



Information and Privacy  
Commissioner/Ontario  
Commissaire à l'information  
et à la protection de la vie privée/Ontario

# **INTERIM ORDER P-1201**

**Appeal P-9600093**

**Ministry of Natural Resources**



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

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

Web site: <http://www.ipc.on.ca>

416-326-3333

1-800-387-0073

Fax/Téloc: 416-325-9195

TTY: 416-325-7539

<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

The Ministry of Natural Resources (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to copies of letters sent to the local Ministry office and the Deputy Minister by the proprietors of two named businesses (the affected parties).

The Ministry notified the affected parties of the request and subsequently issued a decision to the requester granting access to the letters. One of the affected parties (now the appellant) appealed this decision.

This office sent a Notice of Inquiry to the requester, the Ministry and the appellant. In the Notice, the parties were invited to comment on the application of sections 49(b) (invasion of privacy) and 17(1) (third party information) of the Act. Representations were received from all three parties.

The records at issue consist of three letters sent by the appellant to the Ministry. The first letter is dated August 11, 1995 and is addressed to the Ontario Moose Advisory Committee. The next document was sent to a Ministry official at a district office and bears the date of August 15, 1995. The final record was sent to the Deputy Minister on September 27, 1995.

## **DISCUSSION:**

### **THIRD PARTY INFORMATION**

Section 17(1) of the Act states, in part:

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;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

In this case, because the Ministry has decided to disclose the records, it is the appellant who must demonstrate that the above elements of the exemption have been satisfied. The appellant has provided only limited generalized assertions that he provided the letters to the Ministry in confidence and that their disclosure would "have an effect on his business". Based on my review

of the records and the submissions of the appellant on this issue, I find that the criteria for exemption of the records under section 17(1) have not been met and that the exemption does not apply.

## **PERSONAL INFORMATION**

Under section 2(1) of the Act, “personal information” is defined, in part, to mean recorded information about an identifiable individual, including the individual's 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.

The letters contain statements and allegations against the requester, a Ministry employee. Information about an employee does not constitute personal information where the information relates to the individual's employment responsibilities or position. Where, however, the information involves an examination of the employee's performance or an investigation into his or her conduct, these references are considered to be the individual's personal information. On this basis, the Ministry submits that the records contain the personal information of the requester and I agree. This information consists of the appellant's views or opinions about the requester.

It is the position of the Ministry that the records do not contain the personal information of the appellant as this individual wrote and signed the letters in his capacity as the owner of a business, as opposed to in his personal capacity as an individual. In my view, while this is an important factor to consider, it is not determinative of the type of information contained in the documents.

The definition of “personal information” in the Act contains no reference to information relating to a corporation, partnership or sole proprietorship. The records contain information about the appellant's business and his personal experiences and interactions with various Ministry employees, including the requester.

In Order 113, former Commissioner Sidney B. Linden stated:

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. The Commissioner will look at the nature of the information in question and not only the entity in whose name the exemption is claimed.

In Order P-364, Assistant Commissioner Tom Mitchinson found that information related to a cattle farming operation owned by a couple constituted the personal information of these individuals as there was a sufficient nexus between the couple's personal finances and the contents of the record. He thus concluded that the facts of that case represented an example of the exceptional circumstances envisaged by former Commissioner Linden.

In this case as well, I am of the view that the records contain the personal information of the appellant. First of all, regardless of the manner in which the appellant signed the letters, some of the information relates to incidents which occurred prior to the appellant owning his business.

Secondly, while some of the information in the records relates to the appellant's business, much of it is **about him** and his dealings with the Ministry and other individuals. It contains his views on some of the Ministry's operations. In my view, this information is inextricably linked with the other information in the records so as to make it impossible to separate the "personal" from the "business" information.

The letters of August 11 and September 27, 1995 also contain the personal information of other identifiable individuals.

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Under section 49(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Ministry has the discretion to deny the requester access to that information.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found 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 where 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 contained in section 21(3) apply, the institution must consider the application of the factors listed in section 21(2) of the Act, as well as all other considerations that are relevant in the circumstances of the case.

As this is a third party appeal, both the Ministry and the requester have taken the position that the records should be disclosed.

I have reviewed the letters and find that none of the presumptions in section 21(3) apply in this case.

The Ministry states, that as the records contain employment related complaints, fairness dictates that the person complained against, in this case, the requester, should be given as much disclosure of the substance of the allegations as is possible in the circumstances. This is a consideration which, in Order P-1014, former Inquiry Officer John Higgins described as "adequate degree of disclosure" and commented on as follows:

... individuals such as the appellant, who face accusations which result in administrative or judicial proceedings, are entitled to know the case which has been made against them.

In that appeal, involving a complaint and subsequent investigation under the Ontario Public Service Workplace Discrimination and Harassment Prevention policy, Inquiry Officer Higgins

found that the factor requiring adequate disclosure applied to the personal information in the records (including the undisclosed witness statements) which is directly related to the subject matter of the investigation, the investigator's findings and the Ministry's final disposition of the matter.

In this case, the Ministry also states that the only sensitive information in the records relates to the requester and not to the appellant. It states that there is no evidence that the requester would or could harm the appellant in any way. Finally, the Ministry refers to the appellant's use of the phrases "I also believe this should go on the record" and "I would also like to go on the record ..." as suggesting that the letters were not being sent in confidence. Thus, it is the Ministry's position that disclosure of the records would not constitute an unjustified invasion of the personal privacy of the appellant.

