



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-1972

Appeal PA-010179-1

Ministry of Tourism, Culture and Recreation



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/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Ministry of Culture, Citizenship and Recreation (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records pertaining to the harvesting of sunken logs from Ontario waterways, a technique known as “underwater logging”. The Ministry located a number of responsive records and provided notification of the request to certain third parties pursuant to section 28 of the *Act*. Following the receipt by the Ministry of the submissions of one of the third parties, the Ministry decided to disclose the information contained in a portion of one of the records to the original requester.

One of the third parties, now the appellant, appealed the Ministry’s decision to disclose portions of the responsive records to the original requester.

Initially, the original requester objected to the timeliness of the appeal against the Ministry’s decision to disclose the record. The objection resulted in Order PO-1916, in which Senior Adjudicator David Goodis held that the appeal filed by the appellant against the Ministry’s decision to disclose Pages 6 to 9 of Record 49 ought to proceed.

During the mediation of the appeal, the appellant indicated that he was objecting to the disclosure of Pages 6 to 9 of Record 49 on the basis that this information was subject to copyright and was exempt from disclosure under sections 17(1) (third party information) and 21(1) (invasion of privacy) of the *Act*.

Further mediation of the appeal was not possible, and the matter was moved into the Adjudication stage of the appeals process.

As the appellant was the only party resisting the disclosure of the requested information, I decided to seek his representations, initially. I did not receive any submissions from him, nor did he respond to several follow-up telephone messages left by this office. Because the exemptions claimed by the appellant, sections 17(1)(a) and (c) and 21(1), are mandatory exemptions, I am required to determine whether they apply to the record at issue even in the absence of submissions from him. In making this determination, I will rely on the record itself and the submissions made by the appellant to the Ministry in response to its notice under section 28 and his correspondence to this office during the processing of the appeal.

DISCUSSION:

PRELIMINARY ISSUE:

Is the information contained in the record at issue subject to copyright and if so, does this preclude its disclosure under the *Act*?

The appellant takes the position that the information contained in Pages 6 to 9 of Record 49 is subject to copyright and, as such, cannot be reproduced without the consent of its author. In the submissions made by the appellant in response to the section 28 notice from the Ministry,

the appellant submits that the publication from which the information at issue was extracted is not a record available to the general public, as it was privately printed. He indicates that a named individual, now deceased, owns the copyright in the document and advised him that he/she wishes to keep this information confidential.

In Order M-29, former Commissioner Tom Wright dealt with the issue of copyright and its relationship to a request for access to information under the *Act*. He stated:

I think that it is important to note that providing **access** to information under the *Municipal Freedom of Information and Protection of Privacy Act* does not constitute an infringement of copyright. Specifically, sections 27(2)(i) and (j) of the *Copyright Act* provide that disclosure of information pursuant to the federal *Access to Information Act* or any like Act of the legislature of a province does not constitute an infringement of copyright.

Sections 27(2)(i) and (j) of the *Copyright Act* read as follows:

The following acts do not constitute an infringement of copyright:

- (i) the disclosure, pursuant to the *Access to Information Act*, of a record within the meaning of that Act, or the disclosure, pursuant to any like Act of the legislature of a province, of like material;
- (j) the disclosure, pursuant to the *Privacy Act*, of personal information within the meaning of that Act, or the disclosure, pursuant to any like Act of the legislature of a province, of like information;

Thus, even if the information in the report may be subject to copyright, **disclosure** of it pursuant to the *Act* is not an infringement of copyright.

I adopt the reasoning of the former Commissioner and find that regardless of whether or not an identifiable individual has (or had) copyright in the record at issue, disclosure of it under the *Act* cannot represent an infringement of that copyright. Accordingly, I dismiss that portion of the appeal.

DISCUSSION:

PERSONAL INFORMATION

Section 2(1) of the *Act* defines the term “personal information” to mean, in part, “recorded information about an identifiable individual”. Based on my review of Pages 6 to 9 of Record 49, I find that it refers to the author of the publication in which this excerpt appeared, along with the title of the publication. This information is handwritten at the top of Page 6 of the

record. In my view, this qualifies as “personal information” as that term is defined in section 2(1)(h) since it includes the individual’s name, along with other personal information about her; specifically, the fact that she has published a book.

In addition, I find that Pages 8 and 9 contain photographs of individuals but they are taken at such a distance that the persons appearing therein are not identifiable. The photographs also appear to be many, many years old. I find that the photographs do not contain personal information as that term is defined in section 2(1) as they are not about “identifiable” individuals.

