



**Information and Privacy
Commissioner/Ontario**

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

Reconsideration Order PO-2126-R

Appeal PA-010421-1

Order PO-2099

Ministry of Natural Resources



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BACKGROUND TO THE RECONSIDERATION

On January 17, 2003, I issued Order PO-2099 in which I ordered the disclosure of certain information contained in various Flight Manifest Summaries, Aircraft Journey Logs and Flight Manifests respecting the use of aircraft operated by the Ministry of Natural Resources (the Ministry). I upheld the Ministry's decision to deny access to some of the requested information on the basis that it contained personal information and was exempt from disclosure under the mandatory exemption in section 21(1). In addition, I also upheld the Ministry's decision to deny access to the names of the security personnel and flight crews on the basis that this information was exempt under the discretionary exemptions in sections 14(1)(e) and 20, respectively.

By letter dated February 7, 2003, the Ministry requested that I reconsider my decision in Order PO-2099 on the basis that the disclosure of some additional information in the Flight Manifests and Aircraft Journey Logs would enable one to determine the existence of or the size of the security detail which accompanied the government officials who made use of the Ministry's aircraft. It argued that even if the names of the security officers were severed under section 14(1)(e) from the records, it is possible to determine the number of such personnel by counting the severances or by subtracting the number of government officials indicated from the total number of passengers on each flight, as listed in the Flight Manifests and Aircraft Journey Logs.

Based on these submissions, I determined that I had been provided with sufficient information to make a preliminary finding that a fundamental defect had occurred in the adjudication process under section 18.01 of the *Code of Procedure* (the *Code*). By letter dated February 12, 2003, I stayed on an interim basis the operation of the order provisions of Order PO-2099 pending the outcome of my determination of the reconsideration request. I also invited the parties to the appeal to make submissions, first on whether I should reconsider the decision in Order PO-2099 and second, on the substantive issues raised by the reconsideration request.

Both the appellant and the Ministry made representations in response to this letter. I also received submissions from Cabinet Office, which I will address below.

SHOULD ORDER PO-2099 BE RECONSIDERED?

Section 18.01 of the *Code* describes the grounds upon which a decision of the Commissioner's office will be reconsidered. The section states:

The IPC may reconsider an order or other decision where it is established that there is:

- (a) a fundamental defect in the adjudication process;
- (b) some other jurisdictional defect in the decision; or
- (c) a clerical error, accidental error or omission or similar error in the decision.

The appellant argues that the Ministry's request for a reconsideration of the decision in Order PO-2099 is a "blatant stalling tactic and an abuse of the Freedom of Information legislation." He submits that "[t]he Ministry's argument that the information requested, and subsequently ordered

to be released, would reveal the size of the Premier's security detail is spurious at best. This is hardly a state secret and to suggest otherwise is laughable."

The Ministry argues that the decision ought to be reconsidered on three grounds:

- the disclosure of the severed version of the records will still serve to reveal information which I have determined is in fact subject to the law enforcement exemption in section 14(1)(e);
- the IPC failed to provide notification to all affected persons as required under section 50(3) of the *Act*; and
- the decision in Order PO-2099 failed to consider certain evidence contained in an affidavit attached to the Ministry's original representations.

The Ministry submits that by not addressing the application of sections 14(1)(e) and 20 to other information contained in the records which would reveal the size of the security detail, an accidental error or omission took place within the meaning of section 18.01(c) of the *Code*.

It further submits that I erred in not notifying the former Premier and other elected officials and their staffs pursuant to section 50(3), regardless of the fact that the information may not have qualified as their "personal information". Accordingly, the Ministry submits that a fundamental defect in the adjudication process occurred, as contemplated by section 18.01(a) of the *Code*.

Finally, the Ministry submits that in not properly considering the information contained in the affidavit which it attached to its submissions, a fundamental defect in the adjudication process occurred which warrants a reconsideration of Order PO-2099.

I have also received representations from Cabinet Office requesting that I reconsider my decision in Order PO-2099 on the same basis as that put forward by the Ministry. It argues that by failing to provide notification under section 50(3) to what it describes as the "affected persons", a jurisdictional defect occurred in the adjudication process.

I note that Cabinet Office was not a party to the original appeal. The request was made to the Ministry of Natural Resources which issued the decision letter upon which the appeal was based. Further, representations at the adjudication stage were made by the Ministry. If the Ministry had required the input or assistance of Cabinet Office in the preparation of its representations, it would have been entitled to obtain that assistance and incorporate the concerns expressed by Cabinet Office at the adjudication stage of the appeal. It is well-established that, for the purposes of the making of representations in the course of an appeal under the *Act*, that the Government of Ontario "speaks with one voice".

In Order P-965, former Assistant Commissioner Irwin Glasberg commented on the principle of "indivisibility of government":

... In practical terms, this means that where a ministry has assumed the responsibility of processing an access request, it is that ministry which should speak for and represent the interests of the provincial government as a whole.

I consider this approach to be the correct one for several reasons. First, there is a long line of judicial authority which endorses the proposition that the Crown is one and indivisible [see, for example, *Re Caisse de Depot et Placement du Quebec and Ontario Securities Commission* 42 O.R. (2d), 561 (Ont. Div. Ct) and *Alberta v. Canada (Canadian Transportation Commission)* (1977) 75 D.L.R. (3d) 257 (S.C.C.)]. Second, the scheme of the *Act* as set out in sections 25 and 27 of the statute contemplates that there will be a lead ministry which will be responsible for dealing with a request. In this respect, the *Act* provides specific mechanisms to ensure that the collective position of the provincial government is advanced. Third, I have not found any wording in either section 50(3) or 52(13) of the *Act* which would lead me to believe that the Commissioner must notify one emanation of the Crown where another is already participating in an appeal.

