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

ORDER PO-2108

Appeal PA-020051-1

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 under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

> …all copies of any/all correspondence, documentation that involves myself . . . This includes information in regards to surveillance, sharing of information with my previous employer (Ministry of Correctional Services), photographs that have nothing to do with the Fish and Game Act. Last time applied under F.O.I. I only received a fraction of file.

Further to discussions between the requester and the Ministry, the request was narrowed to records compiled between January 2000 and the date of the request.

In its initial decision, the Ministry advised that it could neither confirm nor deny the existence of surveillance or intelligence records. With respect to the remainder of the request, the Ministry identified 13 pages of notes taken by Conservation Officers and noted that other records had already been provided as a result of a previous request. The Ministry decided to grant partial access to eight of the 13 pages, severing both the non-responsive information and other portions which the Ministry claimed to be exempt under sections 14(1)(e) (endanger life or safety), 20 (danger to safety or health) and 21(1) (invasion of privacy) of the *Act*. The five remaining pages were withheld in their entirety on the basis that they contained information which was not responsive to the request. Finally, the Ministry provided a fee estimate of $61.60. The requester paid the fee as requested by the Ministry.

The requester (now the appellant) appealed the Ministry's decision.

During the mediation stage of the appeal, the Ministry advised that it was no longer relying on the exemptions in sections 14(1)(e) and 20 and that it would refund $60 to the appellant from the fee which he had paid. The Ministry also confirmed that it is relying on section 14(3) of the *Act* to refuse to confirm or deny the existence of intelligence or surveillance records. In a second decision letter, the Ministry clarified that if these records existed, the following exemptions under the *Act* would apply to them:

- Law enforcement - sections 14(1)(a), (b), (c), (d) and (g); and
- Invasion of Privacy – section 21(1) with reference to the presumption in section 21(3)(b) (records compiled as part of an investigation into a possible violation of law).

The appellant indicated that he wished to pursue access to all of the records, including those which the Ministry felt were not responsive. In discussions with the mediator, the appellant raised the issue of the existence of additional records (in addition to the requested surveillance and intelligence records). In particular, the appellant stated that correspondence between the Ministry and the Ministry of Correctional Services (Corrections) should exist, and cited two employees as the probable authors of any such documents. The appellant also advised that there should be additional notes created by five named Conservation Officers with whom he has had contact since January 2000.

The mediator raised the possible application of section 49(b) to the records at issue, since they appear to contain personal information about the appellant. The Ministry subsequently confirmed that it wished to rely on section 49(b) of the *Act*, in conjunction with section 21(1), to withhold the undisclosed portions of the records. In discussions with the mediator, the appellant advised that he wishes to pursue access to all portions of the record, including information pertaining to other individuals. Accordingly, sections 49(b) and 21(1) remain at issue in this appeal.

Further mediation of the appeal was not possible and the matter was moved to the adjudication stage of the appeal process.

I decided to seek the representations of the Ministry initially as it bears the onus of demonstrating that the exemptions claimed apply to the records and that its search for records was reasonable. The Ministry submitted representations, the non-confidential portions of which were shared with the appellant, along with a copy of the Notice of Inquiry. The appellant indicated that he would not be making representations in response to the Notice.

During the Inquiry stage of the appeal process, the Ministry advised that it located an additional record, described as a "note to the Ministry of Corrections from the Enforcement Supervisor", and has advised the appellant that, because the Ministry of Public Safety and Security (formerly the Ministry of Corrections) has a greater interest in that record, it is transferring this record, pursuant to section 25 of the *Act*.

RECORDS:

The records at issue consist of the undisclosed portions of 13 pages of notes taken by several Conservation Officers.

DISCUSSION:

REASONABLENESS OF SEARCH

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether the Ministry has conducted a reasonable search for the records as required by section 24 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Ministry will be upheld. If I am not satisfied, further searches may be ordered.

Where a requester provides sufficient detail about the records which he is seeking and the Ministry indicates that further records do not exist, it is my responsibility to ensure that the Ministry has made a reasonable search to identify any records which are responsive to the request. The *Act* does not require the Ministry to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the Ministry must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in the Ministry's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

The Ministry indicates that, given the nature of the records requested, it first conducted searches of its record-holdings located in the Kenora office. This search was followed by others involving the Ministry's Evaluation and Special Services Unit in the Northwest, Northeast, South-Central and the Provincial office in Peterborough. While records were located in these offices, they fell outside the time frame set forth in the appellant's request. The search of the Kenora office was undertaken by the Information Management Supervisor for that District. Searches of the file cabinets and computer record-holdings were undertaken by this individual, who is experienced and well-versed in the requirements of the *Act*. The Ministry also conducted searches of the notebooks of the District's Conservation Officers identified by the appellant, which yielded the 13 pages of records identified in the Ministry's decision letter.