I further find that the remaining portions of Pages 6 and 7 do not contain any information which qualifies as “personal information” within the meaning of section 2(1) of the *Act*. Rather, they describe certain logging techniques in use many years ago. As the invasion of privacy exemption in section 21 only applies to information qualifying as “personal information”, the exemption has no application to any of the information at issue, with the exception of the handwritten notation at the top of Page 6.

INVASION OF PRIVACY

Where a requester seeks personal information of another individual, section 21(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. In my view, the only exception which might apply in the circumstances of this appeal is section 21(1)(f), which reads:

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.

Sections 21(2) and (3) 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 institution to consider in making this determination. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

In his response to the section 28 notice from the Ministry, the appellant submits that the presumptions in sections 21(3)(f) and (h) apply to the name of the author and the publication contained in Page 6 of the record. These sections state:

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

- (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
- (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

I have reviewed the information contained in Page 6 which I have found to qualify as "personal information" and find that it cannot be said to fall within the ambit of either of these presumptions. I will now determine whether the considerations listed in section 21(2), or any unlisted factors, apply to the personal information on Page 6 of the record.

The appellant has not referred to any of the considerations listed under section 21(2) favouring privacy protection and, in my view, none apply. In my view, an unlisted consideration favouring disclosure exists in the circumstances of this appeal. As noted above, Pages 6 to 9 of Record 49 consist of an excerpt from a published work. Even though this information satisfies the definition of the term "personal information" included in section 2(1), I find that there can be no reasonable expectation that the identity of the author of published material would be kept confidential. As the record was not published anonymously or using a pseudonym, I find it reasonable to assume that the author wished to have her name associated with it. Consequently, it cannot be said that the author's name and the title of the publication carries with it a reasonably held expectation of privacy.

I find that the exception in section 21(1)(f) applies to the personal information in Page 6 of Record 49 as its disclosure would not result in an unjustified invasion of personal privacy.

THIRD PARTY INFORMATION

For a record to qualify for exemption under sections 17(1)(a) or (c), the appellant, who is resisting the disclosure of the record, 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 institution 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 subsection 17(1) will occur.

[Orders 36, P-373, M-29 and M-37]

The Court of Appeal for Ontario, in upholding Assistant Commissioner Tom Mitchinson's Order P-373 stated:

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 at 476 (C.A.)]

Part 1: Type of Information

In his response to the section 28 notice from the Ministry, the appellant submitted that the record contains information which qualifies as commercial, technical or financial information within the meaning of section 17(1).

Technical Information

Technical information is 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. Finally, technical information must be given a meaning separate from scientific information which also appears in section 17(1)(a) of the *Act*. [Order P-454]

Commercial Information

Commercial information is 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]

Financial Information

The term refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples include cost accounting method, pricing practices, profit and loss data, overhead and operating costs. [Orders P-47, P-87, P-113, P-228, P-295, P-394 and PO-1911]

I adopt these definitions for the purposes of the present appeal.

Pages 6 and 7 of Record 49 describe the techniques employed many years ago in the logging industry for the transportation of felled timber to its eventual destination. I find that although the record relates logging practices which have long since fallen into disuse, this information satisfies the definition of technical information for the purposes of section 17(1). The techniques and processes contained in the record, which were once well known, have not been in practice in Ontario for many years. Regardless of this fact, the information is in the nature of "applied science" and thereby qualifies as technical information as that term has been defined in previous orders of the Commissioner's office.

However, I find that there is no reference to any financial or commercial information as those terms have been defined in previous orders.

Part 2: Supplied in Confidence

It is undisputed that the appellant provided the information contained in the record to the Ministry. I have not been provided with any evidence that the information was supplied with an expectation, either implicit or explicit, that it would be treated confidentially by the Ministry. As the appellant has failed to demonstrate that the information was provided in confidence, I find that he has failed to satisfy the second part of the section 17(1) test. As all three parts of the test must be met, I find that the record is not exempt from disclosure under section 17(1).

By way of summary, I find that the disclosure of the information which is the subject of the original request and this appeal is not prohibited by any copyright in it. The record is not exempt under either sections 17(1) or 21(1) and may, therefore, be disclosed by the Ministry in accordance with its original decision.

ORDER:

1. I uphold the Ministry's decision to disclose the information contained in the record to the requester and dismiss the appeal.
2. I order the Ministry to disclose the record to the requester by providing him with a copy no later than December 20, 2001.

Original signed by: _____
Donald Hale
Adjudicator

November 29, 2001