

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

FINAL ORDER PO-3605-F

Appeal PA14-554

Ministry of Community Safety and Correctional Services

May 13, 2016

Summary: The Ministry of Community Safety and Correctional Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act (FIPPA)* for information about an investigation of a complaint regarding spent bullets found outside the boundary of a police shooting range. The ministry denied access to portions of one responsive record, citing the application of the discretionary advice or recommendations exemption in section 13(1), read in conjunction with section 49(a). Interim Order PO-3560-I required the ministry to re-exercise its discretion. In this order, the adjudicator upholds the ministry's re-exercise of discretion and finds that the information at issue is exempt under section 13(1), read in conjunction with section 49(a), and that the public interest override in section 23 does not apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 49(a), 13(1), 23.

Cases Considered: Interim Order PO-3560-I.

OVERVIEW:

[1] The Ministry of Community Safety and Correctional Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* for the following:

All documents with respect to investigation of complaint statement by [named individual] to [named individual], Firearms Officer - Inspector dated [specified date] (See complaint statement attached).

[2] The ministry identified a record responsive to the request, a memorandum from a Firearms Officer/Inspector of the Chief Firearms Office (the CFO) to the Superintendent/Chief Firearms Officer of the CFO, and issued a decision to disclose the record in part.

[3] The requester (now the appellant) appealed the ministry's decision.

[4] The appellant advised the mediator that she wished to proceed to adjudication to seek access to the "Issues/Recommendations" portion of the record severed under sections 13(1) and 49(a) of the *Act*. The appellant raised the application of the exceptions to section 13(1) in sections 13(2)(a), (d) and (f) of the *Act*. The appellant also advised the mediator that there is a public interest in the disclosure of the information at issue in the record. Consequently, the application of the public interest override in section 23 of the *Act* is at issue in this appeal.

[5] As mediation did not resolve all of the issues in this appeal, the file was transferred to the adjudication stage where an adjudicator conducts an inquiry.

[6] I issued Interim Order PO-3560-I, where I found that section 13(1), in conjunction with section 49(a), applied to the information at issue in the record. In that order, I required the ministry to re-exercise its discretion to apply this exemption.

[7] The ministry then re-exercised its discretion and continued to withhold all of the information at issue in the record. It provided its reasons to the appellant for so doing. Representations were then sought and exchanged between the parties on the ministry's re-exercise of discretion in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[8] In this order, I uphold the ministry's re-exercise of discretion and find that the information at issue is exempt under section 13(1), read in conjunction with section 49(a), and that the public interest override in section 23 does not apply.

RECORD:

[9] Remaining at issue is the "Issues/Recommendations" portion on pages 3, 4 and 5 of the 5-page ministry¹ memorandum to the Chief Firearms Officer.

¹ Both the CFO and the Ontario Provincial Police (the OPP) are part of the ministry.

ISSUES:

- A. Did the institution re-exercise its discretion in a proper manner under section 13(1), read in conjunction with section 49(a)?
- B. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 13(1) exemption?

DISCUSSION:

A. Did the institution re-exercise its discretion in a proper manner under section 13(1), read in conjunction with section 49(a)?

[10] The ministry states that in re-exercising its discretion it considered the particular circumstances of this request and the contents of the record at issue. It determined that the disclosure of the record could be expected to inhibit the flow of free and frank advice and recommendations. It has considered the fact that the recommendations are contained in an internal memorandum prepared by a staff member at the CFO solely for the head of the CFO. It states that if the recommendations were disclosed it could cause staff at the CFO, and potentially elsewhere in the ministry, to self-censor the recommendations they provide to advise senior management. It states:

Self-censoring could be expected to occur out of concern that recommendations intended for internal communications would be disclosed in a manner that was not intended, even if the recommendations were properly exempted in accordance with section 13 of *FIPPA*. This could lead to management within the ministry not receiving from their staff recommendations they need to receive in order to discharge their duties. It is [the ministry's] position that such an outcome is contrary to public policy, as it would compromise the ability of ministry program areas, such as the OPP² or the CFO, to carry out their respective mandates.

[11] In re-exercising its discretion, the ministry determined that the appellant does not have a "sympathetic or compelling" need to see the recommendations as disclosing the recommendations would not enhance the appellant's or her family's or visitors' safety. Its position is based on the following considerations:

The firearms range has been in operation for approximately 30 years. There is no evidence to indicate when the bullets were fired, and in

² The Ontario Provincial Police.

particular that they were fired in recent years, which would potentially be evidence of an ongoing risk to safety.

[12] The ministry contends that the firearms range is operated safely as it is subject to an annual inspection by the CFO, which results in the CFO preparing a report on the basis of its inspection, which could include recommendations that the OPP would implement. It states that if the OPP became aware at any time that there were safety concerns involving the use of the range, the OPP would act immediately in accordance with its mandate as a public safety organization.