This approach has been applied in many previous decisions of the Commissioner's office (Orders P-270, P-395, P-902, P-965, P-902 and PO-1846-F).

In my view, it would be prejudicial to the appellant and not in keeping with the rules of natural justice to enable Cabinet Office to make submissions on an appeal which does not involve its record-holdings or a decision made by it with respect to records. The subject matter of the request and the subsequent appeal lie with the Ministry and I am not obliged to accept the submissions of parties who do not have a direct interest in the outcome of the appeal.

Accordingly, I decline to consider the representations of Cabinet Office in the present reconsideration decision.

Based on the representations provided by the Ministry, I find that in failing to consider whether the disclosure of other information contained in the records could reasonably be expected to reveal information which might be subject to the exemptions in sections 14(1)(e) or 20, there was an accidental error in the decision which warrants its reconsideration. I find no basis for concluding that I ought to reconsider the decision on the other grounds proposed by the Ministry, however.

In making a determination as to whom to notify during the adjudication stage of the appeal under section 50(3), I decided that the Ministry would be in the best position to make submissions on the application of the exemptions claimed. In addition, I made a preliminary decision that the records contained some personal information, relating to individuals who are not government officials or elected representatives. This finding is reflected in the decision in Order PO-2099 in which I upheld the Ministry's decision to deny access to the names of these individuals under section 21(1). As the references in the records to other individuals, specifically the elected representatives and their staffs, clearly do not constitute their "personal information" for the purposes of section 2(1) of the *Act*, I was not obliged to notify them under section 50(3) as they are not "affected persons". Accordingly, I find that a fundamental or jurisdictional defect did not occur in the adjudication process or in the decision and I decline the reconsideration request on that basis.

Finally, I do not accept the Ministry's arguments that I failed to properly consider the affidavit evidence submitted with its representations. The decision in Order PO-2099 refers specifically to those representations repeatedly in my discussion of sections 14(1)(e) and 20. I note too that much of the information contained in the affidavit was submitted in confidence and was not shared with the appellant owing to those confidentiality concerns. I was unable, therefore, to refer to them in greater detail in the body of the decision. I dismiss the reconsideration request on this basis as well.

IS THERE ADDITIONAL INFORMATION IN THE RECORDS WHICH IS EXEMPT FROM DISCLOSURE UNDER SECTIONS 14(1)(e) AND 20?

The Ministry submits that the Aircraft Journey Logs and Flight Manifests contain information which is subject to exemption under sections 14(1)(e) and 20. In Order PO-2099 I upheld the Ministry's decision not to disclose the names of the members of the security detail and the names of the flight crews under sections 14(1)(e) and 20 respectively. The Ministry argues that additional information which appears on these records, including the number of passengers, the weight of the passengers and their baggage could lead "an unscrupulous individual" to determine the existence of or the size of the security detail assigned to each flight. It argues that the reasoning in Order PO-1944, which I expressly adopted in Order PO-2099, extends to include information which could be used to determine the security arrangements in place on each flight. The Ministry has again provided me with confidential submissions which I am unable to refer to in the body of this decision. I have considered these representations, however.

I agree with the submissions of the Ministry with respect to some of the information in the records. I specifically find that the information contained in the Flight Manifests and the Aircraft Journey Logs which identifies the number of passengers and the weight ascribed to them and their luggage falls within the ambit of section 14(1)(e). I find that this information could reasonably be expected to assist in determining the existence of and the size of the security detail for each of the flights listed. In my view, the disclosure of this information could reasonably be expected to endanger the life or physical safety of the security personnel or other persons and this information is, therefore, exempt from disclosure under section 14(1)(e). I find that the reasons provided by the Ministry in support of the non-disclosure of this information are not a frivolous or exaggerated expectation of endangerment to safety. Rather, the Ministry has established a reasonable basis for believing that a person's safety will be endangered if this information is disclosed.

The remaining information contained in the Aircraft Journey Logs and Flight Manifests, however, could not be used for this purpose and is not, accordingly, exempt under this section. Similarly, the Manifest Summaries do not include information which could be used to determine details about the security arrangements in place for each flight. These records do not contain any information which is subject to the exemption and should be disclosed in their entirety.

To summarize, I find that the Ministry has provided me with sufficient evidence to establish a reasonable basis for concluding that the disclosure of the number of passengers and the total weight ascribed to them and their luggage could be expected to endanger the life or physical safety of a person. This information, in addition to that found to be exempt under sections 14(1)(e), 20 and 21(1) in Order PO-2099, should not be disclosed to the appellant.

ORDER:

1. I order the Ministry to disclose the Manifest Summaries in their entirety and those portions of the Flight Manifests and Aircraft Journey Logs which **do not** refer to the following information:
 - the number of passengers and the weight ascribed to them and their luggage; and
 - the names of those individuals who are not government officials, security personnel or aircrewby providing the appellant with copies by **April 21, 2003** but not before **April 16, 2003**.
2. I uphold the Ministry's decision to deny access to the information contained in the Flight Manifests and Aircraft Journey Logs which refer to the number of passengers and the weight ascribed to them and their baggage, as well as the names of those individuals who are not government officials, security personnel or aircrew.
3. I reserve the right to require the Ministry to provide me with copies of the records which are disclosed to the appellant pursuant to Order Provision 1.

Original signed by: _____
Donald Hale
Adjudicator

_____ March 17, 2003