Similarly the requester maintains that the records should be disclosed. Although he has not referred to any specific sections of the Act, the thrust of his submissions are concerned with his right to find out who made the allegations against him and the substance of the allegations. This submission appears to relate to the Ministry's comments on "adequate degree of disclosure" described above.

The requester states that as a result of the information contained in the records, the Ministry investigated him for alleged conflict of interest violations. He states that he followed the conflict of interest guidelines set out by the Ministry. The Ministry investigation concluded that the requester was not in a conflict of interest situation. Finally, the requester indicates that this experience has been stressful for both him and his family.

The appellant states that he provided the information to the Ministry in confidence (section 21(2)(h)). He explains that he wrote the three letters at issue to appeal the Ministry's decision not to grant him a Bear Management Area. He states that he was advised by Ministry area personnel to put his concerns in writing as part of the confidential appeal process. He indicates he was told who to write to and to set out his concerns in his correspondence to these individuals. He states that he took steps to ensure that when he sent the letters by facsimile transmission they were picked up by the "proper person".

The appellant also states that disclosure would expose him unfairly to pecuniary or other harm and unfairly damage his reputation (sections 21(2)(e) and (i)). All of these factors favour privacy protection.

Having reviewed the records and considered the submissions of the parties, I have made the following findings:

- (1) I accept the evidence of the appellant that the personal information was provided to the Ministry in confidence as part of what was described to him as a "confidential appeals process". In my view, the appellant's references in one of his letters to matters "going on [the ] record" are more accurately interpreted as an expression of his desire to register his complaints and concerns with the Ministry. I do not accept the Ministry's interpretation

of this phrase as suggesting that the correspondence was not sent in confidence. Therefore, I find that section 21(2)(h) is a relevant consideration in this appeal.

- (2) I do not find that this is a case where the concerns about “adequate degree of disclosure” are relevant. First of all, despite the fact that the requester states that he “became aware that a letter from an **unknown third party** was written ... alleging improprieties about me ...”, his request clearly identifies the two third parties who authored the correspondence he was seeking. Secondly, I am not satisfied that this case is analogous to those dealing with employment related complaints. The submissions of the requester and the Ministry appear to suggest that the Ministry’s investigation was undertaken in response to the appellant’s correspondence. However, based on the information received from the requester and the conflict of interest guidelines he provided to this office, it appears as if the investigation was undertaken only after the requester advised the Deputy Ministry of his situation pursuant to the guidelines which state:

Whenever an employee considers that he or she could be in a position of conflict with the interests of the Crown, the employee must promptly disclose the matter in writing to the Deputy Minister.

Furthermore, the Deputy Minister’s response contains no references to any information having been received by the Ministry from the appellant. It discusses the matters set out by the requester and why the **requester** brought these matters to the attention of the Ministry at that time.

- (3) I do not accept the position of the Ministry that only the personal information of the requester is highly sensitive. I find that some of the appellant’s comments can also be so characterized and that section 21(2)(f) is a relevant consideration in this appeal.
- (4) The appellant has not provided any evidence to support his claim that disclosure of the records would expose him unfairly to pecuniary or other harm or that it might unfairly damage his reputation. Therefore, I find that sections 21(2)(e) and (i) do not apply in the circumstances of this appeal.
- (5) Having considered all the circumstances of this appeal, I find that disclosure of the letters would constitute an unjustified invasion of the personal privacy of the appellant.

As I have stated, section 49(b) is a discretionary exemption. This section gives the Ministry the discretion to grant or deny access to the requester, even if doing so would constitute an unjustified invasion of another individual’s personal privacy. The Ministry has chosen to grant access in this case.

As noted by Commissioner Tom Wright in Order M-54, when dealing with a similar situation under section 38(b) of the Municipal Freedom of Information and Protection of Privacy Act, the equivalent of section 49(b) of the Act:

The result in this appeal highlights an important aspect of section 38 of the Act. Section 38 is a discretionary exemption and even if, as in this case, the disclosure of the information would be an unjustified invasion of another individual's privacy, discretion can be exercised in favour of disclosure. In my view, the availability of discretion under section 38 is consistent with one of the purposes of the Act which is to "... provide individuals with a right of access to (their own) information".

In Order M-54 and two subsequent orders dealing with this issue (Orders M-63 and M-125), the institutions provided explanations as to why they exercised their discretion in favour of disclosing the personal information at issue despite the fact that it would result in an unjustified invasion of the personal privacy of another individual. This is not the case in the present appeal. Accordingly, I order the Ministry to provide representations to the Commissioner's office regarding its exercise of discretion in this matter.

### **ORDER:**

I order the Ministry to provide me with written representations as to the factors considered in the exercise of discretion relating to the disclosure of the records at issue within fourteen (14) days of the date of this interim order.

Original signed by: \_\_\_\_\_ June 6, 1996  
Anita Fineberg  
Inquiry Officer

### **POSTSCRIPT:**

Throughout this appeal, the appellant has expressed his concerns about what he perceives to be the prior disclosure of the existence of his letters and disclosure of at least some of the information contained in the letters. Should he wish to pursue this matter further, he should contact the Compliance Department of the Commissioner's office.