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

ORDER PO-2338

Appeal PA-030388-2

Ministry of Natural Resources

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NATURE OF THE APPEAL:

This is an appeal from a decision of the Ministry of Natural Resources (the Ministry), made under the *Freedom of Information and Protection of Privacy Act* (the *Act*).

This appeal arises out of a request for access to information about approximately 45 research projects, noting which ones are joint with CFIA [Canadian Food Inspection Agency] Animal Disease Centre and more detailed information about a specific project. In response to the request, the Ministry located a number of records and provided access to parts of them. Some of the records pre-existed the request. As a means of conveying the information sought by the requester, the Ministry also created a record, consisting of a list of research projects.

In its decision, the Ministry stated that the names of research partners on the list of research projects were non-responsive. With respect to the other records, relating to a specific project, the Ministry denied access based on the mandatory exemption in section 17 (third party information).

The appellant appealed this decision, and Appeal No. PA-030388-1 was opened. In this appeal, among other things, the appellant challenged the Ministry's decision under section 17 as well as its assertion that the names of research partners was non-responsive. As a result of mediation, Appeal No. PA-030388-1 proceeded on the issue of the application of section 17 to information about a specific research project. Recently, I issued Order PO-2305 on that appeal.

With respect to the names of the research partners, the Ministry agreed to issue a new decision on access to this information, on the understanding that the appellant could file a further appeal if he wished. After seeking the views of the research partners named in the record (the affected parties), the Ministry issued a new decision providing access to some of the names, and denying access to others based on section 17, the mandatory exemption in section 21 (personal privacy) and the discretionary exemption in section 14 (law enforcement).

The appellant appealed the decision to deny access to the names of some research partners and this appeal (PA-030388-2) was opened. During mediation of this appeal, the mediator obtained the consent of three more research partners to the disclosure of their identities, and this information was disclosed to the appellant.

As some names of research partners continue to be at issue, this appeal was referred to me for adjudication. I sent a Notice of Inquiry to the Ministry and to three affected parties, inviting them to make representations in the appeal. After receiving representations from all of these parties, I have decided it is unnecessary to invite the appellant to respond.

At issue before me is whether the appellant should be granted access to the names of the three remaining research partners named in the record.

DISCUSSION:

PRELIMINARY ISSUE

In its representations, the Ministry takes the position that this appeal ought to be dismissed as "there is no issue before the Information and Privacy Commissioner/Ontario". It submits that it has "fully complied with the request and exceeded its obligations under the Act by creating a list of research projects in order to lower the appellant's costs and provide more expeditious service."

Further, the Ministry asserts "the Commission has no authority under the Act to adjudicate with respect to created records." In a nutshell, it states that because the record in which the disputed information is contained was created as a result of mediation, "the Commission has no statutory authority to review what in effect is a settlement of the parties, i.e., the Ministry and the requester".

In its representations, the Ministry describes the processing of the request, and its discussions with the appellant to clarify the request. The Ministry states that although it had no statutory obligation to do so, it agreed to create a list of projects. It states "the agreement to create the record was to reduce the cost to the requester who otherwise would have had to pay for the search and reproduction of the records which would have provided the raw material for the request." The Ministry submits that the appellant has not been denied access to a record or part thereof under section 24(1), as no record which listed the rabies research projects existed. Accordingly, there is no appeal under section 50(1), and the Commission has no jurisdiction to hear an appeal or make an order under section 54 with respect to a created record.

Analysis

I do not accept the position of the Ministry that there is no justiciable issue before me. Neither do I accept its position that I have no jurisdiction to decide this appeal.

From the material before me, including the representations of the Ministry, it appears that in responding to the appellant's request, the Ministry decided to create a record as a means of conveying information to the appellant. I accept that the Ministry took this step as a means of reducing costs to the appellant, and as such it is to be commended for finding a more efficient way of dealing with a potentially costly search for records.

It is also not in dispute that in creating the record, the Ministry included information identifying some of its research partners. After creating the record, the Ministry then took the position that the information about the research partners was non-responsive to the request.

In mediation, the Ministry agreed to withdraw this position and instead issue a decision on whether any exemptions applied to justify withholding this information from the appellant. This development is documented in the Mediator's Report, which is sent to the parties for comment,

and which sets out the nature of the issues remaining in dispute at the conclusion of mediation. In both the draft and final Reports, the mediator notes the parties' agreement to have the Ministry issue a new decision on the information previously claimed as non-responsive. In both the draft and final Reports, the statement of issues in dispute does not include the responsiveness of the information severed from the record. It indicates only that the applicability of exemption(s) under the *Act* remain in dispute.

I am therefore satisfied that, to the extent that the parties have not come to any agreement on the applicability of exemptions to the information at issue, this issue is before me for adjudication. There is, in the Ministry's terminology, a "justiciable issue".

I am also satisfied that I have jurisdiction to decide the appeal. The matter began with an access request under section 24(1) to which the Ministry responded by, among other things, creating a record. Regardless of the fact that it was arguably under no obligation to create the record, the Ministry then issued an access decision with respect to this record. This decision has been appealed. I see no basis in these circumstances to preclude the appellant from appealing the decision under section 50(1). I see no basis for a finding that I am without jurisdiction to decide the appeal.

