



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

# **ORDER PO-2325**

**Appeal PA-030352-1**

**Ministry of Natural Resources**



Tribunal Service Department  
2 Bloor Street East  
Suite 1400  
Toronto, Ontario  
Canada M4W 1A8

Services de tribunal administratif  
2, rue Bloor Est  
Bureau 1400  
Toronto (Ontario)  
Canada M4W 1A8

Tel: 416-326-3333  
1-800-387-0073  
Fax/Télé: 416-325-9188  
TTY: 416-325-7538  
<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 a copy of an e-mail document authored by a named individual and sent to the Ministry in South Porcupine, Ontario. The request also identified that the document "... apparently contains allegations against [a named cottagers association] and certain named individuals".

The requester also advised that she was not interested in the identity of the named individuals.

The Ministry responded to the request by stating:

Pursuant to section 21(5) of the *Act*, the Ministry is unable to confirm or deny the existence of a record or records responsive to your request. Under this subsection a head may refuse to confirm or deny the existence of a record, if the disclosure of the existence of the record would constitute an unjustified invasion of an individual's privacy.

The requester (now the appellant) appealed the decision.

Mediation did not resolve this appeal, and it was transferred to the adjudication stage of the process. I sent a Notice of Inquiry to the Ministry, initially, and received representations from the Ministry. I then sent the Notice of Inquiry, together with a copy of the non-confidential portions of Ministry's representations, to the appellant. I did not receive representations from the appellant.

## **DISCUSSION:**

### **REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF A RECORD - INVASION OF PRIVACY**

#### **Introduction**

Section 21(5) reads as follows:

A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

A requester in a section 21(5) situation is in a very different position than other requesters who have been denied access under the *Act*. By invoking section 21(5), 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 that should be exercised only in rare cases (Order P-339).

#### *Definition of Personal Information*

An unjustified invasion of privacy can only result from the disclosure of personal information. Under section 2(1), "personal information" is defined, in part, to mean recorded information

about an identifiable individual, 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 [paragraph (h)].

Any record responsive to the appellant's request would, by definition, contain information about the individual named by the appellant as the author of the e-mail, in the context of any interaction he may have had with the Ministry. Therefore, I find that any such record would be "about" the named individual in a personal sense, and would fall within the scope of the definition of "personal information".

*Unjustified invasion of personal privacy and Section 21(5)*

Sections 21(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Section 21(2) lists some 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. 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). A section 21(3) presumption can be overcome, however, if the personal information at issue is caught by section 21(4) or if the "compelling public interest" override at section 23 applies (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

In this case, the Ministry takes the position that disclosing any responsive information, if it exists, would constitute a presumed unjustified invasion of privacy under section 21(3)(b). This section reads as follows:

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 identifies that it conducts investigations of offences under various provincial statutes, and identifies the relevant statutes. It then states as follows regarding the presumption in section 21(3)(b):

If such a record exists it would have been compiled as part of a law enforcement investigation. As such, it would fall within section 21(3)(b) and its release would be presumed to be an unjustified invasion of privacy.

Concerning the application of section 21(5), the Ministry states:

Disclosing the fact that a record exists or does not exist would in itself convey information to the requester on whether or not the individual named as the author had made a complaint which could constitute an unjustified invasion of personal privacy.

As identified earlier, the requester has not provided representations in this appeal.

Based on the Ministry's representations, I find that disclosure of the record, if it exists, would be a presumed unjustified invasion of privacy pursuant to section 21(3)(b). Sections 21(4) and 23 have no application in the circumstances of this appeal, and disclosure of the record, if it exists, would therefore be an unjustified invasion of personal privacy.

In the circumstances of this appeal, particularly in light of the nature and wording of the request, I have concluded that section 21(5) applies. In my view, this is a situation in which the very nature of the request permits the Ministry to rely on the "refuse to confirm or deny" exemption. Disclosing the existence or non-existence of records responsive to this request would itself reveal personal information about a named individual, specifically whether or not the individual named as the author had made a complaint to the Ministry. In the absence of any factors favouring disclosure of the existence or non-existence of records, I find that disclosing the existence or non-existence of responsive records would constitute an unjustified invasion of the individual's personal privacy. In my view, this justifies the Ministry's discretionary decision to apply section 21(5).

Accordingly, I find that the Ministry properly exercised its discretion to refuse to confirm or deny the existence of responsive records, and that section 21(5) applies in this appeal.

**ORDER:**

I uphold the Ministry's decision.

Original Signed by: \_\_\_\_\_  
Frank DeVries  
Adjudicator

\_\_\_\_\_  
September 28, 2004