Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-4206-I

Appeals PA19-00258 and PA19-00259

Ministry of Northern Development, Mines, Natural Resources and Forestry

November 9, 2021

Summary: This interim order deals with whether a ministry wildfire investigation report, its attachments and its draft forms are exempt from disclosure under section 14(2)(a) (law enforcement report). In this order, the adjudicator finds that the reports, both draft and final, are exempt from disclosure under section 14(2)(a) of the *Freedom of Information and Protection of Privacy Act*. However, she also finds that the attachments are not exempt from disclosure under section 14(2)(a). In addition, she does not uphold the ministry's exercise of discretion in withholding the body of the reports, both draft and final. The ministry is ordered to disclose the attachments to the appellant and to re-exercise its discretion with respect to the body of the final and draft reports. Lastly, the appellant raised the application of the obligation to disclose provision in section 11(1). The adjudicator finds that she does not have the authority to order disclosure under this section.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 11(1), 14(2)(a) and 14(4).

Orders and Investigation Reports Considered: Orders PO-1959, PO-1988, PO-3868-I and PO-3925-I.

OVERVIEW:

[1] This interim order disposes of most of the issues raised as a result of appeals of two access decisions made by the former Ministry of Natural Resources and Forestry[1] (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The access decisions were made in response to requests for the investigation report relating to a wildfire that occurred in the Parry Sound area with its attached films, electronic records, emails, plans, drawings, photographs, sound recordings, voicemails and DVDs, as well as drafts of the report and their covering emails. The fire, known as Parry Sound 33 (PS 33), was significant and garnered public attention. The requester is a member of the media.

[2] The ministry located records responsive to the request, the Wildfire Investigation Report, attachments, and its draft versions, and notified four third parties of the request. In the end, the ministry issued decisions to the requester denying access to the records in full, claiming the application of the discretionary exemption in section 14(2)(a) (law enforcement report) of the *Act* to all of them.

[3] The requester, now the appellant, appealed the ministry's decisions to the office of the Information and Privacy Commissioner/Ontario (the IPC). Appeal file PA19-00258 was opened, which deals with the final Wildfire Investigation Report and its attachments. Appeal file PA19-00259 was opened, which deals with draft versions of the report. The drafts do not have attachments.

[4] During the mediation of the appeal, the ministry issued a revised decision to the appellant disclosing six pages of the attachments to the final Wildfire Investigation Report as follows:

- an industrial fire intensity code report,
- export weather data,
- lightning data,
- a weather observation report, and
- a radio log.

[5] As a result, the disclosed pages are no longer at issue. The appellant subsequently advised the mediator that he wished to proceed to adjudication to try to obtain access to the remaining records.

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[1] Now the Ministry of Northern Development, Mines, Natural Resources and Forestry.

[6] The files were then transferred to the adjudication stage of the appeals process in which an adjudicator may conduct an inquiry under the *Act*. The adjudicator assigned to the appeals sought and received representations from the ministry and the appellant. Portions of the ministry's representations were withheld as they met the IPC's confidentiality criteria.[2] The files were then transferred to me to continue the adjudication of the appeal. In his representations, the appellant raises the possible application of the mandatory disclosure provision in section 11(1), which I address below.

[7] For the reasons that follow, I find that the body of the wildfire report and its drafts are exempt from disclosure under the discretionary section 14(2)(a) exemption, while the attachments are not. I also find that the ministry did not properly exercise its discretion in deciding to withhold the body of the reports, both final and draft. The ministry is ordered to disclose the attachments to the appellant as set out in Order provision 1, and to re-exercise its discretion with respect to the body of the reports.

RECORDS:

[8] The information remaining at issue consists of a final Wildfire Investigation Report and its attachments. The report contains a 20-page narrative portion and a 14-page investigation summary. The attachments consist of photographs, a drawing, maps, a grid search and handwritten notes. Also at issue are the draft versions of the investigation report. The draft versions of the report do not have attachments.

ISSUES:

A. Does the discretionary exemption at section 14(2)(a) apply to the record?

B. Did the ministry exercise its discretion under section 14(2)(a)? If so, should this office uphold the exercise of discretion?

PRELIMINARY ISSUE:

[9] In his representations, the appellant argues that the obligation to disclose provision in section 11(1) applies. Section 11(1) states:

> Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the

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[2] Set out in Practice Direction 7 of the IPC's Code of Procedure.

> head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.

