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

RECONSIDERATION ORDER PO-2183-R

Appeal PA-010421-1

Ministry of Natural Resources

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BACKGROUND TO THE RECONSIDERATION:

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:

> All logs detailing the use of the two Ministry of Natural Resources Gulfstream King Air turboprops by Premier Mike Harris and/or government ministers since March 1, 2000. Also the approximate cost of such flights and how long the trips lasted.

The Ministry identified a large number of responsive records consisting of Aircraft Journey Logs, Manifests and Manifest Summaries. Access to these records was denied on the basis that they were exempt from disclosure under the following exemptions contained in the *Act*:

- law enforcement – sections 14(1)(e), (i) and (l)
- danger to safety or health – section 20
- invasion of privacy – section 21(1)

The requester, now the appellant, appealed the Ministry's decision to the Commissioner's office.

After conducting an inquiry in the appeal, I issued Order PO-2099 on January 17, 2003. In that decision, I upheld the Ministry's decision to deny access to information relating to the identities of the flight crews and security personnel that was contained in the records. I did not uphold the Ministry's decision to deny access to information relating only to Government of Ontario employees and elected officials and ordered the Ministry to disclose this information to the appellant.

The Ministry requested that I reconsider my decision on the basis that the disclosure of some additional information contained in the Flight Manifests and Aircraft Journey Logs would enable one to determine the existence of or the size of the security detail which accompanied the officials who made use of the aircraft. As a result, I issued Reconsideration Order PO-2126-R on March 17, 2003 in which I upheld the Ministry's decision to deny access to additional information that would disclose the composition of the security detail on each flight.

On April 17, 2003, the Ministry initiated an Application for the Judicial Review of my decisions in Orders PO-2099 and PO-2126-R in the Superior Court of Justice (Divisional Court) seeking an order overturning my decisions. One of the grounds for the application was the fact that I did not notify each of the individuals listed in the records in order to seek their views on the disclosure of the information under section 50(3) of the *Act*.

This ground raises the possibility that there was a fundamental defect in the adjudication process, one of the bases for a reconsideration identified in section 18.01 of this office's *Code of Procedure*. In order to address this issue, I provided a Notice of Inquiry setting out the facts and issues extant in the appeal to each of the 74 individuals whose names appear on the records at issue, seeking their views on the disclosure of the information contained in the records. In response to the Notice, I received representations from two individuals who indicated that they

had no objection to the disclosure of the information contained in the records. Three other individuals responded by stating their objections to the disclosure of the information on the basis that they had concerns about their personal safety and security if the records were to be released. I also received representations on behalf of three senior civil servants (the affected parties) who are officials with the Ontario Native Affairs Secretariat (ONAS) responding in detail to each of the issues raised in the Notice. I will address those submissions in the body of this order.

DISCUSSION:

Are the names of the elected representatives and public servants which appear in the records exempt from disclosure under sections 14(1) (e), (i) and (l) and/or 20 of the *Act*?

Sections 14(1)((e), (i) and (l)

These sections state:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > (e) endanger the life or physical safety of a law enforcement officer or any other person;
> >
> > (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
> >
> > (l) facilitate the commission of an unlawful act or hamper the control of crime.

With regard to section 14(1)(e), the affected parties' submissions point out that I made the following finding at page 6 of Order PO-2099:

> I agree with the findings of the Assistant Commissioner for the purposes of the present appeal. In my view, the disclosure of the names of the security officers assigned to government officials making use of government aircraft which are reflected in the manifests could reasonably be expected to give rise to the harms contemplated by section 14(1)(e). I find that the evidence provided by the Ministry in support of this position is detailed and convincing and the disclosure of this information could reasonably be expected to endanger the life of *the governmental officials who use the aircraft and* the law enforcement officers who provide security services to these individuals. In accordance with the findings in Order PO-1944, I find that the names of the law enforcement officers which are

> included in the manifest records qualify for exemption under section 14(1)(e). [emphasis added]

Accordingly, the affected parties submit that the names of the government officials ought to be subject to the exemption in section 14(1)(e), in addition to those of the security officers assigned to protect them. In drafting the language used in Order PO-2099, it was my intention to make a finding that section 14(1)(e) applied only to the names of the security officers and not to those of the government officials contained in the records. Unfortunately, this intention was not made clear in the wording described above.

