



March 7, 2008

Alain Préfontaine
Senior Counsel
Civil Litigation Section
Department of Justice
Bank of Canada Building
East Tower, Room 1133
234 Wellington Street
Ottawa ON
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Re: Our File MPCC 2007-006 (Amnesty International Canada & B.C. Civil Liberties Association) – MPCC Access to Government Records

Dear Mr. Préfontaine:

This letter is in response to your letter of February 22, 2008 in which you communicated the Government of Canada's position on the extent to which it is prepared to voluntarily share information with the Commission to enable it to fulfill its statutory mandate in respect of the captionally-noted complaint investigation under Part IV of the *National Defence Act* (NDA).

The Government's position re cooperation with MPCC's investigation

Your letter expresses the Government's position that the Commission should not have access to any information other than that which it could compel if it held a public interest hearing. Despite your assurances of the Government's commitment to cooperate, this obviously represents a rejection of the Commission's request for greater cooperation by government departments and agencies beyond the Department of National Defence (DND).

Perhaps equally disappointing is that, despite the Commission's efforts to articulate the importance of the information sought from various departments and agencies to the successful completion of this public interest investigation – none of which has been disputed to date – your letter offers no legal or policy reason for the Government's position. I will address further below specific issues arising from your letter.

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Assumption that the Commission should not receive greater access to information in its investigation than it could compel at a hearing

The stated assumption in your letter that the Commission should not have greater access to information in its public interest investigation than it could compel through the holding of a hearing is not supported by any accompanying legal or policy reasons. Nor does your letter address the Commission's repeated assurances as to its obligations, capacity and willingness to take appropriate steps to safeguard sensitive government information.

Moreover, your assumption is not consistent with either logic or legislative policy. It is self-evident that processes conducted entirely in private (such as the Commission's present investigation), versus those which include a hearing – particularly one conducted wholly or partially in public – can more readily take steps to safeguard sensitive information, thereby justifying a more open approach to the sharing of information. While there are likely numerous other examples in federal legislation, a review of the Commission's enabling legislation (NDA Part IV) and section 38 and following of the *Canada Evidence Act* (CEA) clearly reflect the expectation that investigations conducted in private give rise to less concerns regarding the receipt of sensitive information than do public proceedings.

Relevant documents in the possession of other departments and agencies

Another point raised in your letter is the lack of a “distinct” or “formal” “relationship” of such departments and agencies as the Department of Foreign Affairs and International Trade (DFAIT) and the Correctional Service of Canada (CSC), with the Canadian Forces (CF) military police. However, this has nothing to do with whether these entities hold information relevant to the Commission's mandate in a particular case, or to their ability to share such information with the Commission. The legislation governing the Commission's mandate and authorities contains no express or implied limitation on the potential institutional sources of information relevant to its complaint investigations.

If it were otherwise, one could argue by analogy that, in a hypothetical criminal investigation by the RCMP relating to activities of DFAIT and CSC officials, it would be appropriate for DFAIT officials to be less cooperative with the probe than their CSC colleagues simply because they are under a different ministerial portfolio from the RCMP.

In this matter, the Commission is merely seeking information relevant to its public interest investigation. It is publicly known and acknowledged that personnel from the DFAIT and the CSC have been involved in observing and monitoring the treatment of persons held in Afghan prisons, including the very institutions to which detainees transferred by CF military police have been sent, and reporting on same. However one

chooses to characterize these activities (and, contrary to the indication in your letter, the Commission has never purported to define the “primary role” of CSC or any other government department or agency), they clearly put DFAIT and CSC in a position to provide information regarding the practices of Afghan security forces with respect to the treatment of prisoners, including detainees. I would add that your assertion that CSC officials have had no contact with CF military police in Afghanistan is not consistent with information in the possession of the Commission.

Factual assertions in your letter with which the Commission takes issue

I will also take this opportunity to address a number of factual points in your letter with which the Commission takes issue. These points are addressed below.

i) Commission not satisfied with CSC cooperation

Contrary to the statement to this effect in your letter, the Commission has not expressed its satisfaction with CSC’s overall response to the Commission’s request for information. The Commission does acknowledge that CSC chose not to apply, vis-à-vis the Commission, redactions under CEA section 37 to copies of its documents among those released in the ongoing Federal Court proceedings with Amnesty International Canada and B.C. Civil Liberties Association. However, the Commission is equally dissatisfied with the decision of both CSC and DFAIT to apply the far more voluminous redactions under CEA section 38 to material made available to the Commission.

ii) Commission not in same position as if it held a hearing

It is not the case that the Government’s approach as described in your letter “places the Commission in the same position it would enjoy if it were to convene a public hearing into the complaints ...” Certainly one major difference between the two scenarios is that, with a hearing process, the Commission could challenge the redactions to documents under the CEA in Federal Court. Presently, as CEA sections 37 and 38 do not apply to the Commission’s public interest investigation, there is no legal mechanism for the Commission to challenge the Government’s voluntary redaction of the documents.