[10] The ministry argues that, contrary to the appellant's position, it has no obligation to disclose the records under section 11 of the *Act*. Its position is that there are no reasonable and probable grounds to believe that the records reveal a grave environmental health or safety hazard to the public. Further, the ministry submits that the authority in section 11 lies solely with the head of an institution and the IPC does not have the authority to make an order requiring disclosure of a record under section 11.

[11] I agree with the ministry that section 11(1) is not properly before me. Section 11(1)[3] is a mandatory provision, which requires the head to disclose records in certain circumstances; specifically, if the head has reasonable and probable grounds to believe that it is in the public interest to do so and the record reveals a grave environmental, health or safety hazard to the public. Order 65, and subsequent IPC orders[4] have affirmed that the duties and responsibilities set out in section 11(1) of the *Act* belong to the head alone. As a result, the IPC does not have the authority under section 11(1) of the *Act* to order disclosure of the records pursuant to section 11(1), and I expressly decline to do so in this appeal.

DISCUSSION:

Issue A: Does the discretionary exemption at section 14(2)(a) apply to the record?

[12] Section 14(2) states, in part:

> (2) A head may refuse to disclose a record,
>
> > (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

[13] The term "law enforcement" is used in several parts of section 14, including section 14(2)(a), and is defined in section 2(1) as follows:

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[3] Section 11(1) states: Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.

[4] See for example Orders MO-3225, MO-3766, PO-3557 and PO-3909.

"law enforcement" means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or

(c) the conduct of proceedings referred to in clause (b).

[14] The term "law enforcement" has covered situations such as Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997.*[5]

[15] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[6]

[16] In order for a record to qualify for exemption under section 14(2)(a) of the *Act*, the institution must satisfy each part of the following three-part test:

1. the record must be a report, and
2. the report must have been prepared in the course of law enforcement, inspections or investigations, and
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.[7]

[17] The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact.[8]

[18] The title of a document does not determine whether it is a report, although it may be relevant to the issue.[9]

[19] There are two exceptions to section 14(2)(a), which are sections 14(4) and (5).

[20] Section 14(4) states:

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[5] Order MO-1337-I.
[6] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[7] Orders 200 and P-324.
[8] Orders P-200, MO-1238 and MO-1337-I.
[9] Order MO-1337-I.

> Despite section 14(2)(a), a head shall disclose a record that is a report prepared in the course of routine inspections by an agency that is authorized to enforce and regulate compliance with a particular statute of Ontario.

[21] The section 14(4) exception is designed to ensure public scrutiny of material relating to routine inspections and other similar enforcement mechanisms in such areas as health and safety legislation, fair trade practices laws, environmental protection schemes, and many of the other regulatory schemes administered by the government.[10]

[22] Generally, "complaint driven" inspections are not "routine inspections".[11] The existence of a discretion to inspect or not to inspect is a factor in deciding whether an inspection is "routine".[12]

[23] Section 14(5) states:

> Subsections (1) and (2) do not apply to a record on the degree of success achieved in a law enforcement program including statistical analyses unless disclosure of such a record may prejudice, interfere with or adversely affect any of the matters referred to in those subsections.

Representations

[24] The ministry submits that the purpose of the exemption in section 14(2)(a) is to maintain the integrity of investigations, maintain public confidence in investigations and to further and protect public assistance in the investigative process. For example, the ministry argues, investigations may depend on assistance from individuals who do not wish to be identified. As well, it is important for investigators to be able to give advice freely and make findings or recommendations in reports without fear of reprisals or public criticism.

[25] In this case, the ministry submits that the record is a wildfire investigation report prepared by staff of the ministry employed by the Enforcement Branch and the Aviation, Forest Fire and Emergency Services Branch, following an investigation into the cause(s) of a fire that took place known as PS 33. One main purpose of the investigation, the ministry submits, was to determine whether or not charges should be laid arising from the start of PS 33 under the offence provisions in the *Forest Fires Prevention Act* (the *FFPA*). A conviction for an offence under the *FPPA* can result in a fine of up to $25,000 or three months imprisonment (or both) for an individual and a

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[10] Order PO-1988.
[11] Orders P-136 and PO-1988.
[12] Orders P-480, P-1120 and PO-1988.

fine up to $500,000 for a corporation.

