



**Information and Privacy
Commissioner/Ontario**

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

ORDER 113

Appeal 880261

Ministry of the Attorney General



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O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987 (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) a right to appeal any decision of a head to the Commissioner.

The facts of this case and the procedures employed in making this Order are as follows:

1. On April 27, 1988, the appellant made a request to the Ministry of the Attorney General (the "institution") for the following information:

Application is hereby made on behalf of our client, the Pickering Harbour Company and Frenchman's Bay Harbour Marine Service Company Limited, ... for access to your records containing all submissions made by third parties to the Attorney General in connection with Frenchman's Bay, and in particular:

- (i) any correspondence received from the Canadian Federation of Independent Business with respect to our clients,
- (ii) the operation of Frenchman's Bay, or
- (iii) any correspondence or submissions urging the Attorney General to join in the legal proceedings against our client, and to make a claim to the lands and shares which are the subject matter of the action.

Further clarification of this request was given by the requester in a letter to the institution dated June 13, 1988 as follows:

1. We would appreciate a copy of the correspondence referred to in parts (i) (ii) and (iii) of our letter or any notes or memoranda of conversations in connection with the matters set out therein.
 2. The only third parties who we believe may have written to the Attorney General in connection with the matters raised in our letter are the Canadian Federation of Independent Business, the Metropolitan Toronto Region Conservation Authority, the Corporation of the Town of Pickering, Keen Kraft Marina Limited. If anyone else wrote to your Ministry, we would also like a copy of that correspondence.
 3. By the operation of Frenchman's Bay, we mean the operation of Frenchman's Bay as a harbour for pleasure boats. We want to know if any complaints were made to your Ministry that the Pickering Harbour Company Limited was taking the position that the Town of Pickering did not have the power to pass zoning legislation in relation to Frenchman's Bay. The time period is from 1975 up to 1982 when the Attorney General consented to have the Town of Pickering act as relator in an action brought against our clients. We are not asking for the information produced on the examination for discovery.
 4. We understand that a letter was sent by the Canadian Federation of Independent Business probably on behalf of Keen Kraft Marina complaining about the manner in which our client was conducting business on Frenchman's Bay. It is difficult to supply you with details with respect to correspondence which we have not seen, and all we can do is really refer you back to our letter of April 27, 1986 (sic).
3. On July 27, 1988, the institution responded, granting partial access to the records requested.

The institution claimed exemptions for part of the record under subsection 13(1), section 19 and section 21 of the Freedom of Information and Protection of Privacy Act, 1987.

4. On August 25, 1988, the requester appealed the institution's decision, and I gave notice of the appeal to the institution.
5. In his letter of appeal, the appellant stated that:

The position taken by the Ministry is that disclosure would constitute an invasion of personal privacy. We respectfully submit that the disclosure of the name of the sender of the letter cannot be refused to the person whom the sender is writing about on the basis that it would constitute an unjustified invasion of privacy. This is so because section 21 only gives the head the right to refuse to disclose personal information on that basis to a person other than the individual to whom the information relates.

We also submit that the name of the individual who wrote the letter is not personal information as defined in Section 2 of the Act and therefore this is not information which the Ministry should refuse to disclose. We further submit that there is nothing in the letters to indicate that the persons writing the letters do not wish to have their names disclosed and, therefore, there is no basis on which to suggest that the release of such names would constitute an unwanted invasion of privacy.

6. The records at issue were obtained and reviewed by an Appeals Officer from my staff. Although the institution refused to disclose the records or parts of records on the grounds of the exemptions contained in sections 13(1), 19

and 21, the appellant agreed during discussions with the Appeals Officer that he would appeal only the section 21 exemptions. The Appeals Officer, with the consent of the institution, sent the appellant a copy of page 21 of the record, as the institution indicated that it had intended to release that page, and had not done so through inadvertence. Settlement was not effected on the section 21 exemptions, and the parties indicated that they were content to proceed to an inquiry.

7. By letter dated April 27, 1989, I notified the institution and the appellant that I was conducting an inquiry into this matter. Thirty four (34) affected persons were also notified of the appeal by this Office, and given the opportunity to make representations with respect to the issues affecting their interests.

