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

ORDER PO-1984

Appeal PA-010104-1

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/Téléc: 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 from a member of the media under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> all memos, faxes, fax cover sheets, records of meetings, minutes of meetings, handwritten notes, briefing notes, information notes, records of verbal transactions, telephone messages, e-mails and letters related to [a named] subdivision and golf course and/or media coverage concerning it, which took place between the dates of Sat. January 13, 2001 and Thursday, January 19, 2001 inclusive.

The Ministry identified a total of 114 pages of responsive records, and notified certain individuals whose interests might be affected by disclosure of these records (the affected persons). Before receiving submissions from the affected persons, the Ministry granted partial access to most of the 106 pages listed on an index that was provided to the requester. The Ministry denied access to the withheld portions on the basis of section 22 (information publicly available) and section 21(1) (invasion of privacy) of the *Act*. The Ministry also took the position that certain pages or portions of pages were not responsive to the request, and denied access on that basis. The Ministry subsequently granted full access to the remaining 8 pages after receiving and considering submissions from the affected persons.

The requester, now the appellant, appealed the decision to deny access. In his letter of appeal, the appellant also questioned whether other responsive records might exist.

During mediation a number of events occurred:

- The Ministry accepted the Mediator's position that pages 28 and 29 were responsive to the request and disclosed these two pages to the appellant.

- With one exception, the appellant accepted the Mediator's position that the Ministry had properly withheld other pages or portions of pages on the basis that they were not responsive to his request. The one exception was "the page-preceding page 1", which remains at issue in this appeal.

- The Mediator wrote to the two individuals referred to on pages 12 and 13 to determine if they would consent to disclose any personal information about them. One individual consented to disclose his name and address, and the other individual did not respond. As a result, the Ministry disclosed the information on page 12 to the appellant. The appellant agreed not to pursue access to the withheld information on page 13, as well as the cell phone number of one individual contained on page 1.

- The Ministry disclosed some other portions of records, including the list of employee names appearing on page 6.

At the end of the mediation stage, the only information remaining at issue was a total of 10 lines of handwritten text severed from pages 17, 24, 25 and 92 on the basis of section 21(1) of the *Act*.

Although the Ministry undertook additional searches during the course of mediation, the appellant continued to maintain that additional responsive records should exist, and the issue of whether the Ministry had undertaken reasonable efforts to locate all responsive records remained outstanding when the appeal was transferred to the adjudication stage.

I sent a Notice of Inquiry initially to the Ministry and the two remaining affected persons - the author of pages 17, 24, 25 and 92 (affected person #1), and the individual referred to in the severed portions of these pages (affected person #2). Affected person #1 contacted this office to advise that he would not be providing representations. Affected person #2 and the Ministry both submitted representations, the non-confidential portions of which I shared with the appellant, along with the Notice. The appellant also provided representations. I then sent the Ministry and affected person #2 a Reply Notice, together with a copy of the appellant's representations, and received additional representations from both of these parties.

After reviewing the appellant's representations regarding the search issue, the Ministry undertook additional searches for responsive records. It located one new record, which was disclosed to the appellant. The Ministry also advised the appellant that it would conduct further searches at its Toronto and Peterborough offices in light of comments made in his representations, and to issue a new decision letter outlining the results of these additional search efforts. To date, I am not aware of any decision letter having been issued, although I am advised that the Ministry is giving this matter ongoing attention. I have decided to proceed to deal with the section 21(1) issue at this time, while remaining seized of this appeal in order to address any outstanding issues regarding the adequacy of the Ministry's searches for responsive records.

RECORDS:

The records at issue are the undisclosed portions of pages 17, 24, 25 and 92, which consist of a total of 10 lines of handwritten notes made by affected person #1.

PRELIMINARY MATTER:

RESPONSIVENESS OF RECORD

During mediation, the appellant asked this Office to review "the page preceding page 1" to determine whether it contained any responsive information. The Ministry provided me with a copy of this page, and takes the position that it deals with matters unrelated to the appellant's request and is therefore not responsive.