The Ministry also located the requested correspondence to the Ministry of Correctional Services, and the portion of the request dealing with this particular record was transferred to that Ministry pursuant to section 25, as indicated above.

The Ministry concludes its submissions on this issue as follows:

> As the nature of the contact between the Ministry and the requester tended to relate [to] enforcement, and as none of the records found suggest that [there are] additional records which may be found in other locations, it was reasonable for the Ministry to conclude that it was unlikely that additional records existed in other locations.

The appellant did not submit representations in response to the Notice of Inquiry explaining the basis for his belief that additional records beyond those identified by the Ministry ought to exist.

Based on the submissions of the Ministry, my review of the records which were located and the absence of submissions from the appellant on this issue, I find that the Ministry has conducted a reasonable search for responsive records. I am satisfied that the Ministry has made a reasonable effort to locate the records described in the request and that the searches which it undertook in its locations throughout the province were in keeping with the requirements of the *Act*. Accordingly, I will dismiss this part of the appeal.

RESPONSIVENESS OF THE RECORDS

The appellant took the position in mediation that all portions of the 13 pages of records identified by the Ministry contain information that is responsive to his request. He maintains that he is entitled to have access to all of the information in these records.

The Ministry argues that only certain portions of eight pages of the identified records contain information relating to the appellant and that five pages do not contain any responsive

information as they do not refer to him at all. In support of this argument, the Ministry submits that:

> It is the practice of enforcement officers to record their daily activities and local conditions. These activities were not related to the request or the documents sought. The exempt portions do not refer or mention the requester or his activities. There is no connection or relation between these notes and those related to the requester other than they are on the same page or in close physical proximity to those relating to the requester. Accordingly, those portions of the records were found not to be responsive to the request and were not released.

I have reviewed the information contained in the records and agree with the position taken by the Ministry. Those portions of the records which the Ministry indicates are not responsive to the request do not contain any information relating to the appellant or his activities. The Ministry identified those portions relating to the appellant and has either disclosed them to the appellant or claimed the application of one of the exemptions in the *Act* to this information. Based on my review of the records, I find that the records and parts of records claimed to be non-responsive do not contain any information which is reasonably related to the appellant's request.

PERSONAL INFORMATION/INVASION OF PRIVACY

The Ministry takes the position that the undisclosed information contained in Records 3, 4, 6, 8, 9, 10, 12 and 13 is exempt from disclosure under the discretionary exemption in section 49(b), taken in conjunction with section 21(1). Only information which qualifies as "personal information" is subject to the invasion of privacy exemptions in sections 21(1) and 49(b).

Section 2(1) of the *Act* defines the term "personal information", in part, as "recorded information about an identifiable individual". I have reviewed the contents of Records 3, 4, 8, 9, 10, 12 and 13 and make the following findings:

- Records 3, 4, 10, 12 and 13 contain the personal information of the appellant and other identifiable individuals; and
- Records 6, 8 and 9 contain only the personal information of the appellant.

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. 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 requester 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 institution has the discretion to deny the requester access to that information.

Section 49(b) of the *Act* introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the institution determines

that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 49(b) gives the institution the discretion to deny access to the personal information of the requester.

Because Records 6, 8 and 9 refer only to the appellant, their disclosure to him would not result in an unjustified invasion of personal privacy. I find that Records 6, 8 and 9 should, accordingly, be disclosed to the appellant.

In determining whether the exemption in section 49(b) applies, 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 institution 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.

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].

A section 21(3) presumption can be overcome if the personal information at issue falls under section 21(4) of the *Act* or if a finding is made under section 23 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 21 exemption. [Order PO-1764]

If none of the presumptions in section 21(3) applies, the institution must consider the application of the factors listed in section 21(2), as well as all other considerations that are relevant in the circumstances of the case.

The Ministry relies on the "presumed unjustified invasion of personal privacy" in section 21(3)(b) of the *Act* which states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

The Ministry submits that the information contained in Records 3, 4, 10, 12 and 13 was compiled and forms part of an investigation into possible violations of the *Fish and Wildlife Conservation Act* and other related legislation administered by the Ministry. These notebook entries were compiled by Conservation Officers as part of their duties to investigate possible violations of the

fish and wildlife conservation laws by the appellant and the other individuals mentioned in these records.

I find that the Ministry has established that the undisclosed information contained in Records 3, 4, 10, 12 and 13 was compiled and is identifiable as part of an investigation into a possible violation of law. The undisclosed information in these records falls within the ambit of the presumption in section 21(3)(b). The appellant has not raised the possible application of section 16 and the exceptions in section 21(4) have no application to this information. I find, therefore, that this information qualifies for exemption under section 49(b).

The Ministry has provided me with submissions regarding the manner in which it exercised its discretion to withhold the undisclosed information in Records 3, 4, 10, 12 and 13. Based on these submissions, I find no reason to impugn the manner in which it exercised its discretion.

