federal government goes on to submit:

While releasing these documents by Ontario may not obviously “prejudice the conduct of intergovernmental relations” between Ontario and Canada, their release could harm Canada’s relationship with the First Nation and jeopardize the negotiations surrounding Camp Ipperwash.

It is clear from a reading of the documents that the matters being discussed were on a “without prejudice basis” and of an extremely sensitive nature. It is also clear that the documents record negotiations taking place in the hopes of settling a dispute. A key to the success of these negotiations like any other, is the confidence of all parties in the confidentiality of the process. These negotiations are ongoing and clearly any disclosure at this point could affect the integrity of the process and the First Nations’ willingness or ability to continue the negotiations.

Based on the nature of the documents it is submitted that if provided to Ontario by any of the parties to the negotiation, which to the best of our knowledge was not done by Canada, it would have been done in confidence. If the documents were provided in some other fashion it would have been contrary to the spirit and terms of the negotiations and their release now would only compound that original indiscretion.

Although resolution of the issues regarding Camp Ipperwash is of great concern to the First Nation and Canada, Ontario would also benefit from a successful conclusion to the negotiations. It would be unfortunate if the prospects for success were harmed by the release of the documents.

Based on its inability to locate any evidence that it provided the records to the Ministry, the federal government states, “[t]herefore [the federal government] is not in a position to state that section 15(b) applies to pages numbered 364-374 and 376-379”.

Section 15 of the *Act* recognizes that the Ontario government will create and receive records in the course of its relations with other governments, and that individual institutions should have

discretion to refuse to disclose records where it is expected that disclosure would result in any of the consequences enumerated in this section. In my view, section 15(a) recognizes the value of intergovernmental contacts, and its purpose is to protect these working relationships. Similarly, the purpose of section 15(b) is to allow the Ontario government to assure other governments that it is able and prepared to receive information in confidence, thereby building the trust required to conduct affairs of mutual concern. (See Orders P-1202, P-1398 (upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)))

Turning first to section 15(b), based on the representations submitted to me, particularly those from the federal government, and my independent review of the contents of 364-374 and 376-379, I find that there is insufficient evidence to establish that they were received by the Ministry from the federal government, as required in order to fall within the scope of section 15(b). Also, in my view, the presence of two documentary filmmakers at the meeting described in these records, which was not addressed by either the Ministry or the federal government in their representations, raises questions regarding the confidentiality of the subject matter of the records. Therefore, I find that pages 364-374 and 376-379 do not qualify for exemption under section 15(b) of the *Act*.

As far as section 15(a) is concerned, it is clear from the wording of the section that this exemption was included in the *Act* in order to protect the interests of the **Government of Ontario** in the conduct of intergovernmental relations. Past orders have established that Ontario's interests in this regard are engaged in the course of tripartite land claims settlement negotiations with the federal government and various First Nations (see, for example, Reconsideration Order R-970003, and both of the orders relied on by the Ministry in this regard (Orders P-630 and P-730)). However, in my view, section 15(a) does not extend to situations where the specific interests of Ontario are not engaged.

As noted earlier, the Ministry's representations point to possible prejudice to its relations with the federal government through the disclosure of a number of records at issue in this appeal. The representations do not focus specifically on pages 364-375 and 376-379, but these records are included within the scope of the Ministry's general representations on section 15(a). However, the federal government states in its representations that disclosing these records "may not obviously 'prejudice the conduct of intergovernmental relations' between Ontario and Canada". Instead, its representations focus on the possible harm that disclosure could have on "Canada's relationship with the First Nation". It would also appear from the federal government's representations that the discussions reflected on pages 364-374 and 376-379 are not tripartite negotiations involving Ontario, but rather are bilateral negotiations involving the federal government and the First Nation. In my view, Ontario's intergovernmental interests are not directly engaged in this context, as required by section 15(a). I find that the Ministry's generalized submissions regarding potential harm, particularly in light of the federal government's position that any prejudice to intergovernmental relations between the two levels of government is not "obvious", are not sufficiently detailed and convincing to establish a reasonable expectation of prejudice through the disclosure of pages 364-374 and 376-379.

To be clear, I am not excluding the possibility of prejudice to Ontario's intergovernmental interests in all circumstances where an institution is not directly involved in intergovernmental

discussions or negotiations. Determinations of this nature must be based on the facts, evidence and arguments made by the parties in the specific contexts of an individual appeal. However, in my view, this type of situation is more commonly and appropriately addressed by the section 15(b) exemption claim, which does not require an institution to establish prejudice, but only that disclosure would reveal information received in confidence from another government. The requirements of section 15(b) have not been established here nor, in my view, has the requirement of prejudice in section 15(a).

For all of these reasons, I find that the requirements of sections 15(a) or (b) of the *Act* have not been established for pages 364-375 and 376-379. Therefore, they do not qualify for either of these two exemptions, and should be disclosed to the appellant.

Because of my findings under sections 15(a), (b) and (c), it is not necessary for me to address the section 23 public interest override.

ORDER:

1. I order the Ministry to disclose pages 236-243, 270-277, 364-374 and 376-379 to the appellant by **January 10, 2003**.
2. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the pages disclosed to the appellant in accordance with provision 1 of this order.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

December 17, 2002