[26] Turning to the first part of the three-part test in section 14(2)(a), the ministry argues that this part of the test is met because the wildfire investigation report sets out a formal account of the investigators' findings in a manner that includes collating and considering the information and factors that were gathered, and then evaluating them in order to reach a conclusion. The ministry goes on to submit that the record is the final and formal report prepared by ministry staff into their investigation of the cause(s) of PS 33. In describing the record, the ministry states:

> It describes the processes employed in the investigation, summarizes key evidence, and sets out the analyses and expectations which led staff to their conclusion. In other words, the Report identifies the evidence and factors viewed by staff as determinative, and sets out their deliberative processes, including the elimination of various potential causes of the fire. The record does not merely list the observations of Ministry staff and the statements made to them.

[27] The ministry also submits that parts two and three of the three-part test have been met because the records were prepared as part of an investigation into a possible violation of the *FFPA* and that the ministry in this regard is a law enforcement institution that has the function of enforcing a regulating compliance with a law, namely the *FFPA*.

[28] The ministry also argues that the fire that was the subject matter of the record was high profile and there were property and other losses experienced by members of the public. As a result, there had been a considerable amount of interest in the investigation. The ministry goes on to argue that it is therefore particularly important that ministry staff have the necessary "room" to set out their deliberations and evaluative accounts in a report without the possibility of being affected by public criticism.[13]

[29] The ministry also argues that the exemption in section 14(2)(a) applies equally to the draft versions of the report.

[30] Regarding the exceptions to section 14(2)(a), the ministry submits that neither applies. In particular, it argues that section 14(4) does not apply because the record was not the result of a "routine" inspection, but rather the result of a large fire culminating in an extensive and complex investigation. With respect to the second exception in section 14(5), the ministry submits that it does not apply because the record does not address the topic of success in the ministry's law enforcement program or activities and provides no analysis in this regard, statistical or otherwise.

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[13] See, for example, Order PO-3469.

[31] The appellant submits that the fire resulted in the mass evacuation of thousands of people, and caused damage to private property, vast tracts of land and wildlife. In addition, efforts to contain the fire cost millions of dollars. The appellant states that his media outlet began to ask questions seeking accountability, for example, why construction of a wind farm project continued the summer of the fire despite extreme conditions and several precursor fires at the site. The appellant seeks access to the investigation report to understand the cause of the fire and also to examine the scope, competence and credibility of the province's conclusions.

[32] The appellant goes on to state that while he accepts that the report was generated in the course of a law enforcement investigation, the ministry has failed to demonstrate the harm that might result from disclosing the report. Concerning the ministry's position that disclosure of the report could affect the integrity of investigations and the willingness of witnesses to come forward, the appellant submits that the witnesses who were interviewed would have been advised that their statements could become public. Further, the appellant argues, the ministry could have severed the witnesses' names instead of asserting a blanket exemption.

[33] In addition, the appellant does not accept the ministry's argument that disclosure of the report would interfere with an investigator's ability to freely make findings and recommendations. Investigators, the appellant submits, know they and their work are under scrutiny should their advice or conclusions surface in court prosecutions or litigation.

[34] The appellant further argues that the ministry investigates all wildfires in the province routinely and this report is a routine investigation report.

[35] In reply, the ministry submits that in order for section 14(2)(a) to apply, it is not necessary to demonstrate that harm will result from disclosure of the record. Instead, it argues, what must be demonstrated is that the record is a "report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law." With regard to the appellant's argument that the exception in section 14(4) applies, the ministry submits that the record was not the result of a routine inspection and that the investigation was what is considered to be a "Class 4 Investigation," which is the highest level investigation and involves more and higher ranking staff than other classes of investigations.

[36] In sur-reply, the appellant submits that freedom of information legislation is intended to help facilitate public access to government documents, while balanced against some restrictions to protect privacy, commercial and law enforcement interests. His position is also that the onus is placed on an institution to demonstrate when and why the public should be denied access and that, in this case, the ministry has simply failed to provide sufficient evidence to justify withholding the records. Regarding witness statements, the appellant goes on to argue that the ministry has failed to

provide concrete evidence to explain who or what parties have privacy concerns and that parties do not have a *de facto* right to secrecy in this context.

[37] Lastly, the appellant submits that failing to disclose the report will cause great harm to transparency and faith in democratic institutions, stating:

> Withholding it maintains secrecy, and thus public ignorance, around the adequacy of Ontario's regime that is supposed to be protecting our people and lands from massive industrial-related forest fires.