REFUSE TO CONFIRM OR DENY THE EXISTENCE OF A RECORD/LAW ENFORCEMENT

The Ministry has refused to confirm or deny the existence of any records relating to surveillance or intelligence-gathering with respect to the appellant. It claims the application of section 14(3) of the *Act*, taken in conjunction with sections 14(1)(a), (b) and (g) to any such information, if it indeed exists.

Sections 14(1)(a), (b) and (g) and 14(3) of the *Act* provide:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
>
> (3) A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) apply.

In Order PO-1656 Senior Adjudicator David Goodis reviewed the comments made in prior orders regarding section 14(3):

> In Order P-255 Assistant Commissioner Tom Mitchinson made some general comments about the purpose and application of section 14(3) of the *Act*:

> By including section 14(3) the legislature has acknowledged that, in order to carry out their mandates, certain institutions involved with law enforcement activities must have the ability, in the appropriate circumstances, to be less than totally responsive in answering requests for access to government-held information. However, as the members of the Williams Commission pointed out in Volume II of their report entitled *Public Government for Private People, The Report of the Commission on Freedom of Information and Protection of Privacy/1980* at page 301, it would be a rare case in which the disclosure of the existence of a file would communicate information to the requester which may frustrate an ongoing investigation or intelligence-gathering activity.

In Order P-344, Assistant Commissioner Mitchinson stated the following with respect to the interpretation and application of section 14(3):

> A requester in a section 14(3) situation is in a very different position than other requesters who have been denied access under the *Act*. By invoking section 14(3), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power which I feel should be exercised only in rare cases.
>
> In my view, an institution relying on section 14(3) must do more than merely indicate that records of the nature requested, if they exist, would qualify for exemption under sections 14(1) or (2). An institution must provide detailed and convincing evidence that disclosure of the mere existence of the requested records would convey information to the requester which could compromise the effectiveness of a law enforcement activity.

I adopt the principles derived from the above cited decisions of Assistant Commissioner Mitchinson for the purpose of this appeal. In my view, before it may be permitted to exercise its discretion to invoke section 14(3), the Ministry must provide sufficient evidence to establish that:

1. Disclosure of the records (if they exist) would qualify for exemption under sections 14(1) or (2); and

2. Disclosure of the fact that records exist (or do not exist) would in itself convey information to the requester which could compromise the effectiveness of a law enforcement activity which may exist or may be reasonably contemplated.

Part One: Disclosure of the Records (if they exist)

Under part one of the section 14(3) test, the Ministry must demonstrate that disclosure of the records, if they exist, would qualify for exemption under sections 14(1) or (2). The Ministry provided me with confidential representations regarding the first part of the test under section 14(3). I am, therefore, unable to describe these submissions in any detail in this order. Based upon those representations, I am satisfied that the disclosure of records of the type sought by the appellant in his request pertaining to surveillance or intelligence-gathering, if they exist, could reasonably be expected to interfere with a law enforcement matter or an investigation undertaken with a view to a law enforcement proceeding as contemplated by sections 14(1)(a) and (b). In addition, I find that the disclosure of the types of information sought by the appellant, if they exist, could reasonably be expected to interfere with the gathering of or would reveal law enforcement intelligence information within the meaning of section 14(1)(g).

Accordingly, I find that the first part of the test for section 14(3) has been met by the Ministry.

Part Two: Disclosure of the Fact that Records Exist (or do not exist)

Under part two of the test for the application of section 14(3), the Ministry must demonstrate that disclosure of the fact that records exist (or do not exist) would in itself convey information to the appellant which could compromise the effectiveness of a law enforcement activity which may exist or may be reasonably contemplated.

Again, the Ministry has provided me with confidential representations concerning part two of the section 14(3) test and I am unable to refer to them in this order. I find that the disclosure of the fact of the existence or non-existence of records of the sort requested would convey to the appellant information which could reasonably be expected to result in interference with a law enforcement matter, an investigation or the gathering of intelligence information under sections 14(1)(a), (b) and (g). The second part of the section 14(3) test has, accordingly, also been met by the Ministry.

I therefore uphold its decision to refuse to confirm or deny the existence or non-existence of records relating to surveillance or intelligence-gathering activities undertaken by the Ministry with respect to the appellant and his activities under section 14(3).

ORDER:

1. I order the Ministry to disclose Records 6, 8 and 9 to the appellant by providing him with copies by **March 13, 2003** but not before **March 7, 2003.**

2. I uphold the Ministry's decision to deny access to Records 3, 4, 10, 12 and 13 and its refusal to confirm or deny the existence of surveillance or intelligence records under section 14(3) of the *Act*.

3. In order to verify compliance with order provision 1, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant.

Original signed by: February 6, 2003
Donald Hale
Adjudicator