[13] The ministry points out that the recommendations are over four years old and there is newer information available about the firearms range, therefore, it is possible that the recommendations are based on out-of-date factual considerations. It states that the appellant owned her property for many years before it was open to the public for agri-tourism, at which time the firearms range became a concern to her. It submits that the appellant's concerns are not safety concerns but are about land use and economic development.

[14] The ministry contends that the disclosure of the record would not increase public confidence in the operation of the ministry because the record is over four years old, and does not reflect more recent, ongoing, and pro-active efforts the ministry is making to work with the county and the appellant to promote best practices on the firearms range.

[15] The ministry submits that the recommendations were part of internal communications, and that there is an important policy interest in keeping this internal communication confidential. The ministry believes that this policy interest is more important than releasing four-year-old recommendations.

[16] The appellant states that there is no basis given for the assertion that disclosure of the record would inhibit the flow of free and frank advice and recommendations within the ministry. She states that she has never been provided with any information as a result of the investigation in 2011 and that she and her family continue to be fearful of injury for themselves and their employees and patrons, from the continued use of the site as a practice range. The appellant has brought a court application in Superior Court naming the owner (the county), as the respondent. The appellant seeks an injunction to restrain it from allowing the site to be used by the OPP as a firearms range because, inter alia, it is not zoned to permit this use, it is unsafe, it is very noisy and it is detrimental to the environment. She states that the record in this appeal is not within the control of the county so it is unlikely that it can be obtained in the context of the litigation.

[17] The appellant submits that there is no evidence that the CFO or staff in the ministry has taken any steps to alleviate concerns being addressed by her or numerous

other nearby residents of the site. She states that although the use as a gun range has been in effect for a number of years, its use has increased greatly in recent years and has now become a major training area for a number of OPP detachments in the province, not just the local one. She states that disclosure would increase public confidence in the operation of the ministry as the shooting range is still very much a "hot issue" in the local community.

[18] In reply, the ministry states that the appellant's representations do not state or imply that the ministry improperly or otherwise failed to comply with the Interim Order PO-3560-I. It submits that the ministry was well within its right to re-exercise its discretion as it did, and the appellant cannot substitute the appellant's exercise of discretion for the ministry's.

[19] The ministry notes that a significant portion of the appellant's representations refer to civil litigation between the appellant and the County of Norfolk related to the use of the firearms range. It states that the appellant can seek a court order to obtain the record in the litigation.

Analysis/*Findings*

[20] Section 13(1), read in conjunction with section 49(a), are discretionary exemptions and permit an institution to disclose information, despite the fact that it could withhold it.

[21] Section 49(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[22] In this case, the institution relies on section 49(a) in conjunction with section 13(1), which states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[23] Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to

grant requesters access to their personal information.³ Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[24] As discretionary exemptions apply to the withheld information in this appeal, the ministry must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[25] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[26] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁴ This is what I ordered in Interim Order PO-3560-I. This office may not, however, substitute its own discretion for that of the institution.⁵

[27] As set out in Interim Order PO-3560-I, relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:⁶

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information

³ Order M-352.

⁴ Order MO-1573.

⁵ Section 54(2).

⁶ Orders P-344 and MO-1573.

- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[28] In Interim Order PO-3560-I, I found that in exercising its discretion, the ministry failed to take into account the following relevant considerations:

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - exemptions from the right of access should be limited and specific
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant to the requester
- the age of the information

[29] The record is a memorandum from a CFO inspector to the CFO Superintendent. The CFO is part of the ministry. The information remaining at issue in the record consists of the CFO inspector's recommendations. This information does not contain the personal information of the appellant or any other individuals.

[30] In reviewing the parties' representations and the record, I agree with the ministry that it has properly re-exercised its discretion and has considered all of the

relevant considerations listed above that it did not previously consider. I find that it has taken into account the appellant's need to receive the information at issue in the record. In particular, the ministry has considered both the appellant's safety concerns and the assertions as set out in the court application of December 2015 concerning the zoning requirements and the permitted use of the property upon which the firing range is located.

[31] The withheld advice or recommendations in the record is from June 2011 and concerns the non-binding recommendations of the CFO Firearms Officer/Inspector as to signage and measurements at the firing range. I find that this information does not address the appellant's concerns set out in her representations and as reflected in her court application.

[32] I found in Interim Order PO-3560-I that the withheld information was subject to section 13(1). The purpose of this exemption is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.⁷ Therefore, I do not agree with the appellant's position that there is no basis for the assertion that disclosure of the record would inhibit the flow of free and frank advice and recommendations within the ministry.

[33] The appellant has safety concerns about the current use of the firing range. The ministry has described in its representations what safety measures it has in place. In addition, annual CFO inspection reports concerning the firearms range have been provided to the county, as owner of the property, most recently the inspection report prepared in 2015. The ministry is not opposed to these inspection reports being shared by the county, at its discretion.

[34] Based on my review of all of the evidence, I find that the ministry has re-exercised its discretion in a proper manner and I am upholding its re-exercise of discretion. Subject to my review of the application of the public interest override in section 23, the information at issue in the record is exempt under section 13(1), read in conjunction with section 49(a), of *FIPPA*.

B. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 13(1) exemption?

[35] Section 23 states:

⁷ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

An exemption from disclosure of a record under sections **13, 15, 17, 18, 20, 21** and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[36] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[37] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.⁸

COMPELLING PUBLIC INTEREST

[38] In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.⁹ Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.¹⁰

[39] A public interest does not exist where the interests being advanced are essentially private in nature.¹¹ Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.¹²

[40] The word “compelling” has been defined in previous orders as “rousing strong interest or attention”.¹³

[41] Any public interest in *non*-disclosure that may exist also must be considered.¹⁴ A public interest in the non-disclosure of the record may bring the public interest in

⁸ Order P-244.

⁹ Orders P-984 and PO-2607.

¹⁰ Orders P-984 and PO-2556.

¹¹ Orders P-12, P-347 and P-1439.

¹² Order MO-1564.

¹³ Order P-984.

¹⁴ *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

disclosure below the threshold of “compelling”.¹⁵

[42] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation¹⁶
- the integrity of the criminal justice system has been called into question¹⁷
- public safety issues relating to the operation of nuclear facilities have been raised¹⁸
- disclosure would shed light on the safe operation of petrochemical facilities¹⁹ or the province’s ability to prepare for a nuclear emergency²⁰
- the records contain information about contributions to municipal election campaigns²¹

[43] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations²²
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations²³
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding²⁴
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter²⁵
- the records do not respond to the applicable public interest raised by appellant²⁶

¹⁵ Orders PO-2072-F, PO-2098-R and PO-3197.

¹⁶ Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).

¹⁷ Order PO-1779.

¹⁸ Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.) and Order PO-1805.

¹⁹ Order P-1175.

²⁰ Order P-901.

²¹ *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.

²² Orders P-123/124, P-391 and M-539.

²³ Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

²⁴ Orders M-249 and M-317.

²⁵ Order P-613.

[44] The appellant submits that the public has an overwhelming interest in knowing whether or not there is a public safety concern arising out of the continued use of the firearms range.

[45] In reply, the ministry submits that the interests being advanced by the appellant's complaint about the range relate to the allegedly incompatible use of adjoining property and is a private property dispute. It states that to the extent there may be public safety issues concerning the use of the firearms range, they would have been addressed at a public council meeting, which was held at the county chambers, where this very subject was discussed and which addressed section 23 considerations.

[46] The ministry states that it has disclosed extensive parts of the record, so as to inform the appellant about the nature of the investigation that took place, following the complaint. The ministry notes, in particular, that the parts of the record containing the summary of the investigation, as well as the conclusion were both disclosed. It further states that there is a public interest in non-disclosure since disclosure could adversely affect the provision of full, free and frank advice and recommendations within the CFO.

[47] In sur-reply, the appellant states that there is an inherent public interest in understanding what safety risks exist where firearms are being discharged in close proximity to the public. The appellant's states that as per the record, her property is "down range from its' firing lines". She states that the site has been used for almost 30 years as a firing range without any official approval by the property owner (the municipality) nor the CFO and the use of the applicable site as a shooting range is not in compliance with the current zoning by-law. She states that no safety inspections have ever been provided to the public or the property owner and that:

The fact that bullets may be leaving the firing range is a safety concern to all properties near the range that could be affected by the overshooting. The writer of the report in question identifies that the purpose of the inspection was for "public safety only". No other process has addressed the public interest considerations. [The county] is simply dealing with whether or not to formalize the existing status quo by way of a written lease.

No public hearings were commenced regarding the safety of this firing range. It is untrue that "parts of the record containing the summary of the investigation, as well as the conclusion were both disclosed".

Analysis/Findings

[48] Based on my review of the record and the parties' representations, I do not find

²⁶ Orders MO-1994 and PO-2607.

that there is a compelling public interest in disclosure of the record. The record is from 2011. The information at issue in the record consists of some non-binding recommendations about signage and measurements for the range. The disclosed conclusion portion of the record states that the range is far superior to the range the inspector utilized previously and that many safety improvements have been facilitated on the range.

[49] I find that the appellant's interests are essentially private in nature and are primarily concerned about the impact of the range on her property and her business. I have not been provided with evidence that since the date of the report of June 2011, more spent bullets, other than the few found prior to that time, have since been located on her property. I do not find that disclosure of the information at issue in the record from 2011 would address the safety and other concerns set out in the appellant's representations.

[50] I find that the information at issue does not respond to the applicable public interest raised by appellant about the current safety issues and the zoning allowances.

[51] As I have found that there is no compelling public interest in the disclosure of the information at issue in the record, there is no need for me to consider whether this interest clearly outweighs the purpose of the section 13(1) exemption.

[52] Accordingly, I find that the information at issue in the record is exempt under section 13(1), read in conjunction with section 49(a), of *FIPPA*.

ORDER:

1. I uphold the ministry's decision that the information at issue in the record is exempt under section 13(1), read in conjunction with section 49(a), and dismiss the appeal.

Original Signed by: _____
Diane Smith
Adjudicator

_____ May 13, 2016