In *Ministry of Labour (Office of the Worker Advisor) v. Holly Big Canoe et al* (1999), 46 O.R. (3d) 395, the Ontario Court of Appeal determined that "harm to an individual need not be probable for a government institution to successfully rely on the exemption provisions in ss.14(1)(e) and 20 of the [*Act*]. … The expectation of harm must be reasonable, but it need not be probable. … [T]he party resisting disclosure must demonstrate that the reason for resisting disclosure is not a frivolous or exaggerated expectation of endangerment to safety."

Applying this standard, there is nothing in the affected parties' arguments about section 14(1)(e) to make me change my decision regarding the application of that exemption. My finding in Order PO-2099 that the section 14(1)(e) exemption does apply to the names of government officials therefore remains in effect.

Sections 14(1)(i) and (l) require "detailed and convincing" evidence of "a reasonable expectation of probable harm" (see Order PO-1747). In support of its argument that sections 14(1)(i) and (l) ought to apply to the names of government officials, the affected parties submit the following:

> If the identities of senior officials of the government are disclosed as passengers on these aircraft, then the aircraft could be targeted in future. This could reasonably be expected to endanger the security of the aircraft or facilitate the commission of unlawful acts.

In Order PO-2099, I dismissed similar arguments raised by the Ministry in its submissions by making the following findings:

> I find that the information contained in the manifest summary and the manifests themselves do not establish a routine or pattern of travel on the part of any governmental officials which could be used by an individual to facilitate the commission of a crime. I find that the records do not reveal any consistent travel arrangements which could be used to assist the undertaking of a criminal act, despite the inclusion of the arrival and departure airports. I find that no set patterns of travel by any individual or individuals would be revealed by the disclosure of the records. Accordingly, I cannot agree that the information contained in the records (other than that relating to the security personnel discussed above) qualifies for exemption under sections 14(1)(e), (i) or (l) on this basis.

The affected parties have failed to provide me with the kind of "detailed and convincing" evidence required to establish "a reasonable expectation of probable harm" under sections 14(1)(i) or (l). In my view, the evidence and argument provided to me in the original inquiry, and subsequently, are not sufficient to support a finding that the harms contemplated by sections 14(1)(i) or (l) can reasonably be expected to flow from the disclosure of the information remaining at issue. Accordingly, I find that sections 14(1)(i) and (l) have no application to the information relating to government officials.

Section 20

This section states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

In support of their contention that the information is subject to the exemption in section 20, the affected parties submit that:

> . . . disclosure of the identities of passengers could reasonably be expected to seriously threaten the safety or health of the passengers as contemplated by section 20. In these circumstances, the identifiable information in the records at issue is exempt.
>
> In this case, as we understand it, the Ministry had provided a confidential affidavit that outlined the basis for the safety concerns we are also raising concerns that we have in relation to my safety, should this information be disclosed. In these circumstances, the identifiable information in the records at issue is exempt. The decision of the Court of Appeal in *Ministry of Labour (Office of the Worker Advisor) v. Holly Big Canoe et al* [*supra*] applies. The Court established a test of possible harm as contrasted with probable harm and found that it applied where an affidavit established a reasonably held concern for safety.

In Order PO-2099, I found that information relating to the flight crews contained in the flight log records was properly exempt under section 20. I also made certain findings with respect to the application of section 20 to the information in the manifests which relates only to the names of government officials:

> I have found that the names of the security personnel contained in the manifests are exempt from disclosure under section 14(1)(e). Accordingly, I need not address these portions of the manifests in my discussion of section 20. The remaining information describes the identity of the other passengers on the aircraft, the destinations and other flight details for each trip which is recorded. For the reasons set out in my discussion of sections 14(1)(e), (i) and (l), I find that section 20 also does not apply to the remaining information in the manifests.