Enclosed with the Notice of Inquiry was a copy of a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal, and sets out questions which paraphrase those sections of the Act which appear to the Appeals Officer, or any of the parties, to be relevant to the appeal. In this case, the Appeals Officer raised the issue of the applicability of section 17 of the Act to the records at issue, in addition to the exemptions cited by the institution. The Appeals Officer's Report indicates that the parties, in making representations to the Commissioner, need not limit themselves to the questions set out in the Report.

8. I have received representations from the appellant, the institution and twelve (12) affected parties, and have considered them in making my Order.

It is important to note at the outset the purposes of the Act as set out in section 1. Subsection 1(a) provides a right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. Subsection 1(b) sets out the counter-balancing privacy protection purpose of the Act. The subsection provides that the Act should protect the privacy of individuals with respect to personal information about themselves held by institutions and should provide individuals with a right of access to that information.

Further, section 53 of the Act provides that the burden of proof that the record falls within one of the specified exemptions in this Act lies with the head of the institution (the "head"). In the circumstances of this case, the head shares with the affected party the burden of proof with respect to the applicability of the exemption claimed under section 17.

Before I begin the substantive discussion of the applicability of sections of the Act to the records at issue in this appeal, it should be noted that all of the pages of the requested records have been paginated by the institution for ease of reference by them. References in this Order to, for example "page 54 of the record", refer to the particular record at issue paginated as page 54 by the institution.

The issues arising in this appeal are as follows:

- A. Whether any part of the requested records are subject to exemption from disclosure pursuant to subsection 17(1) of the Act.
- B. Whether any part of the requested records qualify as "personal information" within the meaning of subsection 2(1) of the Act.
- C. If the answer to issue "B" is in the affirmative, whether the disclosure of the requested records would be an unjustified invasion of the privacy of the persons to whom the information relates, pursuant to section 21 of the Act.

ISSUE A: Whether any of the requested records are subject to exemption from disclosure pursuant to subsection 17(1) of the Act.

The records for which a claim for exemption has been raised pursuant to subsections 17(1) (a) and (c) are five letters, from pages 1 to 7 of the record, inclusive, all of which relate to the operation of an affected party's business, and a "Notice of Proceeding Against the Crown", from pages 54 to 57 of the record. With the exception of the last of the letters, at pages 6 and 7 of the record, and the Notice of Proceeding Against the Crown, these records have been withheld in their entirety. Several paragraphs of the last-mentioned letter, including the name and address of the writer, have been severed by the institution. The name of the plaintiff and its solicitor and a description of land have been severed in the Notice of Proceeding against the Crown.

Subsection 17(1) of the Act reads as follows:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied; or
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

As I stated in Order 36 (Appeal Number 880030), dated December 28, 1988, records must meet a three-part test in order to fall within the section 17 exemption:

1. the records must contain third party information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the records must give rise to a reasonable expectation that one of the types of injuries specified in (a), (b) or (c) of subsection 17(1) will occur.

Failure to satisfy the requirements of any part of this test will render the section 17 exemption claim invalid.

The appellant has not addressed the question of the section 17 exemption claims in his representations.

With respect to the information severed in the letters, the institution, in its representations, states that the information at issue is both commercial and financial. The evidence I have received from the affected party to whom this information relates, supports this contention. The information relates not only to the operation of a business, but also to future financial planning. Having examined the records and considered the evidence which has been submitted, in my view, the information in the records is both commercial and financial information.

In order to satisfy the second part of the test, the information must have been supplied to the institution in confidence. From an examination of the records, it is clear that the information therein was supplied to the institution. The institution, in its representations states "...[the] individuals writing to the Attorney General do so implicitly in confidence, and would not expect that letters setting out... financial information... would be made publicly available to third parties." The affected party's evidence supported this view as to his expectations that the correspondence would be treated in a confidential manner.

These representations have established to my satisfaction that the information at issue in the letters was supplied to the institution in confidence. Accordingly, I find that the second part of the test for section 17 has been met.

With respect to the third part of the test for the section 17 exemption, the representations of the affected party and of the institution show a reasonable expectation that disclosure could

result in the kinds of harm contemplated by subsection 17(1)(a). The relationship between the parties, and the fact that the appellant operates in direct competition with the affected party lend weight to the evidence tendered by the institution and the affected party. Having reviewed the records and the evidence submitted, I find that disclosure of the information severed in the letters could result in prejudice to the competitive position and interference with the negotiations of the affected party.

