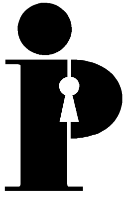

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1691

Appeal PA-980306-1

Ministry of Natural Resources

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BACKGROUND:

Prior to 1995, Ontario's forest management planning was governed by the Crown Timber Act. Under the Crown Timber Act, individual loggers and forestry companies were granted "forest resource licences" which permitted them to log specified amounts of timber in designated areas within one of Ontario's "Crown Management Units" (CMUs). Typically, these licenses were for a short period of time (e.g. seasonal, up to one year). Under the Crown Timber Act, each CMU could contain many forest resource licences issued to a variety of corporations and individual loggers.

The Ministry of Natural Resources (the Ministry) indicates that during the time that the Crown Timber Act was in effect, small woodlots on the Dryden CMU were made available to individuals on an annual basis by the Ministry. The objective of the Small Woodlot program was to provide employment opportunities to individuals who were unemployed. The Ministry indicates that it allocated 40 to 70 woodlots annually under the Small Woodlot program.

In 1995, the Crown Forest Sustainability Act (the CFSA) replaced the Crown Timber Act. Under this new legislation, only one "sustainable forest license" (SFL) is issued for each CMU. Unlike the older forest resource licenses, the SFLs are for a longer period of time (e.g. 20 years). The SFL grants the holder exclusive logging rights within the CMU.

In many CMUs, the holder of the SFL will be a major forestry company. However, in smaller CMUs, which were traditionally logged by many small companies and/or individual loggers, the SFL may be issued to a company that has been specifically formed by these smaller companies and individual loggers for the purpose of obtaining an SFL. The corporate holder of the SFL may then enter into "overlapping forest cutting agreements" with its shareholders (i.e. the smaller companies and individual loggers) and grant to each of the smaller companies and individual loggers the right to log a specific amount of timber.

The Dryden Forest Management Company was formed by small logging companies and individual loggers and holds the SFL for the Dryden CMU. The appellant in this appeal is a First Nation logging corporation, but is not a shareholder in the Dryden Forest Management Company and is, therefore, not entitled to log in the Dryden CMU without an overlapping license approved by the Dryden Forest Management Company.

The appellant indicates that, according to a decision of the Environmental Assessment Board, the Ministry is obligated to "implement ways of achieving a more equal participation by Aboriginal peoples in the benefits provided through timber management planning." The appellant states that the Ministry has stated that its approach to this obligation is to create "a new Aboriginal harvest opportunity on the Dryden CMU equivalent to 5% of the total harvest by setting aside the timber previously allocated to the Dryden CMU's Small Woodlot Program." The appellant believes that the timber previously allocated under the Small Woodlot program was largely granted to First Nation individuals and logging companies. He states that, therefore, the "new" 5% allocation in the proposed overlapping licence is actually a reallocation, and limits the appellant to historic levels of logging, which it believes are not consistent with the Ministry's obligations to implement ways of achieving a more equal participation by Aboriginal peoples in timber management planning.

The appellant is seeking access to the names of the Small Woodlot Program licence holders and their allocated cutting volumes in order to determine what percentage of the Small Woodlot Program allocations were allocated to First Nation individuals and First Nation logging companies.

NATURE OF THE APPEAL:

The appellant made a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry. The request was for access to "copies of all licences issued in respect of the Small Woodlot Program for the Dryden Crown forest between 1991 and the present."

Pursuant to section 28 of the Act, the Ministry notified the licensees of the request and sought their views as to why the records should not be disclosed. After hearing from the licensees, the Ministry decided to grant partial access to the records. The Ministry provided the appellant with a copy of each licence, with the names, addresses, telephone numbers and signatures of the licensees severed pursuant to the exemption found in section 21 of the Act (invasion of privacy).

The appellant appealed the Ministry's decision. During mediation of the appeal, the appellant indicated it was only pursuing access to the names of the licensees. Accordingly, the addresses, telephone numbers and signatures are not at issue in this appeal.

I sent a Notice of Inquiry to the Ministry and the appellant. Representations were received from both parties. I also sent a Notice of Inquiry to each of the license holders, asking them to indicate whether they consent to the disclosure of their names to the appellant. Only two licence holders provided their consent.

