



Information and Privacy  
Commissioner/Ontario

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

# ORDER P-964

Appeal P-9400771

Ministry of Natural Resources



80 Bloor Street West,  
Suite 1700,  
Toronto, Ontario  
M5S 2V1

80, rue Bloor ouest  
Bureau 1700  
Toronto (Ontario)  
M5S 2V1

416-326-3333  
1-800-387-0073  
Fax/Télé: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The Ministry of Natural Resources (the Ministry) received a request for information relating to air safety surveys regarding its fleet, conducted from 1988 onward.

The Ministry located records responsive to the request and initially denied access to them pursuant to the exemption in section 13(1) of the Act (advice and recommendations).

The requester appealed this decision. In his letter of appeal, the appellant outlined his reasons for objecting to the Ministry's refusal to disclose the requested information. As well, the appellant attached a number of documents to his letter of appeal regarding other access requests he has made for similar information. He indicated further that sections 11 and 23 are applicable to the records in the circumstances of this appeal.

Subsequently, the Ministry issued a revised decision letter to the appellant in which it withdrew its reliance on section 13(1) and indicated that it is now relying on the following exemptions to deny access to the records:

- economic and other interests - section 18(1)(c)
- invasion of privacy - section 21(1).

The appellant continues to object to the Ministry's decision. A Notice of Inquiry was provided to the Ministry and the appellant. Transport Canada Aviation was also notified as an affected party and was invited to submit representations. Representations were received from all three parties. The appellant indicated that he also relies on his letter of appeal and attached documentation as part of his representations.

Transport Canada Aviation indicated in its representations that it has no interest in the records at issue and that any decision regarding disclosure rests with the Ministry.

## RECORDS

The records at issue consist of a document entitled "Transport Canada Safety Survey 1993" prepared by the Regional Aviation Safety Officer for Transport Canada Aviation. This document contains two records: "Ministry of Natural Resources Confidential Safety Survey, Interim Report, March 26, 1993" and "Ministry of Natural Resources Safety Survey, May 12, 1993". The Survey examined issues surrounding Management, Flight Operations, Maintenance and Communications.

## **PRELIMINARY MATTER:**

### **OBLIGATION TO DISCLOSE A GRAVE ENVIRONMENTAL, HEALTH OR SAFETY HAZARD**

In his letter of appeal and representations, the appellant takes the position that the Ministry is obliged to disclose the records at issue by virtue of section 11(1) of the Act. This provision states that:

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.

In Order P-482, Inquiry Officer Holly Big Canoe addressed the potential application of section 11 to an appeal brought under the Act. She approached the matter in the following fashion:

Section 11 of the Act is a mandatory provision which requires the head to disclose records in certain circumstances. The duties and responsibilities set out in section 11 of the Act belong to the head alone. As a result, the Information and Privacy Commissioner or his delegate do not have the power to make an order pursuant to section 11 of the Act.

I agree with this interpretation and adopt it for the purposes of this appeal. It follows that I do not have the authority to review the Ministry's decision not to release the records under section 11 for the purposes of the present appeal.

Where, as in this case, an appellant takes the position that there exists a public interest in the disclosure of a records, it is entirely appropriate for the Commissioner's office to consider whether the documents in question might be released under section 23 of the Act (the public interest override provision). I shall return to this issue later in the order.

## **DISCUSSION:**

### **ECONOMIC AND OTHER INTERESTS**

Section 18(1)(c) of the Act states:

A head may refuse to disclose a record that contains,

information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

Section 18(1)(c) provides institutions with a discretionary exemption which can be claimed where disclosure of the records could reasonably be expected to prejudice an institution in the competitive marketplace, interfere with its ability to discharge its responsibilities in managing the provincial economy, or adversely affect the government's ability to protect its legitimate economic interests (Order P-441).

"Could reasonably be expected to" has been interpreted to mean that the expectation of prejudice to the economic interests or competitive position of the Ministry, should a record be disclosed, must not be fanciful, imaginary or contrived, but rather one which is based on reason (Order 188). I agree with this interpretation and adopt it for the purposes of this appeal. It is not necessary to prove that actual harm will result from disclosure.

