



**Information and Privacy
Commissioner/Ontario**

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

INTERIM ORDER PO-1961-I

**Appeals PA-010228-1, PA-010229-1, PA-010230-1
and PA-010231-1**

**Ministry of the Solicitor General
Ministry of the Attorney General
Cabinet Office
Ministry of Natural Resources**



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NATURE OF THE APPEAL:

The Ministry of Natural Resources (MNR), the Ministry of the Attorney General (MAG), the Ministry of the Solicitor General (MSG) and Cabinet Office (the institutions) each received the same request under the *Freedom of Information and Protection of Privacy Act* (the Act). The requester sought access to:

...any minutes, notes, transcripts, memos, summaries or any other items related to a meeting held on September 6, 1995. Attending this meeting were the Premier, the Minister of Natural Resources, and possibly other Cabinet Ministers, the Deputy Minister for the Attorney General, the Deputy Minister for the Solicitor General and the Superintendent of the Ontario Provincial Police, and possibly other staff members and Deputy Ministers.

This was not a cabinet meeting, and as such, is not protected by section 12 of the Act.

After conducting searches, MSG and MNR advised the requester that no records responsive to the request were located. MAG and Cabinet Office each identified five responsive records, and provided the requester with full access to one record and partial access to the other four records. The records and severances in both decisions were identical. The reason for withholding the remaining portions of these four records was that they contained information not responsive to the request.

The requester (now the appellant) appealed all four decisions.

The appeals were not settled through mediation, and I held inquiries on September 12 and 17, 2001 (the September inquiries) to determine whether each institution had made a reasonable effort to identify and locate all responsive records. On October 3, 2001, I issued Interim Order PO-1954-I. In that order, I found that I was not satisfied, based on the evidence and argument provided by the institutions, that all reasonable search efforts had been made. The reasons for this finding are discussed in detail in Interim Order PO-1954-I, so I won't repeat them here. I included the following provisions in Interim Order PO-1954-I:

1. I order the four institutions listed in Appendix A of this interim order to provide me with affidavits sworn by each of the individuals listed under the institution's name, answering the following questions:
 - did you create any hardcopy or electronic records prior to and in preparation for any meetings held on September 6, 1995 that involved Premier Harris and other Cabinet Ministers and/or senior government/Ontario Provincial Police officials dealing with matters relating to Ipperwash Provincial Park?
 - if you attended any such meeting, did you create any records at the meeting?

- did you create any records following any such meeting that relate to the business conducted at the meeting?
- were any records created by others and provided to you either prior to, during or following any such meeting?
- what steps did you take to assure yourself that no records responsive to the appellant's request were within your custody or under your control?
- are you aware of the existence of any responsive records that may have been created and/or maintained by other individuals that are responsive to the appellant's request, and if so, who would have custody or control of any such records?

The affidavit from Premier Harris should also answer the following question:

- what meetings did you attend on September 6, 1995 involving other Cabinet Ministers and/or senior government/Ontario Provincial Police officials, and who was in attendance at any such meetings?

I will accept affidavits from the Co-ordinators (or the Special Advisor, First Nations in the case of MSG) on behalf of any individuals listed in Appendix A under their institution's name, provided that the deponents of the affidavits give their evidence based solely on first hand, direct conversations with the listed individuals not providing personal affidavits.

The affidavits must be submitted to me by **October 22, 2001**.

The affidavits provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in IPC Practice Direction 7.

On October 22, 2001, I received a letter from the government's legal counsel, attaching affidavits sworn by the Freedom of Information Co-ordinators for the four ministries, as well as an affidavit from the Premier. I received a second letter on October 24, 2001 from legal counsel for MSG, attaching a second affidavit from that Ministry's Co-ordinator.

ISSUE:

The government's legal counsel has asked me not to provide the appellant with a copy of the various affidavits. The purpose of this interim order is to rule on this request.

DISCUSSION:

In Order Provision 1 of Interim Order PO-1954-I, I informed the institutions that any affidavits provided to me may be shared with the appellant, unless there is an overriding confidentiality concern, and pointed them to IPC Practice Direction 7 for a detailed description of the relevant procedures in this regard. IPC Practice Direction 7 states:

General

The Adjudicator [in this instance me] may provide representations received from a party to the other party or parties, unless the Adjudicator decides that some or all of the representations should be withheld.

Request to withhold representations

A party providing representations [in this case the five affidavits and covering letter from legal counsel] shall indicate clearly and in detail, in its representations, which information in its representations, if any, the party wishes the Adjudicator to withhold from the other party or parties.

A party seeking to have the Adjudicator withhold information in its representations from the other party or parties shall explain clearly and in detail the reasons for its request, with specific reference to the following criteria.

Criteria for withholding representations

The Adjudicator may withhold information contained in a party's representations where:

- (a) disclosure of the information would reveal the substance of record claimed to be exempt or excluded;
- (b) the information would be exempt if contained in a record subject to the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act*; or
- (c) the information should not be disclosed to the other party for another reason.

For the purposes of paragraph (c) above, the Adjudicator will apply the following test:

- (i) the party communicated the information to the IPC in confidence that it would not be disclosed to the other party; and
- (ii) confidentiality must be essential to the full and satisfactory maintenance of the relation between the IPC and the party; and

- (iii) the relation must be one which in the opinion of the community ought to be diligently fostered; and
- (iv) the injury to the relation that would result from the disclosure of the information would be greater than the benefit thereby gained for the correct disposal of the litigation.