Previous orders have established that in order to be responsive, a record must be "reasonably related" to the request (Order P-880).

Page 1 is a page from a notebook kept by a Ministry employee (affected person #1) with handwritten notes on the topic of the named subdivision and golf course. With the exception of the cell phone number severed from the page, as noted earlier, this page has been disclosed to the appellant. I have reviewed the handwritten notes on the preceding page from this employee's

notebook, and confirm that its contents relate to matters unconnected to the subject matter of the appellant's request. Applying the reasoning from Order P-880, I find that this page is not reasonably related to the request, and therefore is not responsive.

DISCUSSION:

PERSONAL INFORMATION

The section 21(1) privacy exemption applies only to information that qualifies as "personal information", as defined in section 2(1) of the *Act*. "Personal information" means, in part, recorded information about an identifiable individual, including the views or opinions of another individual about the individual (paragraph (g)), or 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 (paragraph (h)).

Affected person #2 submits that undisclosed information constitutes her personal information because it consists of the views or opinions of affected person #1 about her, specifically "… a personal allegation, which goes to the personal integrity of [affected person #2]." In affected person #2's view, the allegations are a matter of reputation that, if disclosed, could adversely affect her professionally.

The Ministry's representations support this position. After referring to the judgement of the Supreme Court of Canada in *Dagg v. Canada (Department of Finance)*, (1997) 148 D.L.R. (4th) 385 that determined what constitutes "personal information" under the federal *Access to Information Act*, the Ministry submits:

> The critical test is whether the opinion or comments refer primarily to individuals themselves or the ***manner*** in which they carry out their duties or directed to the position and that nature of those duties. In other words, is the information, comments or opinions ***about*** an individual rather than the position in which they are employed.
>
> Applying the test to the severed portions of the records at issue, it is clear that the comments related to the ***manner*** in which the affected party identified in the records carried out her duties and are not a description of the duties. The comments refer to an individual and her character. In other words, the comments are ***about*** the individual and not her position or job functions. … [Ministry's emphasis]

The appellant argues that the information contained in the records cannot be considered personal information. He submits:

> Clearly [affected person #1], who appears to have written the material on these pages, is a dedicated staff member of the Ministry of Natural Resources. This Ministry took a stand during the planning approvals' process on a particularly

> controversial issue involving the environment, which the Ministry is at least partially mandated to protect.
>
> A member of another Ministry, Municipal Affairs and Housing, took to the airwaves after the article was published and---in essence---spoke for the Ministry of Natural Resources, saying it had approved of the development. This clearly was not so. Public documents show that. As a consequence of her public comments, it would appear that [affected person #1] was upset. And it would appear, he communicated that upset in his notes and in his communications with others.
>
> …
>
> The documents released clearly show that a well-thought out and carefully crafted strategy to deflect media interest in the story---involving the drafting of a fact sheet and specifically targeted interviews---began almost immediately after the story was published. The troublesome ministry, Natural Resources, was soon told that they would make no further comments on this "contentious" issue, …and that an official from Municipal Affairs and Housing inside the Minister's office, would take responsibility for all public commentary.
>
> Clearly, this official in that Minister's office, would have been professionally briefed on all details of the issue. She took to the airwaves speaking, not personally, but on behalf of the Minister. Rightly so.
>
> There is, however, nothing "private" about that.

In my view, the information contained in the severed portions of pages 17, 24, 25 and 92 qualifies as the "personal information" of affected person #2. All of these severances deal with essentially the same statement made by affected person #1 about affected person #2. Although unquestionably made in a professional context, the statement is accurately described as an opinion expressed by one individual about another individual within the meaning of paragraph (g) of the definition of personal information in section 2(1) of the *Act*. It does not describe her professional responsibilities or job duties, nor does it deal with any actions taken by affected person #2 in discharging her employment obligations. Rather, it consists of affected person #1's assessment of the manner in which affected person #2 communicated information concerning the named subdivision and golf course development, and his conclusion regarding her character. As such, I find that this information is "about" affected person #2 in a personal rather than a professional sense, and qualifies as her personal information for that reason.