The Ministry provides extensive background on its Aviation Program and its relationship with Transport Canada. The Aviation Services Program of the Ministry has a mandate to provide or arrange non-scheduled air transportation for the Ministry and other Ontario Government ministries.

The Ministry indicates that air carriers and approved maintenance organizations are regularly audited by Transport Canada and that it has undergone six audits within the past five years which cover various aspects of its operations. The purpose of Transport Canada audits is to "promote compliance with the aviation regulations and standards which collectively prescribe an acceptable level of aviation safety". The results of these audits, according to the Ministry, were positive, and revealed no safety concerns.

The Transport Canada Safety Survey, on the other hand, is a voluntary program conducted by Transport Canada's Systems Safety Group to "... identify deficiencies in the company system which permit unsafe operating practices or could cause an accident". The Director of the Aviation, Fire and Flood Management Branch opted to have the safety survey conducted in order to assist the Ministry in establishing a basis for a comprehensive safety program for its operations.

The Ministry indicates that it has concerns about the methodology used by the Aviation Safety Officer who conducted the survey and believes that the issues raised and conclusions drawn are based on insufficient and unsubstantiated evidence.

The Ministry submits that disclosure of these records would prejudice its ability to compete in the market place. The Ministry describes a number of current initiatives it is involved in with respect to marketing its aviation expertise in new directions, and submits that all of these operations and the potential for future contracts is premised on the aviation program's reputation for excellence in resource management flying.

The Ministry states that although its track record for safety and effective operations is excellent, it is concerned that the survey presents an unflattering portrait of the aviation program, and that its release could damage its reputation, which will consequently prejudice its ability to compete in the market place.

In my view, the Ministry alleges possible consequences but does not provide evidence or sufficient explanation to support the conclusion that these consequences **could reasonably be expected** to result from the disclosure of these records. The Ministry's submissions indicate that it has an established

reputation of excellence with documentary evidence to support it by way of regular Transport Canada audits. I am not convinced that the disclosure of one survey which was conducted several years ago could result in the type of harm contemplated by section 18(1)(c). Therefore, I conclude that the harms envisioned by the Ministry could not reasonably be expected to occur should the records be disclosed and section 18(1)(c) does not apply.

## **INVASION OF PRIVACY**

The Ministry submits that the records make a number of critical references to identifiable individuals and that disclosure of this information constitutes an unjustified invasion of their personal privacy.

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the views or opinions of another individual about an individual identified in a record.

I have reviewed the records and I note that no individual has been mentioned by name. There are, however, a number of references to position titles. In most cases, the comments contained in the records relate to the structures or systems and positions which have been established rather than the individuals who fill them. In my view, this does not constitute the personal information of the individuals who are employed in those positions referred to in the survey. As I have found that section 18(1)(c) does not apply to the records at issue and the Ministry has claimed no other exemptions, this information should be disclosed to the appellant.

In some cases, however, the comments in the records appear to be directed at the individuals who hold the positions and reflect the views or opinions of other individuals about them. These comments essentially amount to an assessment of the individuals' performance. Where only one individual holds a particular position, it is possible to identify the individual by reference to that position.

The appellant submits that the personal privacy protections in the Act cannot be applied to public employees or their views nor to the professional air inspector observations of Transport Canada personnel. It has been established in previous orders that information about an employee does not constitute that individual's personal information where the information relates to the individual's employment responsibilities or position. Where, however, the information involves an evaluation of the employee's performance or an investigation into his or her conduct, these references are considered to be the individual's personal information. Accordingly, I find that the portions of the records which I have highlighted in yellow contain the personal information of the individuals referred to.

Once it has been determined that a record contains personal information, section 21 of the Act prohibits the disclosure of this information except in certain circumstances.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Where one of the presumptions in section 21(3) applies to the personal information found in a record, the only way such a presumption against

disclosure can be overcome is if the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information.

