



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2188

Appeal PA-020107-1

Ministry of Natural Resources



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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*) from the Office of the Official Opposition (the appellant) for access to:

copies of all manifests for all flights of Ministers, PC caucus members, their staff, their guests or other government passengers on board government aircraft since January 1, 2001.

The Ministry located a number of responsive records and denied access to them, pursuant to sections 20 (danger to health or safety) and 21(1) (invasion of privacy) of the *Act*. The appellant appealed the Ministry's decision to deny access to the records.

During the mediation stage of the appeal, the appellant indicated that he is not interested in obtaining any personal information relating to any of the guests which may appear in the records. He also advised that he is not interested in obtaining access to the name or telephone number of the "business contact officer" indicated on various pages of the records. Accordingly, section 21(1) is no longer at issue with respect to the information relating to any guests. Also during the mediation stage of the appeal, and within the time for doing so prescribed in the Confirmation of Appeal, the Ministry indicated that it was also relying on section 14(1)(l) of the *Act* (facilitate commission of an unlawful act), in addition to sections 20 and 21(1).

As further mediation was not possible, the appeal was moved to the adjudication stage of the process. I sought the representations of the Ministry, initially, as it bears the onus of demonstrating that the exemptions claimed apply to the records at issue. The Ministry provided representations, the non-confidential portions of which were shared with the appellant. The Ministry also indicated that it was relying on an affidavit by the Director of Investigation Support Bureau of the Ontario Provincial Police which it filed with its submissions in Appeal Number PA-010421-1. The appellant advised that he would not be making submissions in response to the Notice of Inquiry, but is relying on the positions expressed in his original request and appeal letter.

I also solicited the representations of the 110 elected officials and their staff whose names appear on the flight manifests (the affected parties). I received responses from two individuals, one of whom indicated that he had no objection to the disclosure of his name. The other simply stated that he would not be submitting representations. I also received detailed submissions from a representative of the Office of the Premier, stating that these representations were being made on behalf of the "Premier's Office staff, Ministers and Ministers Office staff who have been identified as affected parties" in the appeal. The affected parties' representations also raise the possible application of sections 14(1)(c) and (e), in addition to the exemptions claimed by the Ministry (sections 14(1)(l), 20 and 21(1)), to the information contained in the records.

DISCUSSION:

The records requested in this appeal are similar in nature to those under consideration in Appeal PA-010421-1 which were addressed in Order PO-2099 and Reconsideration Orders PO-2126-R and PO-2183-R. I will rely on the reasoning contained in those orders to assist me in my decision in the present appeal.

PERSONAL INFORMATION

Both the Premier's Office and the Ministry take the position that the information contained in the records constitutes "personal information" within the definition of that term in section 2(1) of the *Act*. This section defines personal information to mean "recorded information about an identifiable individual". Only information which qualifies as "personal information" can be exempt from disclosure under the invasion of privacy exemption in section 21(1) of the *Act*. It should be noted that the appellant is only seeking access to information relating to the flights taken by "Ministers, PC caucus members, [and] their staff". The appellant clarified that he is not seeking access to information about guests on these flights or information relating to the Ministry's contact person listed on the flight manifests.

Submissions of the parties

The Ministry submits that:

. . . the records contain personal information as defined by the *Act* that falls outside of the professional information used in the carrying out of the duties of government officials.

...

Where there is travel outside of the province, such as to the U.S., the manifest includes the date of birth of the passengers. Even though the passengers may be government officials, this information does not relate to the carrying out of their professional duties. It is personal information that falls under the scope of the definition of 'personal information' set out in the *Act*.

The Premier's Office submits that the information at issue is "about identifiable individuals". It states that:

Whether the information is about an individual in their professional or individual capacity is not an issue as far as the definition is concerned. Even if the definition was limited in this way, distinguishing between professional or individual capacity would not be relevant in this situation. In this case, although the purpose of the flights is for government business, disclosure would jeopardize the personal safety of individuals. It is therefore our view that the information is personal. We

believe that the individuals named as using the aircraft could be personally targeted or at risk based on the disclosure of this information.