RECORDS:

The records consist of approximately 108 District Cutting Licences. Each licence describes the location of the authorized cut, the price the licensee must pay to the Treasurer of Ontario per cubic metre of timber cut under the licence, general and special terms and conditions, date of issue and licence period. The only information at issue is the name of each license holder.

DISCUSSION:

INVASION OF PRIVACY

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

The appellant submits that licence holders are obtaining licences in order to carry on business activities and, therefore, the information cannot be characterized as "personal". The appellant submits that in Order P-729, former Inquiry Officer Anita Fineberg determined that individuals who received loans from the Ontario

Film Development Corporation did so as a "business activity" and therefore the amount of such loans could not be characterized as "personal information."

Further, the appellant submits that licences and permits which deal with the utilization of natural resources or emission of pollutants are routinely made available for public viewing at the offices of the Ministry or the Ministry of the Environment. It argues that the rationale for permitting public disclosure of provincial licences and approval is straightforward: the licence holders are obtaining the licences to carry out business activities, and the licences relate to impacts upon public resources. This is identical to the Small Woodlot Program licences.

The Ministry indicates that it could not confirm which licenses were held by businesses and which were held by individuals. The Ministry states that if any of the license holders were businesses, they were likely operated by individuals, not corporations, and, based on previous orders, this information would also be considered personal information for the purposes of the Act.

Having reviewed a list of names of license holders, it appears to me that the overwhelming majority of licenses were held by individuals. I am unable to conclusively identify any as having been issued to a business. The question of whether information which outwardly pertains to a business and may be categorized as relating to an identifiable individual has been canvassed in a number of previous orders issued by the Commissioner's office. In Order 16, former Commissioner Sidney B. Linden made the following general statement:

> 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 associations or corporation, it could and would have used the appropriate language to make this clear.

However, Commissioner Linden went on to state in Order 113 that:

> 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.

In Orders P-515 and M-277, former Assistant Commissioner Irwin Glasberg followed the approach set out in Order 113 and found that information which outwardly pertained to a business entity in these two cases more properly related to an identifiable individual, constituting the individuals' personal information. In Order P-364, on facts somewhat analogous to those in the present appeal, Assistant Commissioner Tom Mitchinson concluded that there was a sufficient nexus between the personal finances of a couple who owned a cattle farming operation and a report containing information about the status of the herd such that the report constituted the personal information of the individual owners.

Having reviewed the records and the representations of the parties, it is my view that the present appeal represents the type of exceptional circumstance envisaged by Commissioner Linden in Order 113. The representations of the Ministry on how the licences were awarded under the Small Woodlot program are particularly compelling on this point.

In my view, the name of the license holder together with information as to whether he or she was the holder of a permit or licence would amount to "personal information" within the meaning of section (h) of the definition of personal information. I am therefore satisfied that the requested information, if it existed, would be personal information as defined in subsection 2(1) of the Act.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances. Specifically, sections 21(1)(a) and (f) of the Act read:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates, except,
>
> (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
>
> (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

With respect to section 21(1)(a), as I indicated above, two of the license holders have consented to the disclosure of their names to the appellant. Accordingly, section 21(1)(a) applies, and the Ministry should disclose the names on these two licenses to the appellant.

With respect to section 21(1)(f), 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 the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the head to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(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 combinationof the factors set out in 21(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.

The Ministry submits that sections 21(2)(f) and (3)(c) and (d) apply. The appellant is relying on sections 21(2)(a) and (d). These sections read:

> (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;
> >
> > (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
> >
> > (f) the personal information is highly sensitive;
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > (c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels;
> >
> > (d) relates to employment or educational history;

Section 21(3)(c)

The Ministry submits that under the Small Woodlot program, applicants were required to complete an application form annually. The application form contained information which was used to ensure that woodlots were allocated to those individuals most in need of employment based on family support and their capability of undertaking such work.

The Ministry indicates that the number of applications received generally outnumbered the available woodlots by three to one. The Ministry used a screening process to identify those applicants who were eligible for a woodlot. To be eligible, an applicant had to be unemployed, a resident of the Dryden District, and able to provide proof that they had a Cut & Skid Certification. Preference was given to applicants with dependents. If the number of eligible applicants exceeded the number of woodlots available, a public draw was held.