> Specifically, I find that the Ministry has failed to provide me with the sufficient evidence to demonstrate "that disclosure could reasonably be expected to seriously threaten the safety or health of an individual, as opposed to there being a groundless or exaggerated expectation of a threat to safety." I find that the Ministry has failed to establish "a reasonable basis for believing that a person's safety will be endangered by disclosing" the manifests, following the removal of the names of the security personnel. As a result, I find that section 20 has no application to this information.

In my view, the affected parties have not provided me with sufficient information to alter my finding with respect to the application of section 20 to the information in the manifests relating only to the names of government officials.

Accordingly, I decline to reconsider my decisions in Orders PO-2099 and PO-2126-R on the basis that I failed to properly apply the exemptions in sections 14(1)(e), (e) and (l) and section 20 of the *Act*.

Are the names of the government officials contained in the records "personal information" within the meaning of section 2(1) of the *Act*?

In Order PO-2099, I made certain findings with respect to whether the records contained "personal information" as that term is defined in section 2(1). I found that information relating to individuals who are not government officials, elected or otherwise, qualifies as the personal information of these individuals. In the representations received from the Ministry during the inquiry which resulted in the issuance of Order PO-2099, I note that the Ministry did not argue that the information relating to government officials qualified as their personal information for the purposes of section 2(1).

Representations of the affected parties

In support of their contention that the records contain their personal information, the affected parties submit the following:

> The information at issue clearly fits within the scope of the introductory wording of the section 2(1) definition of 'personal information' under the *Act* as it is 'recorded information about an identifiable individual.' The records contain our names as a passenger on the aircraft, and we are identifiable individuals. Further more, the information also falls within section 2(1)(h), since disclosure of our names would reveal other personal information about us, namely, that we were passengers on particular aircraft heading for a particular destination.
>
> As noted, previous decisions of the IPC have distinguished between an individual's personal, and professional or official government capacity and have found that, in some cases, information associated with a person in his or her

professional or official government capacity is not considered to be 'personal information' under section 2(1).

However, as is noted in the Notice of Inquiry, the Supreme Court has ruled on two occasions that the distinction outlined above, does not exist in relation to identical wording in the federal *Privacy Act*. In *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)* [2003] S.C.J. No 7, the information sought regarding RCMP members concerning their postings, service and status was held to be 'information about an identifiable individual' and, therefore, 'personal information' within the meaning of section 3 of the *Privacy Act*. Section 3 of the *Privacy Act* uses wording identical to section 2(1) of the *Act*: 'personal information means information about an identifiable individual that is recorded in any form. . .' The Court cited its earlier decision in *Dagg v. Canada (Minister of Finance)*, [1997] S.C.R. 403, to confirm that the introductory wording in the definition of personal information is broadly stated and its intent is to capture *any* information about a specific person. It is noteworthy that in *Dagg*, the Court expressly refuted the 'professional vs individual' distinction which was the basis for the appeal from the Federal Court of Appeal decision. The Federal Court of Appeal had held that the distinction was without foundation.

Since the *Privacy Act* provides an express exception, in section 3(j) in relation to particular information about an individual who is or was an officer or employee of the government institution, the Supreme Court of Canada, in their results, focused on the interpretation of the exception. Such an exception does not exist under *FIPPA*.

It is clear from these cases that information relating to an identifiable individual is that individual's personal information.