With respect to the Notice of Proceeding Against the Crown, this is a document which is required, pursuant to the Proceedings Against the Crown Act, to be served on the Crown prior to the commencement of any litigation against the Crown. It is a notice of intention to litigate. The institution has released the document to the appellant, with the name of the plaintiff, the plaintiff's solicitor and a description of land, severed. I am now informed by the institution that it no longer wishes to claim an exemption for the description of land and intends to disclose this information to the appellant. Accordingly, I will limit my consideration of the record to the information severed; that is, the name of the plaintiff and the plaintiff's solicitor.

The name of the plaintiff and the plaintiff's solicitor must also meet the three part test outlined above in order to satisfy the conditions for an exemption pursuant to subsection 17(1). In my view, the Notice, while "supplied" to the institution, was not supplied in confidence, as required by the second part of the test. The plaintiff supplied notice of his intention to proceed against the Crown. Had the plaintiff followed through on this intention, the record would have been filed with the

Court and become a public record. Therefore, the plaintiff could have had no expectation that the record would have been received, or kept, in confidence by the institution. Since the record has failed to satisfy one of the parts of the three part test, it is not necessary for me to consider whether the record meets the other parts of the test. Accordingly, I order its disclosure to the appellant.

In summary, I find that all three parts of the test for upholding a claim to a section 17 exemption have been satisfied with respect to the five letters at issue (from pages 1 to 7 of the record), and I uphold the head's decision not to disclose them.

With respect to the Notice of Proceeding against the Crown (from pages 54 to 57 of the record), I find that the information severed fails to satisfy the test for exemption pursuant to subsection 17(1), and I order its disclosure to the appellant.

ISSUE B: Whether any part of the requested records qualify as "personal information" within the meaning of subsection 2(1) of the Act.

The remaining records at issue include:

- thirty-three (33) letters written to the institution and to others by various individuals, and one letter in response to one of those letters, from another ministry, the names, addresses, other identifying information and opinions of the writers of the letters have been severed.

- from pages 156 to 158 of the record, being notes relating to accidents and safety in Frenchman's Bay, the writer's name and title have been severed. These notes are referred to in an attached letter, at page 159 of the record, in which the writer's name and address have been severed.

- at page 160 of the record, being a memo from a ministry official, the names of two parties have been severed.

- at page 164 of the record, being a legal memo from the Pickering Town Solicitor, the name of the addressee has been severed in a legal memo from the Pickering Town Solicitor. This memo is referred to in an attached letter at page 162 of the record. The name, business address and professional involvement of the writer of the letter have been severed.

Subsection 2(1) of the Act defines "personal information" as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,

- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individuals' name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

In his representations, the appellant argues that the institution's claim for exemption of the information severed from the records referred to above, is invalid. He states:

Section 2(1) of the Act which defines personal information does not specifically prohibit disclosure of the name of an individual writing such a letter. The only objection to the release of an individual's name is where it appears with other personal information relating to the individual or where the disclosure would reveal other personal information about the individual, section 2(1)(h). The personal opinions or views of the individual where they relate to another individual are not protected, section 2(1)(e).

Examination of the record shows that the names of the writers of the thirty-three letters do not appear alone. The writers have included in the letters their addresses, information about themselves and their personal opinions, all of which are "personal information" as defined by subsections 2(1)(d), (e) and (h) above. The personal opinions which have been severed do not relate only to the appellant, but also to another party. I

find, therefore, that such information as the names and addresses of the letter writers, information about themselves, and their opinions where such opinions do not relate to the appellant, are personal information as defined by subsection 2(1) of the Act.

With respect to those opinions relating to the appellant, the latter argues in his representations:

In this case, most of the accusations are made in connection to the operation of a limited company, but since individuals are the persons responsible for formulation and execution of policy, the opinions expressed do in fact relate to individuals and, therefore, cannot be considered as "other personal information" within the meaning of section 2(1)(h) because of section 2(1)(e).

Perusal of the record at issue shows that the opinions expressed about the operation of the appellant company are intertwined with opinions about another person. In my view, it would not be possible to sever and disclose that information which relates to the appellant alone without revealing that information which relates to another person. Those opinions which are only about the appellant company have been released to the appellant.

In Order 16, (Appeals 880025 et al.) dated September 8, 1988, I canvassed the issue of "personal information" as it relates to business entities. In that appeal, the third party appellants and affected parties, which were business entities, argued that information contained in the records at issue in that appeal was personal information, and that disclosure of those records would be an unjustified invasion of personal privacy.

