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

# ORDER MO-1212

## Appeal MA-980297-1

## Nottawasaga Valley Conservation Authority

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## NATURE OF THE APPEAL:

The appellant made a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the Nottawasaga Valley Conservation Authority (NVCA). The request was for access to any documents provided by Rudy and Associates or other consultants and NVCA queries and responses regarding development at Snow Valley.

The NVCA advised the appellant that it had interpreted the request to pertain to the property at Snow Valley Ski Resort, specifically:

- Permit application and supporting documents including "Site Impact Assessment" by Saar Environmental Ltd., dated June 9, 1997 as well as "Service Road Linkage" by Rudy and Associates, dated June 5, 1998; and

- NVCA queries and responses

The NVCA granted partial access to the records it identified as responsive to the request, claiming the application of the exemptions found in section 10 of the Act (third party information) and "other provisions". The NVCA also applied fees to the request.

The appellant appealed the NVCA's decision to deny access to the records.

During mediation of the appeal, the NVCA clarified that it is relying on the exemptions found in section 10(1)(a), section 14 (invasion of privacy) and 11(a) (economic and other interests) to withhold records or parts of records. The NVCA also revised/reduced the fees it had applied.

The appellant indicated during mediation that he accepts the revised fee and fees are, therefore, no longer an issue in this appeal. The appellant is also no longer seeking access to the correspondence dated February 10, 1993, October 20, 1993, March 23, 1995, February 26, 1997 and June 19, 1997, and these records are no longer at issue in this appeal.

I sent a Notice of Inquiry to the NVCA, the appellant, Saar Environmental, Rudy and Associates, and one other individual (the affected person) whose interests could be affected by the outcome of this appeal. Representations were received from the NVCA, Saar Environmental, Rudy and Associates and the affected person. Both Saar Environmental and Rudy and Associates consented to the disclosure of the reports they prepared. The affected person objected to disclosure of the records in Package B on the basis of section 10 of the Act.

## RECORDS:

The NVCA divided the records at issue into two groups: Package A contains documents for which partial access was granted, and Package B contains records to which access was denied in their entirety.

Package A consists of a permit, a permit application, a permit renewal application, staff reports and correspondence. The information at issue relates to the identity(ies) of the person(s) who is (are) mentioned in the records.

Package B contains reports and correspondence.

## DISCUSSION:

### INVASION OF PRIVACY

Within Package A, the NVCA has denied access to the name, address, telephone numbers, signature and a filename which includes part of the affected person's surname, pursuant to section 14 of the Act. The records do not contain the personal information of the appellant.

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and 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 address and one of the telephone numbers severed by the NVCA relate to a numbered company, and the records themselves relate to information about the development of property owned by the company in respect of which the affected person is listed as owner/representative. In these circumstances, it is my view that the name, address, signature, filename and business telephone number severed from these records do not qualify as personal information, despite the NVCA's submission about pending investigations under the Conservation Authorities Act into the ongoing development at this location. My decision is based on the following considerations:

(i) the information in the records relates to properties and not to an individual;
(ii) the affected person likely does not reside at the given address;
(iii) the property owner might be the numbered company and not the affected person;
(iv) the affected person's name appears in his professional as opposed to his personal capacity.

Accordingly, because I have found that the name, address, signature, filename and business telephone number are not personal information, they cannot qualify for exemption under section 14 of the Act and should be disclosed to the appellant.

The affected person's residential telephone number, which appears on the renewal application dated June 3, 1997 and the permit application dated August 14, 1995, does qualify as personal information under paragraph (d) of the definition of personal information.

Once it has been determined that a record contains personal information, section 14(1) of the Act prohibits the disclosure of this information except in certain circumstances. Specifically, section 14(1)(f) of the Act reads as follows:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates, except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Section 14(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information. In order to establish that section 14(1)(f) applies, it must be shown that disclosure of the personal information at issue in this appeal would **not** constitute an unjustified invasion of personal privacy.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the head to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. Once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2).

The Ontario Court of Justice (General Division) (Divisional Court) determined in the case of John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767 that the only way in which a section 21(3) presumption can be overcome is if the personal information at issue falls under section 21(4) or where a finding is made under section 23 of the Act that there is a compelling public interest in disclosure of the information which clearly outweighs the purpose of the section 21 exemption.

In the circumstances of this appeal, I have not been provided with any representations which weigh in favour of finding that disclosure of the affected person's residential telephone number would not constitute an unjustified invasion of personal privacy. Having found that this information qualifies as personal information of an individual other than the appellant, and in the absence of any representations weighing in favour of finding that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy, I find that the exception contained in section 14(1)(f) does not apply, and the affected person's residential telephone number is properly exempt from disclosure under section 14(1) of the Act.

**THIRD PARTY INFORMATION**

For a record to qualify for exemption under sections 10(1)(a), (b) or (c), the NVCA and/or the affected parties must satisfy each part of the following three-part test:

1. the record must reveal 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 NVCA in confidence, either implicitly or explicitly; **and**

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of section 10(1) will occur.

[Order 36. See also Orders M-29 and M-37]

The Ontario Court of Appeal recently overturned the Divisional Court's decision quashing Order P-373 and restored Order P-373. In that decision the Court stated as follows:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words **"detailed and convincing"** do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

[Ontario (Workers Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 (C.A.)]

**PART 1**

The NVCA submits that the records contain scientific and technical information. It indicates that the reports reflect biological data and findings, background planning reports and engineering design work. The affected person submits that the information is technical and of a commercial nature.

Scientific information has been defined in previous orders as information belonging to an organized field of knowledge in either the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field [Order P-454].