The appellant has not made any submissions with respect to this issue.

Findings

I agree with the position taken by the Ministry with respect to the dates of birth of passengers which appear on some of the flight manifests. I find that this information constitutes the personal information of these individuals within the definition of that term in section 2(1)(a). As the dates of birth would reveal the age of these persons, it falls within the scope of paragraph (a) of the section 2(1) definition of personal information.

In Order PO-2183-R, I addressed similar arguments to those raised by the Premier's Office with respect to whether information relating to air travel undertaken by government officials on Government of Ontario owned aircraft qualifies as the personal information of these individuals within the meaning of section 2(1). I adopted the reasoning articulated by Assistant Commissioner Tom Mitchinson in Order P-1621 and former Adjudicator John Higgins in Order P-1412 and came to the following conclusion:

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.

In my view, the same principles apply to the information contained in the records at issue in this appeal as it also relates to the use of Government of Ontario aircraft by civil servants and elected representatives. I find that, with the exception of the dates of birth contained in some of the flight manifests, none of the information qualifies as the personal information of the individuals

referred to therein. I will, accordingly, only address the possible application of the invasion of privacy exemption in section 21(1) to the dates of birth of the passengers contained in some of the flight manifests.

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 the present circumstances, the only exception which might possibly apply is that contained in 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].

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. [See Order PO-1764]

If none of the presumptions in section 21(3) apply, 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. Section 21(2) lists various criteria which must be considered in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy within the meaning of section 21(1)(f). [Order P-239]

The appellant has not referred to any of the considerations listed in section 21(2) which might weigh in favour of the disclosure of the passenger dates of birth listed in some of the flight manifests. In the absence of any submissions to the contrary, I find that the disclosure of the passengers' dates of birth appearing on some of the records would constitute an unjustified invasion of the personal privacy of those individuals. This information is, accordingly, exempt from disclosure under section 21(1). As the remaining information at issue does not qualify as

the personal information of the individuals named, it cannot be exempt from disclosure under section 21(1).

LAW ENFORCEMENT

The Ministry submits that the information contained in the records is exempt from disclosure under the discretionary exemption in section 14(1)(l). In its submissions, the Premier's Office takes the position that the information qualifies for exemption under the discretionary exemptions in sections 14(1)(c), (e) and (l).

Sections 14(1)(c), (e) and (l) of the *Act* state:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
- (e) endanger the life or physical safety of a law enforcement officer or any other person;
- (l) facilitate the commission of an unlawful act or hamper the control of crime.

In support of its contention that the information is exempt under section 14(1)(l), the Ministry submits that:

Broadly speaking subsection 14(1)(l) of the *Act* is designed to create an exemption for information which could be used to facilitate illegal activity and in particular the harming of individuals or property.

The representations of the Ministry repeat the submissions made in Appeal PA-010421-1 and I will not reproduce them here. The Ministry also expresses its concern over the disclosure of the identities of the aircraft crew members and the security detail which may also be included in the records. However, the appellant has restricted the scope of his request to include only information pertaining to flights taken by "Ministers, PC caucus members, [and] their staff". As a result, the names of the flight crew and the security detail fall outside the ambit of the requested information.

The Premier's Office submits that:

Under the law enforcement exemption, we are of the view that sections 14(1)(c), (e) and (l) are applicable to ensure the safety of officials using the aircraft. Disclosure of the information threatens the safety of senior government officials in particular, and anyone flying with them, and thus has a more substantial impact

on them compared to other individuals. Senior government officials routinely receive threats to their personal safety, and such threats are taken seriously by law enforcement organizations. The concern about safety in this regard is not unreasonable.

Particularly in the wake of the events of September 11, 2001, we are aware that aircraft and their passengers are vulnerable to organized and deliberate threats to safety and security. Heightened security at airports and by airlines since September 11 is evidence that threats to safety involving air travellers are real. Any information, which could possibly impair the security of aircraft and their passengers must be treated with a high degree of confidentiality. This is even more the case with the aircraft at issue which are used to transport people who themselves are public figures and the objects of threats.