INVASION OF PRIVACY

Where a requester seeks personal information of another individual, section 21(1) of the *Act* prohibits an institution from disclosing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. The only section with potential application in 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,
>
> > (f) 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 privacy. Section 21(2) lists various criteria for the Ministry to consider in making this determination, and section 21(3) identifies certain types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

None of the various presumptions in section 21(3) are relevant in the circumstances of this appeal.

The Ministry submits that the factors in sections 21(2)(e), (f) and (i) are relevant considerations that favour privacy protection in the context of this appeal. The appellant identifies section 21(2)(a) as a relevant factor favouring disclosure. These sections read as follows.

> 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;
> >
> > (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
> >
> > (f) the personal information is highly sensitive;
> >
> > (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

Representations

Affected person #2 maintains that disclosure of her personal information would constitute an unjustified invasion of her privacy. She submits:

> The disclosure of the undisclosed information on pages 0017, 0024, 0025 and 0092 would constitute an unjustified invasion of [affected person #2's] privacy. If disclosed, this information would be open to publication by the requester, or anyone provided the information by the requester, and such publication could cause [affected person #2]'s personal integrity to be questioned in a public forum. As stated above, the allegations are a matter of personal reputation, and if

> disclosed, could adversely affect [affected person #2] in her capacity as a [named] professional.

The Ministry's representations support this position. They state that, given the circumstances and the position held by affected person #2 at the time the notes were taken, disclosure of this type of personal information would cause her excessive personal distress (section 21(2)(f)). In support of the relevance of the section 21(2)(i) factor, the Ministry submits:

> In Order P-710, Adjudicator Donald Hale set out the test for the application of this criteria which included the nature of the information, the types of records at issue and the professional and personal circumstances of the affected individual. Applying this test to the severed portion of the records and the rationale in previous orders of subclause 21(2)(i), it is clear [that this] criteria applies and weights heavily on the side of a finding that disclosure would constitute an unjustifiable invasion of [affected person #2's] privacy.

It the confidential portion of the Ministry's representations, which were not shared with the appellant, the Ministry elaborates on its reasons for drawing this conclusion, which are based on the nature of the statements made by affected person #1, and the impact they would have on the professional reputation of affected person #2.

The Ministry also relies on its assumption that the notebook entries made by affected person #1 were never intended to be released publicly, and points to Order M-158 in support of the relevance of this situation in applying the section 21(2)(i) criteria. In the Ministry's view, disclosing information that was not intended to be disclosed to the public in these circumstances would be "unfair" to affected person #2, as required in order to establish sections 21(2)(e) and (i).

The appellant submits that disclosure of the information would not be unfair to affected person #2, and would be desirable for the purposes of subjecting the activities of the Government of Ontario to public scrutiny (section 21(2)(a)).

In responding to the Ministry's position on sections 21(2)(e) and (i), the appellant states:

> Is it "unfair" that [affected person #1]'s dismay, disappointment and anger at what he perceived to be his Ministry's integrity being undermined in the public domain be revealed? The Ministry of Municipal Affairs official was speaking in her professional capacity. The information she released---according to documents that were faxed to [the Deputy Minister's executive assistant] on Jan. 18, 2001---was patently incorrect. On the issue of fairness, what is of greater value---the public interest and its right to be accurately informed, or a Ministry official whose public comments may be criticized in public and suffer a measure of distress?
>
> I submit, Mr. Assistant Commissioner, that the public's right to accurate information in a democracy such as ours, overrides the distress a single official may temporarily experience. She spoke to the public on behalf of her Ministry

> and, in so doing, sought to speak for another Ministry and overstepped her bounds. She was speaking publicly about public matters, with the counsel of her Ministerial staff. There was nothing private about her commentary and there should be nothing private---and can be nothing "unfair"---about another bureaucrat's critique of her deportment of her public responsibilities in the public domain.