Technical information has been defined as information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order P-454].

Commercial information has been defined as information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order P-493].

Having reviewed the records, I find that only Records 3, 7-9, 14, 16-18 and 20 contain information which may be characterized as scientific or technical. These records are environmental impact studies and hydrogeological studies and reports.

The information in Records 1, 2, 4-6, 10 - 13, 15, 19, 21 and 22 relates to the permit application and approval process and describes the development in terms too general to attract the application of section 10.

While the development refers to a commercial operation, it is my view that the records themselves do not refer to the buying, selling, or exchange of merchandise or services. Accordingly, I find that the records do not contain commercial information.

The records do not contain or reveal a trade secret, financial or labour relations information.

**PART 2**

**Supplied in Confidence**

The NVCA submits that it is its practice, and industry practice, to treat all third party support documents implicitly as confidential. The NVCA also points out that the affected person stated explicitly that this material is property of the Snow Valley Association and was submitted to the NVCA on the express condition that they not be released without permission. The affected person submits that the information was supplied to the NVCA in confidence, if not explicitly then certainly implicitly.

Although SAAR Environmental and Rudy and Associates have consented to the disclosure of the information they prepared, the NVCA submits that the ownership of the documents rests with the property owner, and that they were undertaken at the property owner's expense. I accept that the records were supplied to the NVCA by the property owner, and that they were supplied under an implicit understanding of confidentiality.

**PART 3**

**Harms**

To discharge the burden of proof under the third part of the test, the parties opposing disclosure must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 10(1) would occur if the information was disclosed [Order P-373].

Although the NVCA claims that disclosure may result in undue loss or gain to the developer (section 10(1)(c)), it does not explain how the loss or gain would occur, nor does it explain why such an expectation would be reasonable.

***Sections 10(1)(a)***

The NVCA submits that disclosure of the records could prejudice the competitive position and interfere with the contracts or other negotiations of the property owner (section 10(1)(a)). The NVCA claims that the expectation of harm under section 10(1)(a) is reasonable because the studies were undertaken at the applicant's expense. It states that "other persons" could benefit at the applicant's expense if these documents were released. It considers it to be courtesy to any applicant to protect their investment (financial costing of reports).

The affected person submits that the technical reports could be used by other individuals to attempt to undermine the position put forward by the affected person, without the opponents to the plans being obliged to have their experts do similar exhaustive, extensive and expensive research and investigation.

The NVCA also submits that disclosure could prejudice the competitiveness of other consultants in the field, who could simply borrow information from other reports, reporting it as their own.

The representations make no mention of any contractual or other negotiations, or how the progress of these negotiations could reasonably be expected to be interfered with if the records were disclosed, nor is the expectation of such prejudice from disclosure evident from the records.

With respect to prejudice to the competitive position of the property owner, the records refer to the impact of development planned by the property owner. While the property owner participates in the competitive marketplace, a connection between these particular records and any reasonably expected harm is not apparent based on the information currently before me.

With respect to anticipated harm to the "consultants" referred to by the NVCA, both Saar Environmental and Rudy and Associates have consented to the disclosure of the information they provided.

I have carefully reflected on the record and the submissions before me. My conclusion is that the NVCA has not provided me with sufficient evidence to establish that any prejudice to the competitive position or interference with contractual or other negotiations could reasonably be expected to occur if the records are disclosed and, consequently, I find that sections 10(1)(a) does not apply.

***Section 10(1)(c)***

The NVCA submits that "other persons" could benefit at the applicant's expense if these documents were released. It considers it to be courtesy to any applicant to protect their investment (financial costing of reports).

The affected person submits that the technical reports could be used by other individuals to attempt to undermine the position put forward by the affected person, without the opponents to the plans being obliged to have their experts do similar exhaustive, extensive and expensive research and investigation.

The records identify positive and negative environmental consequences of development and propose mitigating measures to address the negative impacts. The information was submitted to the NVCA because, under the Conservation Authorities Act, it is a requirement that requests for a Fill, Construction and Alteration to Waterways Permit Application be reviewed and approved by the local Conservation Authority having jurisdiction over the subject property. The records indicate that the affected person has included the mitigation measures into its proposed work program, and that the NVCA has granted the permit on this basis. Neither the NVCA nor the affected person have made it clear how an opponent to the development could undermine the affected person's position when the NVCA has already granted its permission for the work plans. Further, it appears to me that should another party wish to oppose the plan, it would have to conduct additional research and investigation (at its own expense) in order to identify why the mitigation measures included in the plan were insufficient. Accordingly, I am not convinced that disclosure of the

records could reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency, and section 10(1)(c) does not apply.

**Economic and Other Interests**

In order to qualify for exemption under section 11(a), the NVCA must establish that the information:

1. is a trade secret, or financial, commercial, scientific or technical information; **and**

2. belongs to an institution; **and**

3. has monetary value or potential monetary value.

[See Order 87]

The NVCA submits that the record belongs to the applicant or the identified consultant. Because neither of these parties is an "institution" as defined in the Act, I find that the second part of the above test has not been met. Accordingly, section 11(a) does not apply.

## ORDER:

1. I uphold the NVCA's decision not to disclose the affected person's residential telephone number.

2. I order the NVCA to disclose the remainder of the records to the appellant by sending him a copy by **June 17, 1999**, but not earlier than **June 14, 1999**.

3. In order to verify compliance with this order, I reserve the right to require the NVCA to provide me with a copy of the records disclosed to the appellant pursuant to Provision 2.

Original signed by: May 13, 1999
Holly Big Canoe
Adjudicator