If none of the presumptions in section 21(3) apply, the Ministry must consider the application of the factors listed in section 21(2) of the Act, as well as all other circumstances that are relevant in the circumstances of the case.

In his letter of appeal and representations, the appellant has implicitly raised section 21(2)(b) (access to the record might promote public health and safety) as a factor which weighs in favour of disclosure of the personal information. He submits that the report affects public safety, including the safety of Ministry employees using or working on the air fleet. This argument also forms the basis for the appellant's claim that the public interest override in section 23 of the Act applies in the circumstances of this case.

The Ministry indicates that it considered whether section 21(2)(b) might be a relevant factor in the circumstances of this appeal. The Ministry submits that the personal information contained in the records does not in and of itself raise concerns of public safety, but rather, consists of comments which reflect on the individuals' character. Furthermore, the Ministry indicates that one of the individuals referred to in the records was replaced after the survey was completed. Finally, the Ministry states that the various audits of the program conducted by Transport Canada Aviation do not identify any serious safety concerns. For these reasons, the Ministry concluded that release of this information would not advance or promote public health or safety.

The Ministry also relies on the following factors found in section 21(2) of the Act:

- the information is unlikely to be accurate or reliable (section 21(2)(g))
- disclosure may unfairly damage the reputation of any person referred to in the records (section 21(2)(i)).

With respect to both sections 21(2)(g) and (i), the Ministry reiterates its concern about the methodology employed by the Safety Officer. In considering this background, the Ministry expresses concern about the accuracy of the comments and the damage disclosure of these comments could have on the reputations of the individuals referred to, in particular to an individual who is no longer employed in the position in question.

I have considered the submissions and all documentation provided and have reviewed the personal information at issue, and I make the following findings:

1. The mere fact that the records consist of a safety survey of the Ministry's air fleet does not automatically bring into play section 21(2)(b) of the Act. There must be some connection to access to the personal information and the promotion of public health and safety. In my view, the information at issue pertains to employees' perceptions of certain individuals rather than to safety issues. Accordingly, I find that section 21(2)(b) does not apply.

2. There are no other factors in section 21(2) which would favour disclosure of the portions of the records at issue.
3. The comments about the individuals referred to in the records primarily reflect the views of Ministry staff and are critical of the performance of these individuals. I am satisfied that disclosure of this information could unfairly damage the reputation of the individuals referred to. Accordingly, section 21(2)(i) is a relevant factor favouring non-disclosure.
4. None of the personal information contained in the records falls under section 21(4).
5. I find that the disclosure of the personal information in the records at issue would constitute an unjustified invasion of the personal privacy of the individuals referred to in them and that those portions of the records are exempt from disclosure under section 21 of the Act.

## **PUBLIC INTEREST IN DISCLOSURE**

Section 23 of the Act states:

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

Because of the findings I have made above regarding section 18(1)(c), the appellant will receive the majority of the records at issue. It is only necessary, therefore, to consider the application of section 23 to the personal information which has been withheld under section 21.

Section 23 has two requirements which must be satisfied in order to invoke the application of the so-called "public interest override". There must be a **compelling** public interest in disclosure, and this compelling public interest must **clearly** outweigh the **purpose** of the exemption, as distinct from the value of disclosure of the particular record in question (Order M-24).

It is important to note that section 21 is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified.

In considering the records and the submissions, I am not satisfied that there exists a **compelling** public interest in the disclosure of the personal information which would **clearly** outweigh the purpose of the section 21 exemption, which is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified. Accordingly, I find that section 23 of the Act does not apply.

## **ORDER:**

1. I uphold the Ministry's decision to withhold the personal information in the record. I have highlighted in yellow on the copy of the records to be provided to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order, those portions of the records which should **not** be disclosed to the appellant.
2. I order the Ministry to disclose the remaining information in the records to the appellant within thirty-five (35) days after the date of this order but not before the thirtieth (30th) day after the date of this order.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the portions of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: \_\_\_\_\_  
Laurel Cropley  
Inquiry Officer

\_\_\_\_\_ July 25, 1995