As far as the section 21(2)(a) factor is concerned, the appellant begins by describing how the article concerning the subdivision and golf course originated and was published in the newspaper that he represents, and the public reaction that flowed from the article. After pointing out that the article involved senior government officials, the appellant submits:

> Before 10:30, on the morning the article appeared, Ministry officials began exchanging e-mails; Ministry staff were called in to work overtime on Sunday to develop a media strategy and fact sheet; and the Minister's Office and even the Premier's office had to approve the fact sheet's release to select media.
>
> Following extensive media enquiries in the ensuing days, detailed forms were filed by bureaucrats to the Minister's office. These forms show that the government was responding to the inquiries under its highly controversial "contentious issues" procedures. That meant each and every media inquiry had to be discussed with the Minister's office before any response to the media could be communicated.
>
> …
>
> I note these facts, Mr. Assistant Commissioner, to emphasize that the publication of this article was indeed a highly sensitive and "contentious" issue for the government, and generated interest and decision-making at the Ministers' level and even in the Premier's office.

The appellant points out that affected person #2 became involved in order to serve as spokesperson for the government, and her comments were the source of the notebook entries at issue in this appeal. He goes on to submit:

> As for [affected person #1"s] comments, they point out the extremely important fact that improper and incorrect information was being disseminated by a government official to what must have been thousands of members of the taxpaying public.

In responding to the appellant's representations on the section 21(2)(a) factor, the Ministry outlines the test for this section established as follows in Order M-1074:

> 1. the activities of the institution must have been called into question; and

2. the disclosure of the personal information must be desirable in order to subject the institution to public scrutiny

The Ministry then submits:

> There is no question that the first part of the test has been met. The Government activities which [sic] relating to the approval for a development have publicly been called into question. However, the disclosure of the records are [sic] not necessary, and in light of one of the purposes of the *Act*, not desirable to be disclosed in order to subject the Ministry of the government to public scrutiny on the issue of the approval of the development. The records in questions [sic] contain the personal opinion of one individual. The disclosure of the information is not relevant or at best of minor relevance on this issue which is the subject of public interest and scrutiny, i.e., whether the approval of the development was properly conducted without political interference. The [Commissioner's Office] has held that the extent of disclosure that has already been made by the institution is relevant to whether disclosure of personal information is desirable to subject the activities of the institution to public scrutiny (Orders P-273, P-282, P-328, P-1415). In this instance, the Ministry has already disclosed a substantial amount of information concerning the issue of the approvals through a series of requests under the *Act*. This information has provided the basis for a number of articles by the requester and others which have subjected the Ministry to scrutiny and could provide the basis for further scrutiny. In light of this fact, and given the nature of the personal information, it is not necessary to be disclosed in order to scrutinize the issue of the approval; therefore this factor is not relevant to the determination of whether disclosure of the severed portions are is [sic] unjustifiable invasions of privacy.
>
> Alternatively, if the factor is relevant, it must be weighted against the other factors in subsection 21(2). If this is done, based on the Ministry representations, the only conclusion can be [that] the other factors outweigh those in subclause 21(2)(a) and that disclosure would constitute an unjustifiable invasion of privacy.

Findings

Having reviewed the records and the representations submitted by the parties during the course of this inquiry, I make the following findings.

1. The undisclosed notebook entries made by affected person #1 raise, in a very direct way, concerns he has with the personal integrity of affected person #2. In the circumstances, I accept that disclosure of this information, which could result in these views being disseminated publicly, could reasonably be expected to cause affected person #2 excessive personal distress, as she claims. Accordingly, I find that section 21(2)(f) is a relevant consideration in the circumstances. However, as the appellant points out,

the role played by affected person #2 as the government's spokesperson on the subdivision and golf course matter, and the fact that others involved with this issue may not have shared her public comments, is known by him and presumably by others who followed the story. It is also important to note that the statements reflected in the notebook entry, although personal to affected person #2, relate directly and narrowly to her professional role as government spokesperson and not to more generalized assessments of her character or integrity. For these reasons, I find that this factor has low weight in the circumstances of this appeal.