Analysis and findings

[38] I have reviewed the records at issue, which consist of a 20-page narrative report, a 14-page investigation summary, as well as drafts of same, and attachments, and I have considered the representations of the parties. I find that the narrative report, the investigation summary and draft versions clearly fall within the scope of the section 14(2)(a) exemption and qualify, in combination, as a law enforcement report within the meaning of section 14(2)(a). Conversely, I find that the attachments do not qualify as being a law enforcement report for the purposes of section 14(2)(a). For ease of reference, I refer to the 20-page narrative portion and the 14-page investigation summary as the "report" or the "body of the report." I refer to the attachments as the "attachments."

[39] First, I am satisfied that the record is a "report" within the meaning of section 14(2)(a). The record is an account of an investigation of a wildfire conducted by the ministry. It is "a formal statement or account of the results of the collation and consideration of information". The record does not merely recount statements of fact, but contains an evaluation and conclusion based on the ministry's investigation.[14] I also find that the draft versions of the final report also qualify as being law enforcement reports within the meaning of section 14(2)(a) because they are not qualitatively different from the final report in that they too comprise formal statements of the results of the collations and consideration of information, including evaluations and conclusions based on the ministry's investigation.[15] I acknowledge that some of the report consists of various attachments and I consider this separately below.

[40] Next, I find that the ministry prepared the report and its draft versions in the course of law enforcement, inspections or investigations. The report (and drafts) were prepared in the course of the ministry's investigation of the fire. Finally, I accept that the ministry is an agency that has the function of enforcing and regulating compliance

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[14] Orders 200 and P-324.
[15] See, for example, Order PO-1989 where a final and draft Special Investigations Unit report were found to be exempt under section 14(2)(a) of the *Act*.

with a law, namely the *FFPA*. Although the ministry has many other functions, the report in question was prepared by the Enforcement Branch and the Aviation, Forest Fire and Emergency Services Branch, following an investigation into the cause(s) of a fire that took place known as Parry Sound 33 (PS 33). From my review of the report, I accept the ministry's submission that one main purpose of the investigation, was to determine whether or not charges should be laid under the offence provisions in the *FFPA*.

[41] I further find that the exception in section 14(4) does not apply because the report was prepared at the conclusion of an investigation. It does not relate to a routine inspection and was not prepared in the course of a routine inspection.

[42] In Order PO-1988 Senior Adjudicator Sherry Liang discussed the purpose of the section 14(4) exception, stating:

> The inclusion of section 14(4) in the *Act* followed from a recommendation in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980*, vols. 2 and 3 (Toronto: Queen's Printer, 1980) (the Williams Commission Report). The drafters of that Report recommended that information gathered for regulatory enforcement purposes be treated the same as information gathered for criminal law enforcement, for the purposes of the law enforcement exemption. However, they were concerned that such an exemption not be too broadly construed:
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> > …if the notion of material relating to civil and regulatory enforcement is too broadly construed, much that should be made accessible under a freedom of information law would be brought within the exemption. In particular, it would be inappropriate to withhold routinely from public scrutiny all material relating to routine inspections and other similar enforcement mechanisms in such areas as health and safety legislation, fair trade practices laws, environmental protection schemes, and many of the other regulatory schemes administered by the government.
> >
> > Under the U.S. act, it has been accepted that routine material of this kind not gathered for the purpose of investigating a particular offence is not exempt from the general rule of access merely because it relates to the enforcement of law.
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> Consistent with the above discussion, orders interpreting section 14(4) of the *Act* have found that "complaint driven" inspections are not "routine inspections" (see, for instance, Order 136). Other orders have concluded that the existence of a discretion to inspect or not to inspect is an

> important factor in deciding whether an inspection is "routine" (see, for instance, Order P-480 and P-1120).
>
> I agree that the existence of a discretion to inspect is a factor to be considered in deciding whether an inspection is "routine" for the purpose of section 14(4) of the *Act*. Since discretion, however, takes many forms and can be of varying levels of significance in the whole scheme of regulatory enforcement, I find that it is not always a determining factor. As was noted in Order 136 by former Commissioner Sidney B. Linden, "it is the nature of the inspection itself" which is important. I turn therefore to consider the nature of the inspections which are recorded in the area inspection reports.

[43] I find that the report resulted from the investigation that originated with PS 33, the main purpose of which was to determine whether or not charges should be laid under the offence provisions in the *FFPA*. In my view, this takes it out of the realm of a report that arises out of a routine inspection. Considering the nature of the investigation underlying the creation of the report, I find that this record does not fall within the scope of the section 14(4) exception.