Personal information, as defined by subsection 2(1) relates to an identifiable individual. I stated at page 17 of the Order:

The use of the term 'individual' in the Act makes it clear that the protection provided with respect to the privacy of personal information relates only to natural persons. Had the legislature intended 'identifiable individual' to include a sole proprietorship, partnership, unincorporated association or corporation, it could and would have used the appropriate language to make this clear.

The types of information enumerated under subsection 2(1) of the Act as 'personal information' when read in their entirety, lend further support to my conclusion that the term 'personal information' relates only to natural persons.

It is, of course, possible that in some circumstances, information with respect to a business entity could be such that it only relates to an identifiable individual, that is, a natural person, and that information might qualify as that individual's personal information. However, examination of the records at issue in this appeal, and consideration of the representations which I have received from the parties do not lead me to believe that the appellant, an incorporated company, would qualify as an "identifiable individual" or as the "individual to whom the information relates" (subsection 21(1)) in the circumstances of this case. Accordingly, the opinion of an individual about the appellant corporation is not, in my view, the personal information of the appellant, but that of the individual whose opinion it is.

In the case of one of the letters, at page 153 of the record, addressed to the institution from the Canadian Federation of Independent Business, the writer's name and title have been

severed, but not the company letterhead, or the writer's business address. In my view, the name and title of this person writing in an official capacity are not "personal information" as defined by subsection 2(1). The writer is not expressing his personal views, nor are the issues personal to him. I am not satisfied that to disclose the individual's company title with his name is to disclose "other personal information" about the individual, in these circumstances. I therefore order disclosure of this name and title. The other severances in this letter relate to another individual, and in my view, do qualify as information personal to that individual.

With respect to pages 156 to 158 of the record, the name of the writer of notes on safety and accidents in Frenchman's Bay has been severed. As can be seen from an attached letter at page 159 of the record, the writer characterized these notes as being his views and opinions. The writer's name appears with his opinion, and so in my view, qualifies as "personal information" specifically within the meaning of subsection 2(1)(e) of the Act.

With respect to the internal memo of the institution, at page 160 of the record, the names severed are those of two corporate entities. As I have stated above, these corporations are not "identifiable individuals", and there is nothing in the memo which would lead me to believe that disclosure of the names would reveal personal information about any individual. The names severed are not, in my view, personal information, and I order their disclosure.

At page 164 of the record, the name of the addressee has been severed on a memorandum from the Town Solicitor of Pickering.

The body of the memorandum has been disclosed to the appellant. As has been discussed above, an individual's name may be personal information where it appears with other personal information relating to the individual, or where the disclosure of the name would reveal other personal information about the individual. The subject-matter of the memorandum does not relate personally to the person whose name has been severed. The memorandum is attached to, and referred to in a letter to the institution on page 162. The name, address and professional involvement of the writer have been severed. I find that the name of the addressee of the memorandum, and the name, business address and professional involvement of the writer of the letter are not personal information for the purposes of subsection 2(1) of the Act, and I order their disclosure to the appellant.

In summary, I find that the names, addresses, information about the writers tendered by themselves and personal opinions of the writers of the letters, including opinions about the affected party and the appellant, are personal information within the meaning of subsection 2(1) of the Act.

I find that the name and title of the writer of the letter on behalf of the Canadian Federation of Independent Business (at page 153 of the record) is not personal information, and I order disclosure of that name and title.

I find that the name of the writer of notes, from pages 156 to 158 of the record is personal information within the meaning of subsection 2(1) of the Act.

I find that the names of the two corporations severed from the institution's memorandum (at page 160 of the record) are not personal information, and I order disclosure of those names.

I find that the name of the addressee of the legal memorandum (at page 164 of the record) and the name, business address and professional involvement of the writer of the letter (at page 162 of the record) are not personal information, and I order their disclosure to the appellant.

ISSUE C: If the answer to issue "B" is in the affirmative, whether the disclosure of the requested records would be an unjustified invasion of the privacy of the persons to whom the information relates, pursuant to section 21 of the Act.

The issue of whether the disclosure of any of the information found to be personal information would constitute an unjustified invasion of personal privacy has not been addressed by the appellant, since his position is that the information he is seeking is not the personal information of the individuals writing the letters.

The institution in its representations has addressed this issue with respect to only one of the affected parties.