Findings

In Order P-1621, Assistant Commissioner Tom Mitchinson addressed whether information which related to the employment activities of civil servants could properly be characterized as their "personal information" within the meaning of section 2(1). Discussing the application of the decision in *Dagg* to the definition of personal information in section 2(1), he adopted the findings of former Adjudicator John Higgins in Order P-1412 and found that:

As far as the Dagg decision is concerned, Adjudicator Higgins made the following comments:

> The affected person then cites *Dagg v. Canada (Ministry of Finance)* (1995), 124 D.L.R. (4th) 553 (Fed. C.A.). In this case, which dealt with the definition of "personal information" in the

federal *Access to Information Act*, the Court overturned earlier rulings which had found that the identities of individuals who had worked overtime were not personal information, on the basis of a "predominant characteristic" test. The Court stated:

> ... the test is clearly not in accord with the plain language of the statutory definition which states simply that "personal information" means information about an identifiable individual that is recorded in any form ..." Information in a record is either "personal information" or it is not. The injection of the "predominant characteristic test" is an unwarranted attempt by the Motions Judge to amend the definition of "personal information".

...

> With respect to the Dagg case, in my view, it is distinguishable on the facts. It is a very different thing to find that an individual's overtime hours are personal information than to make such a finding with respect to the identities of government employees or professional staff, or government officials, or their opinions in relation to proposed government policies or activities. Under the historical approach taken by this office, the former could well be considered personal information, while the latter would not be. Therefore, in my view, Dagg is not determinative of this issue as it presents itself in this appeal. Moreover, this office has never characterized the distinction in relation to an individual's professional or official capacity as a "predominant characteristic" test.

While the Supreme Court of Canada reversed the Federal Court of Appeal, and held that the "overtime" information at issue in that case was not personal information, in my view, the court's judgment does not affect the validity of Adjudicator Higgins' conclusions on the applicability of the Dagg case to the present appeal (see *Dagg v. Canada (Minister of Finance)* (1977), 148 D.L.R. (4th) 385 (S.C.C.)).

The majority of the court in Dagg agreed with the approach taken by Mr. Justice LaForest, in dissent, that the definition of personal information under the federal *Privacy Act* (adopted by the federal *Access to Information Act*) is "deliberately broad", subject only to specific exceptions at section 3(j) relating to "information about an identifiable individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual." However, under both the federal access and privacy regime and the personal

information definition at section 2(1) of the provincial *Act*, there is still the requirement that the information be "about an identifiable individual" in order to qualify as personal information. The mere association of an individual's name with other information, whether in an official government or employment capacity or not, does not automatically make that other information "about the individual". Under the provincial *Act*, this view is reinforced by the specifically enumerated category of personal information in paragraph (h) of section 2(1), which defines personal information as including "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**" [emphasis added]. If the "other" information is not "personal" in the sense that it is "about" the identifiable individual, it does not qualify as that individual's personal information (see Orders P-257 and P-427).

While Mr. Justice LaForest was speaking in the context of the express exclusion from the definition of personal information under the federal regime, I believe that the following passage from his reasons for judgment captures the essence of the distinction which this office has drawn between an individual's personal and professional or official government capacity:

> The purpose of these provisions is clearly to exempt [i.e., from the definition of "personal information"] only information attaching to *positions* and not that which relates to specific individuals. Information relating to the position is thus not "personal information", even though it may incidentally reveal something about named persons. Conversely, information relating primarily to individuals themselves or to the manner in which they choose to carry out the tasks assigned to them is "personal information".
>
> The fact that persons are employed in government does not mean that their personal activities should be open to public scrutiny. By limiting the release of information about specific individuals to that which relates to their position, the Act strikes an appropriate balance between the demands of access and privacy. In this way, citizens are ensured access to knowledge about the responsibilities, functions and duties of public officials without unduly compromising their privacy. (at pp. 413, 415)

I am not obliged in this appeal to interpret and apply the provisions of the federal legislation; however, I do wish to make one additional comment on the representations of the affected person concerning the *Dagg* case, where it is submitted:

> ... it is clear that [the Supreme Court of Canada] analysed the issue commencing with the assumption that the information was "personal information" and then found that nonetheless, given the express exclusion as noted above in the *Access to Information Act* [i.e., s.3(j)], ... the information was accessible.

Because there is no express exclusion of information pertaining to government employees under the provincial *Act*, the affected person submits that I should apply the reasoning in the *Dagg* case to find that the information at issue qualifies as personal information.