[44] In addition, I find that exception in section 14(5) does not apply because the report is not a record on the degree of success achieved in a law enforcement program.

[45] I find, therefore, that the body of the report and its draft versions are exempt under the discretionary section 14(2)(a) exemption. I will address the ministry's exercise of discretion under Issue B below.

[46] As stated above, the final report has attachments to it, raising the question of whether these attachments are likewise exempt under section 14(2)(a). These attachments are directly referenced in the report and appear to have been attached to the report by the investigating officers who were involved in the investigation.

[47] Previous IPC orders have considered whether attachments to a report, or other documents contained in an investigation file, can be considered part of a report for the purpose of section 14(2)(a).

[48] In Order PO-1959, former Assistant Commissioner Sherry Liang considered whether records contained in a Special Investigations Unit (SIU) file can collectively be considered a law enforcement report within the meaning of section 14(2)(a). Assistant Commissioner Liang stated:

> Essentially, the ministry's submission is that all of the records must be considered together for the purposes of the application of section 14(2)(a). I am unable to accept this submission, and I find that section 14(2)(a) requires consideration of whether *each* record at issue falls within that exemption. . .

[49] In the end, she found that records such as incident reports and police officers' notes did not meet the definition of a "report" because they consisted of observations and recordings of facts instead of formal and evaluative accounts.

[50] In Order PO-3868-I, former Commissioner Brian Beamish found that only parts of an OPP investigation report and attachments qualified as a "report" for the purposes of section 14(2)(a). He found that the narrative of the report qualified as a report, but that witness statements appended to the report did not form part of the report itself. He concluded that attachments to a report, such as interview notes, will not necessarily form part of the report.

[51] Conversely, in Order PO-3925-I, Senior Adjudicator Gillian Shaw distinguished the report before her from the reports at issue in the above-referenced orders and found that the record at issue in her appeal was one record with no appendices and was a "seamless account" of an SIU investigation, including its conclusions.

[52] I agree with the analyses in these orders. Applying the approaches taken in these orders and on reviewing the attachments, I find that they do not form part of the report itself, in the circumstances. Like the attachments at issue in Order PO-3868-I, these pages do not include or describe any conclusions or analysis following the collection of the information contained therein. In my view, these attachments, which consist of a photograph and a diagram, are even less integrated with the body of the report than were the witness statements before former Commissioner Beamish in Order PO-3868-I. Moreover, they do not, on their own, qualify as a law enforcement report within the meaning of section 14(2) because they do not contain formal, evaluative accounts but rather are solely recordings of facts.

[53] In sum, I find that the body of the reports – the narrative portion of the reports and the investigation summary of both final and draft versions – meet the requirements of the three-part test and qualify as reports for the purposes of section 14(2)(a), subject to my findings regarding the ministry's exercise of discretion, but that the attachments do not qualify as a report for the purposes of section 14(2)(a) for the reasons set out above. As the ministry has not claimed any other exemptions with respect to these attachments, and no mandatory exemptions apply, I will order the ministry to disclose them to the appellant.

Issue B: Did the ministry exercise its discretion under section 14(2)(a)? If so, should this office uphold the exercise of discretion?

[54] The section 14(2)(a) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[55] In addition, the IPC 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, or it fails to take into account relevant considerations.

[56] In either case, an IPC adjudicator may send the matter back to the institution for an exercise of discretion based on proper considerations.[16] I may not, however, substitute my own discretion for that of the institution.[17]

[57] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[18]

- 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 and 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,
- 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, and
- the historic practice of the institution with respect to similar information.

Representations

[58] The ministry submits that it exercised its discretion properly, taking into account

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[16] Order MO-1573.
[17] See section 54(2).
[18] Orders P-344 and MO-1573.

the relevant considerations listed above and not taking into account irrelevant considerations or acting in bad faith or for improper purposes. The ministry also submits that the record does not contain the appellant's personal information and that it is not aware of any relationship between the appellant and any affected parties. The ministry further argues that it also took into consideration the purpose of the exemption in section 14(2)(a), which is to maintain the integrity of investigations, maintain public confidence in investigations, to further and protect public assistance in the investigative process and to allow investigators to give advice and make findings without fear of reprisal or public criticism.

[59] The ministry further submits that it considered whether the contents of the record would likely influence public confidence in the operation of the institution and concluded that the record would not reveal anything that would call into question public confidence in the ministry.