Legal counsel's request

Legal counsel's confidentiality request consists of the following:

While we are content to provide *your Office* with the Affidavits, we are opposed to them being shared with the Appellant. Given the limited scope of the Appellant's request for any notes related to the meeting on September 6, 1995, disclosing the answers to the questions you posed would provide far more information than was originally requested. The Affidavits are being provided to you in confidence and ought not to be shared because of the potential prejudice to the litigation, in which many of the individuals referenced are defendants. In my respectful view, no legitimate public interest would be furthered by sharing this information with the Appellant who is not a party to the litigation. Furthermore, to disclose this information to the Appellant through the vehicle of a reasonable search inquiry would result in him getting information that not only goes beyond the scope of his request, but also information that could not be the subject of an access request. The Affidavits contain personal information and individual recollections of the event. Moreover, many of these individuals are no longer employed by the Crown and some were never so employed.

Findings

Given the nature of these appeals, it is clear that the affidavits could not fit within the first confidentiality criterion, since no exemption claims are at issue.

As far as the other two criteria are concerned, legal counsel's submissions are sketchy at best, consisting of statements with little or no evidence or argument to support them. I will deal with each of these statements separately.

Given the limited scope of the Appellant's request for any notes related to the meeting on September 6, 1995, disclosing the answers to the questions you posed would provide far more information than was originally requested.

This statement is not sufficient to establish any of the confidentiality criteria. As I explained in detail in Interim Order PO-1954-I, I must determine what questions are objectively relevant in order to satisfy myself that all reasonable steps have been taken to locate and identify responsive records. The answers to these questions are relevant, and relate directly to the issues in the appeals, and the fact that they provide information that was not originally requested by the

appellant is irrelevant. By necessity, inquiries in reasonable search appeals involve evidence and information that may not be reflected in records. To limit the scope of these inquiries in the manner suggested by legal counsel is not consistent with the legislative framework established in the *Act*. The position of legal counsel in this regard is also inconsistent with the position taken by her at the September inquiries, where detailed information, including affidavit and oral evidence regarding search activities similar in nature to the information contained in the affidavits provided in response to the interim order were provided to both me and the appellant.

The Affidavits are being provided to you in confidence and ought not to be shared because of the potential prejudice to the litigation, in which many of the individuals referenced are defendants.

Although identifying what is described as a “potential prejudice”, legal counsel provides no evidence or argument to support her position, and does not link this statement to any of the confidentiality criteria contained in IPC Practice 7. The *George v. Harris* lawsuit was discussed in detail during the September inquiries, in the presence of the appellant, and various defendants were identified in that context. The affidavits and oral evidence provided in the September inquiries include reference to individuals identified as defendants in the civil litigation, and the institutions relied on the document production requirements of that proceeding as evidence to support the adequacy of search activities in these appeals. On my review of the affidavits provided to me in response to Interim Order PO-1954-I, and in the absence of argument provided by legal counsel as required by IPC Practice 7, I am unable to conclude that their content could prejudice the *George v. Harris* litigation. In my view, the information contained in the affidavits would not qualify for exemption under the *Act*, nor am I persuaded that the so-called “Wigmore criteria” for confidentiality reflected in the third criterion have been established.

No legitimate public interest would be furthered by sharing this information with the Appellant who is not a party to the litigation.

It is not necessary to establish a public interest in order to permit the sharing of information in the affidavits with the appellant, and his lack of status in the *George v. Harris* litigation is not relevant in this context. The appellant is a party to appeals of the decisions made by the four institutions under the *Act*, and the sharing of information with him is governed by the policy and procedures established by this Office as reflected in IPC Practice 7.

To disclose this information to the Appellant through the vehicle of a reasonable search inquiry would result in him getting information that not only goes beyond the scope of his request, but also information that could not be the subject of an access request.

Again, legal counsel’s position does not accurately reflect the process for dealing with reasonable search appeals. Although records are frequently at issue in appeals, the *Act* is not exclusively a records-based scheme. As I explained in detail in Interim Order PO-1954-I, the issue in this type of appeal is not whether a requester is entitled to access to a requested record. Rather, what I must determine is whether adequate steps were taken to identify and locate all records that may be responsive to the request. In so doing, relevant questions need to be posed

and answers need to be provided and defended. By necessity, information not actually contained in records will be part of this type of inquiry, and it is clear from the affidavit materials provided by the various institutions during the course of the September inquiries that information not reflected in records was the type of evidence tendered by these institutions in support of its position that adequate search activities had been undertaken.

The Affidavits contain personal information and individual recollections of the event. Moreover, many of these individuals are no longer employed by the Crown and some were never so employed.

Legal counsel does not identify what information contained in the affidavits constitutes “personal information”. I have carefully reviewed the documents, and compared them to the affidavits already provided to me and to the appellant in the context of the September inquiries. The documents in both instances are similar in nature and address different aspects of the same issue. To the extent that information contained in the affidavits reflects recollections of various individuals, those recollections refer to objective and factual events. The first affidavits, as well as oral evidence provided at the September inquiries, identify various individuals as employees or former employees of the institutions, as well as defendants in the *George v. Harris* litigation, and consist of individual recollections of the events of September 6, 1995. The second affidavits are essentially the same type of documents containing similar information, and, absent argument from legal counsel to establish any fundamental distinction, I find that their content does not fall within the scope of any of the confidentiality criteria outlined in IPC Practice 7.

PROCEDURE:

Since I have found that the confidentiality criteria do not apply to the affidavits, I intend to provide the appellant with a copy of the six affidavits together with a Notice of Inquiry, no earlier than **November 5, 2001**.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

October 24, 2001