I do not accept the Ministry's submission that, because the creation of the record was voluntary on its part, a dispute about access to the record cannot give rise to an appeal. My conclusion may be different if it were apparent that the creation of the record was part of a complete resolution of the appellant's access request. However, as is clear from the Mediator's Report, it was not.

I will therefore turn to consider whether any of the exemptions claimed by the Ministry apply to the information at issue.

LAW ENFORCEMENT

The Ministry claims that the names of the three remaining research partners at issue are exempt from disclosure under section 14(1)(l). Two of the affected parties also refer to section 14(1)(e). These provisions 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;
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

In supporting the application of section 14(1)(l), an institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner),* [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

In the case of section 14(1)(e), the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.)].

The Ministry submits that one of the affected parties, an elderly scientist (affected party #1), has been working collaboratively with the Rabies Unit since 1982 and has been directly involved in raccoon bait development and research with the Ministry rabies program since 1990. The Ministry states that this individual has worked at a research facility which was the target of demonstrations by animal rights activists and has been escorted out of the building by police. Based on this event and reports of violent or aggressive tactics by some elements of the animal rights movement, the Ministry states that he fears that his home will be the target of vengeful activities by individuals against animal research or specifically, the individuals who have been challenging the Ministry's rabies research program for the past few years.

The Ministry submits that this affected party is upset, anxiety ridden, fearful and unable to sleep, and has stated that he will stop his lifesaving research altogether, if his identity is released. In its submission, releasing the list would allow activists opposed to his research to learn that he is conducting the research and target his home from which he operates. The Ministry states that identification of a location where research is conducted or the home of a researcher facilitates the commission of a crime as it provides a target area for the illegal activities, such as break and enter or vandalism, of the more extreme elements of the animal rights movement.

The Ministry states that the second affected party (affected party #2, a company) is a Level 3 facility, which means that the contents of its workplace are very dangerous and hazardous if not handled in the proper manner. They store the rabies virus which has been identified as a "bio-terrorism" potential product along with other wildlife diseases. The Ministry states that release of the severed information would enable the targeting of the facility by those who wish to gain access to such products or to target extreme animal rights activists opposed to the research as it would confirm that research and the material was carried out at the facility. Thus, it submits, it would reasonably be expected to aid in the commission of a crime such as break and enter, theft and/or vandalism.

The Ministry states that the third affected party (affected party #3) is an organization consisting of approximately six members. Further, it operates out of the private home of its spokesperson, a commercial trapper. The Ministry states that trappers are likely targets of animal rights activists opposed to the fur trade. The Ministry states that the spokesperson lives within a few miles of two individuals who have been and are currently challenging the Ministry's rabies research program, and is fearful for his physical safety. The Ministry submits that identification of a location or home of a trapper, especially associated with an animal research project, would reasonably facilitate the commission of a crime as it provides a target area for the illegal activities of the more extreme elements of the animal rights movement.

In support of its position, the Ministry describes an incident at a provincial park in October of 2003 in which, it states, the park was entered illegally, property damaged and animals were released, and provides an occurrence report describing the event. The Ministry also states that a named organization recently committed an illegal act resulting in charges against five members during a recent cormorant cull at a provincial park. The Ministry submits that as the web-site of this organization condemns the Ministry's cormorant cull research and rabies research, it is not imaginary or contrived to think that there is a threat of illegal activity by those opposed to Ministry programs such as rabies research if this information is released.

Affected party #2 also submits that section 14(1)(l) applies, expressing the concern that it may be targeted by "animal rights activists". It also refers to section 14(1)(e), stating that disclosure of the company name or address could reasonably be expected to engender the life or physical safety of the owners and employees of the company. Although it does not specifically refer to section 14(1)(i), this party also submits that disclosure of the company name or address could be reasonably expected to endanger the security of its building.

Affected party #1 does not address section 14(1) in his submissions, but does describe an incident at a past workplace where employees were harassed as they left work.

Affected party #3 states, with respect to section 14(1)(e), that it does not wish to disclose any personal information that may endanger the life, physical safety and personal property of individuals in the organization.

Analysis

It is important to note that the information about the affected parties contained in the record consists of their identities, in association with specific research projects. The record does not contain information about their addresses.

The submissions of the Ministry, therefore, are to the effect that disclosure of the mere identities of parties engaged in collaborative rabies research projects with the Ministry could reasonably be expected to facilitate the commission of unlawful acts such as break and enter and vandalism.

Upon my review of the material before me, I am not satisfied that it has been shown that such a result can reasonably be expected to occur. Although the Ministry and the affected parties rely on sections 14(1)(e) and (l), the evidence in support of their positions is general in nature and does not provide a link between the incidents described and the disclosure of the specific information at issue. The participation of affected party #1 in collaborative rabies research is publicly known in that the results of past research have been published in scientific journals. Likewise, the identity of affected party #2 as a commercial supplier of rabies vaccines to the Ministry is also publicly known. Given the above, I am not convinced that the identification of these parties in connection with specific research projects could reasonably be expected to result in the harms described in sections 14(1)(e) and (l).