With respect, the approach taken under the federal access and privacy regimes and the provincial legislation is materially different. The federal scheme contains specific exclusions from the definition of personal information relating to government employees, while the provincial *Act* does not. On the other hand, section 21(1)(f) of the provincial *Act* permits the disclosure of personal information where this would not constitute an "unjustified invasion of personal privacy", a concept which is not present in the federal statute. In my view, it simply does not follow that information should necessarily be **included** within the definition of personal information under the provincial statute because the federal Parliament has seen fit to expressly **exclude** similar information from the definition of personal information under a federal enactment which accommodates privacy and disclosure interests in significantly different ways. As Order P-1412 demonstrates, the approach of this office has consistently been to find that information about normal activities undertaken by an individual in his or her employment, professional or official government capacity, including opinions developed or expressed in that capacity, is not information "about" that individual and is therefore not personal information. In my view, the court's judgment in the *Dagg* case in no way affects the validity of this approach.

I adopt the reasoning of the Assistant Commissioner for the purposes of the present appeal.

In Reconsideration Order R-980015, I reviewed the history of the Commissioner's approach to this issue and the rationale for taking such an approach. I also extensively examined the approaches taken by other jurisdictions and considered the effect of the decision of the Supreme Court of Canada in *Dagg* on the approach which this office has taken to the definition of personal information. In applying the principles which I described in that order, I came to the following conclusions:

> I find that the information associated with the names of the affected persons which is contained in the records at issue relates to them only in their capacities as officials with the organizations which employ them. Their involvement in the issues addressed in the correspondence with the Ministry is not personal to them but, rather, relates to their employment or association with the organizations

> whose interests they are representing. This information is not personal in nature but may be more appropriately described as being related to the employment or professional responsibilities of each of the individuals who are identified therein. Essentially, the information is not about these individuals and, therefore, does not qualify as their "personal information" within the meaning of the opening words of the definition.

As noted above, the affected parties also rely on a more recent decision of the Supreme Court of Canada in *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*. This decision interprets the same sections of the federal *Privacy Act* as *Dagg*. The *Information Commissioner* case does nothing to alter my view that the federal access and privacy regimes approach the question of whether information qualifies as "personal information", and how personal information should be protected, in a manner that differs significantly from the provincial *Act*. This difference is important because the analysis under the provincial *Act* examines whether information is "about" an identifiable individual and then goes on to determine whether the disclosure of that information would constitute an unjustified invasion of personal privacy under section 21(1). The Court in *Information Commissioner* case considered the application of section 3(j) of the *Privacy Act*, which has no equivalent in the provincial *Act*. In addition, the Court did not express its views on the meaning of the term personal information as it might relate to information not subject to the exclusion in section 3(j). In my view, there is nothing in the Court's decision in this case that varies from the interpretations placed by this office on the definition of the term "personal information" and I find that this case does not assist the affected parties' arguments.

The information in the records relates to the affected persons only in their capacities as civil servants or elected representatives. It describes the flights taken on government aircraft by these individuals in the course of fulfilling their responsibilities as civil servants or as an M.P.P. The information does not relate in any way to their private lives or their involvement in matters personal to them. It remains routine information relating to their employment functions and does not contain a personal component (such as an allegation of wrongdoing) that might mean that it was in fact personal information, as discussed in Order R-980015. The reasons for the affected persons' use of government aircraft relate solely to their positions and their employment or constituency responsibilities. In my view, applying the principles expressed above from Orders P-1412, P-1621 and R-980015, this information does not qualify as the personal information of the affected parties under section 2(1). I specifically find that the information is not "about the individual" but rather relates to the positions these persons occupy and the accompanying employment responsibilities that go with them.

As a result, I find that the information relating to the affected parties does not qualify as their "personal information" for the purposes of section 2(1). As only personal information can qualify for exemption under section 21(1), I find that this information is not exempt under that section.

ORDER:

I uphold my decisions in Orders PO-2099 and PO-2126-R.

Original signed by: September 29, 2003
Donald Hale
Adjudicator