Section 21 of the Act provides for a general rule of non-disclosure of personal information to any person other than the person to whom the information relates. Certain exceptions to this general rule are set out in subsection 21(1). These exceptions include the consent of the person whose information it is, health and safety circumstances, information collected for the purpose of maintaining a public record, research purposes, or where it would not be an unjustified invasion of personal privacy to release the information. If it is established that the disclosure of the information would not

result in an unjustified invasion of personal privacy, then the personal information must be released.

Subsections 21(2) and (3) of the Act provide guidance in determining if disclosure of personal information would constitute an unjustified invasion of personal privacy.

Subsection 21(2) sets out some factors to be considered:

- (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
 - (b) access to the personal information may promote public health and safety;
 - (c) access to the personal information will promote informed choice in the purchase of goods and services;
 - (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
 - (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
 - (f) the personal information is highly sensitive;
 - (g) the personal information is unlikely to be accurate or reliable;
 - (h) the personal information has been supplied by the individual to whom the information relates in confidence;

- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

Subsection 21(3) provides that the presence of certain types of information will raise a presumption that disclosure would constitute an unjustified invasion of personal privacy:

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
- (c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels;
- (d) relates to employment or educational history;
- (e) was obtained on a tax return or gathered for the purpose of collecting a tax;
- (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
- (g) consists of personal recommendations or evaluations, character references or personnel evaluations; or
- (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

With reference to the information about the one affected party, the head submits:

The information contained in... portions of the record contains character references or personal recommendations of [the affected party], and disclosure of such information with the name of the individual providing such references or recommendations could be said to constitute an unjustified invasion of [the affected party's] personal privacy on the basis of clause 21(3)(g).

I find that a presumption of an unjustified invasion of this affected party's privacy has been raised, and is not rebutted by any of the factors enumerated in either subsections 21(2) or 21(4). I therefore find that disclosure of this personal information would result in an unjustified invasion of this particular affected party's personal privacy, and I uphold the head's decision not to release this information.

I must now turn to the personal information relating to the 33 other affected parties, which is contained in letters written by them to the institution, and in the notes on accident and safety appended to one of the letters. The institution submits that individuals who write to the Ministry do so with the expectation that the correspondence will be held in confidence. I have received representations from 11 of these individuals, and their representations support the institution's contention as to the writers' expectations with respect to confidentiality at the time of writing the letters. The affected parties have stated that disclosure of the personal information would constitute an unjustified invasion of personal privacy, and have declined to consent to the disclosure of their names and other personal information to the appellant. I have considered the

representations and the records at issue and I find that disclosure of this personal information would constitute an unjustified invasion of personal privacy.

In conclusion, my Order is as follows:

I find that the claim for exemption under subsection 17(1) of the Act for the five letters from pages 1 to 7 of the record has been satisfied, and I uphold the head's decision not to release them.

I find that the severances made in the Notice of Proceedings Against the Crown, from pages 54 to 57 of the record, do not satisfy the test for exemption pursuant to subsection 17(1) and I order the release of this record to the appellant in its entirety, within 20 days of the date of this Order.

I find that the names, addresses, information about the writers tendered by themselves and personal opinions of the writers of the 33 letters written to the institution, are personal information within the meaning of subsection 2(1) of the Act and disclosure of this personal information would be an unjustified invasion of personal privacy. I uphold the head's decision not to release this information.

I find that the name and title of the person writing on behalf of the Canadian Federation of Independent Business, at page 153 of the record, is not personal information, and I order its disclosure to the appellant within 20 days of the date of this Order.

I find that the name of the writer of notes, from pages 156 to 158 of the record is personal information within the meaning of subsection 2(1) of the Act and I uphold the head's decision not to release it.

I find that the names of the two corporate entities in the institution's internal memorandum, at page 160 of the record, are not personal information and I order their disclosure to the appellant within 20 days of the date of this Order.

I find that the name of the addressee of the legal memorandum, at page 164 of the record, and the name, business address and professional involvement of the writer of the attached letter, at page 162 of the record, are not personal information, and I order their disclosure to the appellant within 20 days of the date of this Order.

The institution is further ordered to advise me in writing, within five (5) days of the date of disclosure of the records ordered to be released herein, of the date on which disclosure was made.

Original signed by:
Sidney B. Linden
Commissioner

November 9, 1989
Date