



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2368

Appeal PA-040099-2

Ministry of Natural Resources



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NATURE OF THE APPEAL:

This appeal concerns a decision of the Ministry of Natural Resources (the Ministry) made pursuant to the provisions of the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requesters (now the appellants) made a request under the *Act* for a copy of a letter of complaint against them and the response to that letter by a named Ministry staff member.

By way of background, the appellants are hunter education instructors, certified to deliver training pursuant to the hunter education program established in 1998 by the Ministry and the Ontario Federation of Anglers and Hunters. The request relates to a complaint submitted to the Ministry by another instructor (the affected person), who provides training in competition with the appellants. The complaint concerns the alleged removal of the affected person's promotional posters by the appellants from various public locations.

The Ministry issued a decision letter in which it denied access to the responsive records pursuant to the section 49(b) exemption, read in conjunction with section 21 (invasion of privacy) of the *Act*. In support of its reliance upon section 21, the Ministry cited the application of section 21(2)(f) (highly sensitive) and section 21(2)(h) (supplied in confidence).

The appellants appealed the Ministry's decision.

During the mediation stage of the appeal process, the Ministry advised that it had contacted the affected person regarding his complaint and that he did not consent to the release of his complaint to the appellants. The Mediator chose not to contact the affected person during the mediation stage.

During the course of mediation, the Ministry agreed to release portions of its response to the affected person's complaint to the appellants. The severed portions of this record as well as the affected person's letter of complaint, in its entirety, remain at issue.

No further mediation was possible and the file was transferred to adjudication for an inquiry.

I first sought representations from the Ministry and an affected person. The Ministry submitted representations; the affected person chose not to do so. In its representations, in addition to making submissions on the application of sections 21(2)(f) and (h) to the records at issue, the Ministry raised the application of the presumption in section 21(3)(g) (personal recommendations or evaluations). The Ministry agreed to share a non-confidential version of its representations with the appellants.

I then sought representations from the appellants. The appellants were also provided with the Ministry's non-confidential representations. The appellants submitted representations. In their representations the appellants raised the application of section 21(2)(d) (fair determination of rights) as a factor weighing in favour of disclosure of the information at issue.

RECORDS:

There are two records at issue, consisting of the complaint letter (record 1) and the withheld portions of email communication between the affected person and the Ministry (record 2).

DISCUSSION:

PERSONAL INFORMATION

What constitutes “personal information”?

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual,
- (h) 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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information (Order 11).

The meaning of “about” the individual

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

Do the records contain “personal information” and, if so, to whom does it relate?

The Ministry submits that the records contain the personal information of both the appellants and the affected person. The Ministry states that the records contain observations of the affected person about the appellants relating to the removal of posters promoting the delivery of hunter education training by the affected person.

The appellants do not make representations on this issue.

On my review of the records, it is clear that they contain the personal information of both the appellants and the affected person.

Record 1 is written in the form of a “memo” from the affected person to a Ministry employee confirming the details of his complaint regarding the alleged removal of his promotional posters by the appellants. The record contains the names of the affected person, the appellants and another individual and the information is clearly “about” them in the context of the affected person’s complaint. Similarly, this record contains the “views and opinions” of the affected person “about” the appellants regarding the removal of his posters. In addition, the record contains the “personal opinions or views” of the affected person “relating to” the appellants. Accordingly, I find that the information in this record contains the personal information of the appellants and another individual, pursuant to paragraph (g) and (h) of section 2(1). I also find that this record contains the personal information of the affected person within the meaning of paragraphs (e), (g) and (h) of section 2(1).

In light of my finding, it is not necessary to consider the application of paragraph (f) of section 2(1). However, in my view, in cases where someone makes a complaint and seeks some form of action or intervention, it is reasonable to expect that a certain degree of disclosure will be required to address the complaint. Therefore, in these circumstances, I question whether the information provided in the complaint can be viewed as “correspondence” that is “implicitly” of a “confidential” nature within the meaning of paragraph (f) of section 2(1).

Record 2 contains two email messages, one authored by the affected person with reference to record 1 and the other a Ministry employee’s response to the affected person’s complaint.