Given that being unemployed was a condition for eligibility, the Ministry argues that the Small Woodlot program was akin to eligibility for social service or welfare benefit as set out in subsection 21(3)(c).

In my view, the Small Woodlot program was not operated for the purpose of, as a result of, or substantially connected to eligibility for social service or welfare benefits or to the determination of benefit levels. Accordingly, I find that the information at issue is not the type of information that "relates to" that activity. Additionally, unemployment does not equate to eligibility for social service or welfare benefit. In the circumstances of this appeal, I find that section 21(3)(c) does not apply.

Section 21(3)(d)

The Ministry submits that the presumption in section 21(3)(d) applies. The Ministry argues that because the individuals had to be unemployed to be eligible under the Small Woodlot program, disclosure of the names would relate to the employment history of individuals. In my view, the fact that a person was not employed at a particular point in time is not sufficiently detailed to attract the application of section 21(3)(d).

Section 21(2)(a) and (d)

The appellant submits that 21(2)(a) and (d) are relevant. The information requested would enable the appellant to determine whether the licence holders under the Small Woodlot Program are First Nations individuals or corporations. The appellant argues that if these licence holders are largely First Nations individuals and corporations, then the Ministry has not taken any new steps to ensure that First Nations have a more equal participation in forest harvesting opportunities on the Dryden CMU.

I accept that the Ministry has an obligation to create opportunities to ensure that First Nations have a more equal participation in forest harvesting. I also accept that section 21(2)(a) is a relevant consideration in the circumstances. However, in order for public scrutiny of the governments activities in this regard to be effective, the public would have to be able to compare the cutting volumes assigned to First Nations loggers under the <u>Crown Timber Act</u> to the cutting volumes assigned to First Nations loggers under the <u>CFSA</u>. I am not satisfied that disclosure of the cutting volumes assigned under the <u>Crown Timber Act</u> alone would subject the activities of the government to public scrutiny. As well if, as the appellant believes, the licences under the <u>Crown Timber Act</u> were largely assigned to First Nations individuals, then there should be no imbalance for the Ministry to be obligated to correct. I find that section 21(2)(a) carries only moderate weight.

With respect to section 21(2)(d), the appellant has not provided me with any details respecting an existing or contemplated proceeding within which a fair determination of its rights will be determined. Accordingly, I find that section 21(2)(d) is not a relevant consideration in the circumstances of this appeal.

Section 21(2)(f)

The Ministry submits that, because of the eligibility criteria, disclosure of the names of the license holders would be highly sensitive (section 21(2)(f)). With respect to 21(2)(f), the appellant submits that the types of information found capable of causing "excessive personal distress" include criminal records, audit reports and health records. The appellant submits that information requested in this appeal is not of the same degree of sensitivity capable of causing excessive personal distress.

Based on the nature of the eligibility criteria and the fact that most of the licence holders who responded did not want their names disclosed, I am satisfied that the information may properly be considered sensitive, although I agree with the appellant that the information is not so **highly** sensitive that its disclosure would be capable of causing "excessive personal distress", and section 21(2)(f) does not, therefore, apply. I find that the fact that the information is sensitive is a relevant consideration in the circumstances of this appeal, and that this factor weighs moderately in favour of privacy protection.

Having considered all of the circumstances and balanced the appellant's right to access information against the licence holders right to the protection of their privacy, I find that the factors favouring privacy protection are equal in weight to the factors favouring disclosure. The exception to the exemption in section 21(1)(f), however, requires that the factors favouring disclosure outweigh the factors favouring privacy protection. Accordingly, because the application of the section 21(1)(f) exception has not been established, I uphold the Ministry's decision not to disclose the names of the licence holders who have not consented to disclosure.

ORDER:

1. I order the Ministry to disclose the names of the licence holders who consented to disclosure by sending the appellant a copy by **August 6, 1999**, but not earlier than **August 3, 1999**.

2. I uphold the Ministry's decision not to disclose the names of the remaining licence holders.

3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the material disclosed to the appellant.

Original signed by: July 2, 1999
Holly Big Canoe
Adjudicator