[60] The ministry goes on to argue that it considered its severance obligation under section 10(2), considered every part of the record in order to determine whether or not any of the record should be disclosed and, in fact, during the mediation of the appeal, disclosed portions of the attachments to the appellant, which consisted of factual findings or observations.

[61] The ministry also argues that despite the fact that the public interest override in section 23 does not apply to the exemption in section 14, it has been established that the public interest is a factor an institution must take into account when exercising its discretion. As a result, the ministry submits, it took the public interest into consideration as a factor in exercising its discretion, deciding that disclosure of the record would not contribute to objectives such as open government, public debate or the proper functioning of government institutions. In addition, the ministry advises that after the investigation report was completed, it issued a news release stating that the team of investigators found that the fire originated at the location of a disabled vehicle in a specified remote area and that assistance was sought from a forensic fire expert. As well, the press release stated that while the investigation was able to determine the origin of the fire, no provincial offence under the *FFPA* was found to have been committed. The ministry submits that the record contains information/allegations supplied by members of the public who cooperated in the investigation as well as the evaluative analysis of ministry staff, both of which ought to be protected under section 14. As a result, the ministry submits that there is no compelling public interest which would outweigh the purpose of the exemption claimed. The ministry's position is also that the facts contained in the report are likely accessible separate and apart from the record by way of a request for the documents underlying or collected or made in support of the record.

[62] The appellant submits that the ministry failed to strike the right balance by not properly weighing the public's interest and right to access against the exemption claimed. Further, the appellant argues that the ministry claimed "on flimsy-to-no

evidence" that disclosing the records would hinder future investigations. He further submits that public debate can only be had by an informed citizenry, stating:

> MNRF has massive responsibility and jurisdiction. The Ministry holds exclusive domain over investigations of this nature, and over its own conclusions.
>
> The Ministry ought not to be its own judge, and should allow the public to see – in a closed case, with no charges – their detailed conclusions in [a] case that has many unanswered questions.

[63] In reply, the ministry reiterates its position in its initial representations and submits that disappointment by members of the public that it has claimed the exemption in section 14(2) should not, by itself, result in the ministry's exercise of discretion not being upheld.

[64] As an example, the ministry goes on to state:

> . . . [I]t was found that the fire originated at the location of a disabled vehicle. Despite what the appellant may expect of the Report, it does not provide information in response to the majority of the questions listed on page 2 of the appellant's representations. It is not designed to, nor would it, shed light on forest fire risks generally (i.e. beyond this particular fire), or with respect to issues such as extreme weather conditions or climate change.

[65] The ministry further submits that much of the factual information the appellant seeks would be available to them, subject to other applicable exemptions, if they were to make an access request seeking the information that contributed to the making of the report and that, in fact, such a request has been made.[19]

[66] The ministry's position is that should the record, or parts thereof, be ordered disclosed, it is of the view that it would be necessary to contact other parties, including in connection with sections 17 (third party information) and 21(1) (personal privacy) of the *Act*.

Analysis and findings

[67] Based on the ministry's representations on its decision to apply the discretionary section 14(2)(a) exemption, I am not satisfied that it considered all of the relevant

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[19] According to the ministry, the requester in this access request was not the appellant. Its access decision in response to the request was not appealed to the IPC.

factors in exercising its discretion. While I am not suggesting that the ministry exercised its discretion in bad faith, I am not satisfied that it exercised its discretion properly and took into account all relevant considerations. In particular, relevant factors for the ministry to consider are whether there is a continuing public interest in the disclosure of the report, whether the disclosure of the record would promote public confidence in the ministry and whether the non-disclosure of the record would undermine public confidence in the ministry. While the ministry says it took into account its opinion that disclosing the report would not undermine confidence in the ministry, it does not appear to have taken into account these other factors. As a result, I will order the ministry to re-exercise its discretion.

ORDER:

1. I order the ministry to disclose the attachments to the Wildfire Investigation Report to the appellant by **December 14, 2021** but not before **December 9, 2021**.

2. I reserve the right to require the ministry to provide the IPC with copies of the records it discloses to the appellant.

3. I order the ministry to re-exercise its discretion under section 14(2)(a) with respect to the wildfire investigation report and to provide the IPC with representations on its exercise of discretion within 30 days of the date of this order.

4. I remain seized of this appeal to review the ministry's re-exercise of discretion.

Original signed by: November 9, 2021

Cathy Hamilton
Adjudicator