If it were known that senior and other public officials used this kind of air transport for travel to the particular destinations noted in the records, unscrupulous individuals wishing to target senior government officials for injury or death, would know they could target these planes instead of commercial aircraft. Thus, the release of the information would facilitate the targeting of planes that provide transportation to senior political officials and their staff.

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.”

In Order PO-2099, I did not uphold the Ministry’s arguments that section 14(1)(e) applied to similar information to that remaining at issue in the present appeal on the basis that its disclosure would reveal a “pattern of conduct” on the part of the government officials using the aircraft. I stated:

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.

In my view, neither the Ministry nor the Premier's Office has furnished the kind of evidence required to establish that a reasonable expectation of harm exists should the information at issue be disclosed. I find that, while the concerns expressed by the Ministry and the Premier's office cannot be described as "frivolous", they represent "an exaggerated expectation of endangerment to safety" as contemplated by the Court of Appeal in *Ministry of Labour*. As a result, I conclude that the information remaining at issue is not exempt from disclosure under section 14(1)(e).

Sections 14(1)(c) and (l) require "detailed and convincing" evidence of "a reasonable expectation of harm". In Orders PO-2099 and PO-2183-R I made certain findings respecting the application of sections 14(1)(e), (i) and (l) to similar information. I stated as follows:

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.

I concluded that the affected parties had failed to provide sufficiently "detailed and convincing" evidence to establish the application of the exemptions.

I adopt the finding made in these earlier decisions for the purposes of the present appeal. I find that the Ministry and the Premier's Office have not provided me with evidence that is sufficiently "detailed and convincing" to establish a "reasonable expectation of probable harm" under either section 14(1)(c) or (l).

DANGER TO SAFETY OR HEALTH

The Ministry and the Premier's Office take the position that the information remaining at issue in the records is exempt from disclosure under the discretionary exemption in section 20 of the *Act*, which reads:

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.

With respect to the application of section 20 to the records, the Ministry submits that:

. . . disclosure of the records could reasonably be expected to facilitate the commission of an unlawful attack on the Premier or members of the PC caucus who travelled in government aircraft or an attack on the aircraft.

The Premier's office indicates that:

All the individuals using these aircraft are at risk, should this information be disclosed. No information should be disclosed that would enable an individual to know who was using the aircraft, how many people use the aircraft, or what their destinations were.

Pursuant to the advice we have received from the Ontario Provincial Police, we strongly believe this information must be protected and kept private in order to maintain the physical health and safety of each affected individual.

Disclosure of the names of government officials that use government aircraft could enable an individual to ascertain individuals' flight patterns. This could, in turn, enable an individual to predict the mode of travel of government officials for future events. A person wishing to harm senior government officials could target them accordingly. Future freedom of information requests for the same type of information for different periods of time could significantly assist an individual to analyze and predict the flight patterns of senior government officials, increasing their vulnerability to harmful action by unscrupulous individuals.

I have addressed the "pattern of travel" arguments in my discussion of section 14(1)(e) above, and find that they are not persuasive.

In Order PO-2183-R, I addressed the application of section 20 to similar information as follows:

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.

In the present appeal, I adopt the findings expressed in Orders PO-2099 and PO-2183-R with respect to the application of section 20 to the records. Again, I am of the view that I have not been provided with sufficient evidence to demonstrate " a reasonable basis for believing that a person's safety will be endangered by disclosing the information remaining at issue in the records." I also find, therefore, that section 20 has no application in the circumstances of this appeal.

ORDER:

1. I uphold the Ministry's decision to deny access to the dates of birth of passengers contained in some of the records at issue in this appeal.
2. I order the Ministry to disclose all information (other than dates of birth) relating to Ministers, PC caucus members and their staff contained in flight manifests maintained for flights that took place between January 1, 2001 and the date of the request, by **November 17, 2003**, but not before **November 12, 2003**.
3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records that are disclosed to the appellant pursuant to Order Provision 2.

Original signed by: _____
Donald Hale
Adjudicator

October 10, 2003