2. Given the nature of the statements contained in the notebook entries, I accept the position of the Ministry and affected person #2 that their disclosure could reasonably be expected to damage the reputation of affected person #2. I also find that, because the statements are not substantiated, thereby raising possible questions as to their accuracy, this damage would be "unfair" in the circumstances. Had the statements been indisputable facts, I would have found nothing unfair about their disclosure. As far as the weight accorded to this factor, I find that, for the same reasons outlined above regarding section 21(2)(f), this factor has low weight in the circumstances.

3. Based on the representations provided by the Ministry and affected person #2, I am not persuaded that section 21(2)(e) is a relevant factor in the circumstances. In my view, neither of these parties has presented evidence to establish a sufficient connection between disclosure of the personal information of affected person #2 and the possible harm she might suffer, pecuniary or otherwise.

4. I accept the appellant's position that section 21(2)(a) is a relevant factor in the circumstances of this appeal. The Ministry acknowledges that the activities of the Ministry and the government in the context of the planning approval process for the golf course and subdivision have been called into question publicly. In my view, the appellant has also provided sufficient evidence to establish that disclosure of the withheld notebook entries is desirable for the purpose of subjecting the activities of the Ministry and the government to public scrutiny in this context. Although I accept the Ministry's position that a great deal of information and a large number of records have already been disclosed to the appellant, in my view, the fact that none of the previously disclosed information relates directly to the type of information contained in the 10 lines of information that remain at issue in this appeal reduces the significance of the Ministry's argument significantly. The appellant submits that, immediately following the publication of his original article, efforts were made by the government to coordinate the messaging on the subdivision and golf course approval matter, and that affected person #2 became involved for that reason. The Ministry did not dispute this position in its reply representations. The main

> thrust of the appellant's argument appears to be that these efforts at controlled messaging resulted in a divergence of views between Ministry officials (including affected person #1) and the individuals responsible for providing information to the public (principally affected person #2), and that the substantiation of this difference of opinion is an integral part of the process of public scrutiny. I concur with the appellant's view. The content of the undisclosed notebook entries deals directly with the issue which the Ministry acknowledges has been called into question. In addition, it would appear that this information is not otherwise known and its disclosure would, in my view, relate directly to the scrutinization identified by the appellant. As far as the weight to be accorded this factor is concerned, I find that it should be high in the circumstances, given the high profile nature of the subdivision and golf course approval matter and the direct relationship between the contents of the undisclosed notebook entries and the issue that has engaged the public's attention.

In summary, I have found that sections 21(2)(f) and (i) are both relevant factors favouring privacy protection, and that each of these factors should be given low weight in the circumstances. I have also found that section 21(2)(a) is a relevant factor favouring disclosure, and that this factor should be given high weight. In balancing these competing considerations, I find that the one factor favouring disclosure is sufficient to outweigh the two factors favouring privacy protection. In my view, the personal information of affected person #2 is on the low end of the scale of sensitivity, given its narrow application to the specific circumstances of her professional role as a government spokesperson for the golf course and subdivision planning approval issue. On the other hand, the public scrutiny consideration relates directly to issues of public accountability in the operation of the government's planning and development approval process, which falls squarely within the purposes outlined in section 1(a) of the *Act*. In my view, the public's right of access to government-held information outweighs privacy considerations in the circumstances of this appeal, and I find that disclosure of affected person #2's personal information would not constitute an unjustified invasion of her privacy. Accordingly, the exception provided by section 21(1)(f) has been established, and the withheld portions of pages 17, 24, 25 and 92 should be disclosed to the appellant.

ORDER:

1. I order the Ministry to provide the appellant with access to the undisclosed portions of pages 17, 24, 25 and 92 to the appellant by **February 4, 2002** but not before **January 30, 2002**.

2. In order to verify compliance with Provision 1 of this order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant.

3. I remain seized of this appeal in order to deal with any unresolved issues relating to the adequacy of the Ministry's search for responsive records.

Original signed by: December 31, 2001
Tom Mitchinson
Assistant Commissioner