Moreover, even if the Commission called a hearing in this matter, it is far from clear that this in itself would prevent the sharing of sensitive government information with the Commission. CEA sections 37 and 38 only control the “disclosure” of certain sensitive information in the context of a proceeding such as a hearing. However, a review of these provisions suggest that the sharing of information exclusively with a government body which has caused a hearing process to be commenced under a statutory mandate does not necessarily amount to a “disclosure”.

iii) Government's approach with respect to cooperation of departments and agencies other than DND is not "working well"

The Commission does not accept the assessment in the letter that the Government's approach (of providing access only to information which vetted in accordance with CEA sections 37 and 38) is "working well". As indicated in the Commission's one-year status report on this investigation, the Commission is, on the contrary, concerned that the extent of the vetting to which relevant DFAIT and CSC documents presently available to the Commission have been subjected will prevent the Commission from being able to fully and thoroughly probe the allegations at issue in this complaint.

Far from this approach "working well," it was indeed its very inadequacy which caused the Commission to seek better access to information, culminating most recently in the Chair's letter to the Minister of National Defence on January 28, 2008. The Commission is naturally disappointed that the Government has seen fit to reject the Commission's request for further access to relevant information held by DFAIT and CSC, even in the face of the Commission's assessment that this would significantly impair its ability to fulfill its mandate in respect of this important matter of public interest. This decision has – and, it would seem, quite unnecessarily – substantially reduced the Commission's options for honourably discharging the mandate entrusted to it by Parliament in respect of this complaint.

iv) Government is not cooperating to the "fullest extent possible"

Finally, in the apparent absence of legal or other constraints preventing Government cooperation in the manner requested, the Commission cannot accept your characterization of the Government's position as seeking "[t]o facilitate the Commission's investigation to the fullest extent possible consistent with its mandate"[emphasis added].

A further concern

Quite apart from the apparent refusal to reconsider the status quo in respect of the cooperation to be provided by DFAIT and CSC, your letter suggests the even more troubling prospect that the restriction of Commission access to CEA-vetted information is now to be extended to information provided by DND – and not only in respect of this investigation, but also for the separate public interest investigation in respect of the entirely distinct complaint submitted by Professor Amir Attaran (MPCC file 2007-003). Obviously, such developments would be viewed by the Commission as matters of grave concern.

The way ahead

As noted above, the Government's rejection of the Commission's request for greater access to information relevant to this investigation has reduced the options open to the Commission for a satisfactory resolution of this matter.

The alternatives now would be:

- 1) Pursue this investigation as best possible on the basis of limited access to relevant government information while expressly acknowledging the resulting gaps and limitations of the Commission's findings; or
- 2) Seeking to conduct a thorough investigation by moving to a hearing process.

The first option would obviously be a particularly dissatisfying and disappointing result for the complainants as well as for the CF Provost Marshal and indeed all CF military police members, especially all those who have served and are serving in Afghanistan. Nor does it well serve the broader public interest for an appropriately-mandated statutory body to be prevented from fully investigating very serious allegations related to a matter of significant public concern.

The second option, the move to a hearing process, has been before the Commission from the outset. As previously indicated in correspondence with government officials, as well as in its one-year status report for this complaint, the Commission's preference has been to use the hearing process sparingly, in light of the significantly increased cost and delay associated with it. This stance is in keeping with the admonition of the Federal Court of Appeal to bodies (such as the Commission) which are authorized to hold hearings as a matter of discretion: "Investigation is the rule, a public hearing the exception."¹ On top of the added costs and delay inherent in the hearing process itself, the Commission would anticipate, in light of the Government's position, even further costs and delay resulting from litigation between the Government and the Commission.

Clearly, there are significant downsides to both of the options now remaining to the Commission. However, in choosing to reject the Commission's representations with respect to securing improved voluntary cooperation, and the expected results of failing to do so, the Government has placed the Commission in this position.

In closing

Given the seriousness of the matters under investigation and the amount of time which this file has already taken, the Commission will be deciding on its future course of action in the very near future.

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¹ *RCMP Public Complaints Commission v. Attorney General of Canada* 2005 FCA 213, at paragraph 62, per Létourneau JA for the Court.

If it seems from the foregoing that the Commission has misconstrued the Government's position on this matter as expressed in your previous letter, it is requested that you so advise the undersigned forthwith.

Sincerely,

A handwritten signature in black ink, appearing to read "Julianne C. Dunbar". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Julianne C. Dunbar
General Counsel