For the same reasons, even if it were open to affected party #2 to claim the application of section 14(1)(i), I am not satisfied that disclosure of the name of this company in this context could reasonably be expected to endanger the security of its building.

I appreciate that the Ministry has submitted that affected party #1 is anxious about the prospect of disclosure of his identity as a research partner on these projects. However, I have been given no reason why, given the past collaborative research efforts and the public nature of the information about some of these efforts, disclosure of the information about the current projects could reasonably be expected to give rise to concerns about life or physical safety. I have not been provided with any information suggesting that the research projects in the record are more controversial, sensitive, or qualitatively different from the other, publicly-known, activities.

As to affected party #3, I am also not convinced that its identification could reasonably be expected to result in the endangerment of life or physical safety of any person, or facilitate the commission of an unlawful act. Given the existence of public contention over animal welfare issues, it would not be surprising for the activities of this organization to be opposed by persons or organizations engaged in those issues, and indeed, this party does refer to having been the target of "previous demonstrations". However, on the basis of the material before me, I am not satisfied that the identification of this organization as partner in rabies research can reasonably be expected to result in the harms in sections 14(e) or (l). Beyond the reference to section 14(1)(e) in its representations, no evidence was provided to support such a conclusion. The statement about "previous demonstrations" did not provide any more information linking those incidents and the activities represented in the record.

I therefore conclude that sections 14(1)(e) and (l) do not apply to exempt the information about the identities of research partners from disclosure.

THIRD PARTY INFORMATION

The Ministry also relies on section 17(1) to justify withholding the information, which states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in

confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

(d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been *supplied* to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

For the reasons below, I am not satisfied that information about the identities of the research partners was "supplied" to the Ministry, within the meaning of part 2 of the three part test. As all three parts must be met for the information to be exempt from disclosure, it is unnecessary for me to consider parts 1 and 3 of that test.

Part 2: supplied in confidence

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation [Orders PO-2018, MO-1706].

The Ministry relies on the representations and evidence of the affected parties on this issue. It does not address whether the names of the research partners were "supplied" to it. .

Affected party #1 states that he considered his confidentiality agreement with the Ministry to include the names of the partners, but does not address whether this information was "supplied" to the Ministry. Affected party #2 acknowledges that its name does not constitute "supplied" information.

Although affected party #3 refers to section 17(1)(a), its representations do not address the specific provisions of this exemption, and are more directed to sections 14(1) and 21.

Analysis

Based on the representations and material before me, I am not persuaded that the names of the research partners are information "supplied" to the Ministry. Given the purposes of section 17(1), I am not convinced that the identity of parties who either contract with or engage in collaborative work with government institutions is the sort of information intended to be protected by section 17(1). It does not constitute an "informational asset" of the affected parties. In a sense, it is more appropriate to view this information as mutually generated, in that it represents an agreement by the Ministry and the affected parties to enter into relationships with each other.

I therefore conclude that section 17(1) has no application.

PERSONAL INFORMATION

As I have indicated, the Ministry also relied on the mandatory exemption in section 21 to withhold the information. As section 21 is concerned with the protection of personal privacy, it only applies if the information at issue qualifies as "personal information" under the *Act*.

Under section 2(1), personal information is defined, in part, to mean recorded information *about an identifiable individual*, including the address or telephone number of the individual (paragraph (d)), 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)).

The Ministry submits that affected party #3 is a small organization, consisting of six members. It submits that the individual named as the representative for the organization operates it out of his home. Further, the Ministry indicates that its front-line staff members immediately identify this contact person when the organization is named. On this basis, the Ministry submits, it is reasonable to expect that disclosure of the name of affected party #3 will lead to the identification of an individual.

The representative of affected party #3 states that this party is a non-profit organization run out of his house.

Analysis

As indicated, the information about affected party #3 consists of the name of an organization. It reveals that this party was a research partner with the Ministry on a project. As such, the record does not contain information about any identifiable individual. However, previous orders have established that if a record contains information about individuals that can reasonably be identified, it may be considered "personal information" despite the absence of names: see, for instance, Orders P-230, P-644 and MO-1708.

In this case, I am not satisfied that the record contains "personal information". The mere identification of the organization as a research partner does not disclose any information about any specific member of the organization. Neither the Ministry nor affected party #3 has indicated what information about any specific individual member would be revealed through disclosure of the name of the organization.

I thus conclude that section 21 has no application, and the information is not exempt from disclosure under this provision.

In the result, I have found that sections 14(1), 17(1) and 21 do not apply, and I will order the Ministry to disclose the information at issue.

ORDER:

1. I order the Ministry to disclose the remaining information severed from the record to the appellant.

2. Disclosure is to be made by sending the appellant copies of the record ordered to be disclosed by **December 3, 2004** but not before **November 29, 2004**.

3. In order to verify compliance, I reserve the right to require the Ministry to provide me with a copy of the record disclosed to the appellant pursuant to the above provisions, upon request.

October 28, 2004

Sherry Liang
Adjudicator