In my view, a portion of the affected person's email message qualifies as his personal information. Specifically, I find that his name, email address and the information provided in the body of the message qualify as his personal information under paragraph (h) of section 2(1). However, the remaining information identifying the date the message was sent, the Ministry employees to whom it was sent and the subject matter of the message is not personal information and should be disclosed to the appellants. Accordingly, I will order the Ministry to do so.

Regarding the Ministry's email response to the affected person's complaint, this information contains the appellants' and affected person's names, and its contents is clearly "about" them in the context of the affected person's complaint against the appellants. Accordingly, I find that this information qualifies as the personal information of both the appellants and the affected person under paragraph (h) of section 2(1).

Having found that portions of the records contain the personal information of both the appellants and the affected person, I must now consider the application of the section 49(b) exemption to this information.

INVASION OF PRIVACY

Introduction

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.

Section 49(b) of the *Act* provides:

A head may refuse to disclose to the individual to whom the information relates personal information,

where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Under section 49(b) of the *Act*, where a record contains the personal information of both the appellant and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the appellant. On appeal, I must be satisfied that disclosure *would* constitute an unjustified invasion of another individual's personal privacy [see Order M-1146].

If the information falls within the scope of section 49(b), the institution may choose to exercise its discretion to disclose the information to the requester. I will review the Ministry's exercise of discretion under section 49(b) later in this order, after I have decided whether the exemption applies.

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 head to consider in making a determination as to 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(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 section 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767], though it 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) 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.

In addition, if any of the exceptions to the section 21(1) exemption at paragraphs (a) through (e) apply, then disclosure would not be an unjustified invasion of privacy under section 49(b).

In this case, the Ministry has raised the application of the factors in sections 21(2)(f) and (h) and the presumption in section 21(3)(g) and the appellants have raised the application of the factor in section 21(2)(d). These sections read:

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

...

(f) the personal information is highly sensitive;

...

- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
- (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
 - (g) consists of personal recommendations or evaluations, character references or personnel evaluations; or

The parties' representations

The Ministry submits:

After considering the factors set out in section 21(2), the balance favoured a finding [...] that disclosure would constitute an unjustifiable invasion of privacy and a conclusion supporting the non-disclosure of the personal information. There are no proceedings commenced or contemplated by the requester, so that release is not relevant to a determination of rights as contemplated by sub-clause 21(2)(d). The information was provided by the affected party in confidence, so that sub-clause 21(2)(h) would be engaged to favour a finding of an unjustifiable invasion of privacy. The records contain information which is highly sensitive as contemplated by sub-section 21(2)(f). Finally, the records contain the personal evaluations of the affected party [and] therefore fall within sub-clause 21(3)(g). As such the presumption of invasion of privacy has been engaged. Furthermore, as there is nothing to rebut that presumption, the only conclusion that can be reached is that disclosure of the records would constitute an invasion of the affected party's privacy.

The appellants' representations address the Ministry's position on the application of section 21(2)(d). The appellants state that the Ministry "does not know if other proceedings have commenced." The appellants state that having a complaint on file with the Ministry "could be cause for de-certification and therefore a great loss of family income." The appellants are concerned that if this should happen they will not be in a position to properly defend themselves without knowing the identity of the affected person. The appellants believe that the affected person's "right to privacy should not outweigh [their] right to defend [themselves]." The appellants submit that their "reputation has been irrevocably damaged with the Ministry" and they believe that disclosing the letter of complaint would not be an invasion of the affected person's privacy.

Analysis and findings

Application of section 21(3)(g) presumption

I do not agree with the Ministry's view regarding the application of the section 21(3)(g) presumption in the circumstances of this appeal. In Order P-447, Adjudicator Holly Big Canoe made the following comments with respect to the application of the presumption in section 21(3)(g):

In my opinion, the terms "personal evaluations" or "personnel evaluations" refer to assessments made according to measurable standards. The records contain opinions, comments and observations provided by the primary and secondary affected persons during the course of an investigation of an allegation of sexual harassment and, in my view, do not consist of personal or personnel evaluations. Accordingly, I find that the presumption of unjustified invasion of personal privacy contained in section 21(3)(g) does not apply.

The approach taken by Adjudicator Big Canoe has been followed in other decisions of this office (see, for example, Order PO-1756) and I accept it for the purposes of this appeal. In my view, the comments contained in the records at issue in this appeal cannot reasonably be characterized as "assessments made according to measurable standards". Rather, they represent the affected person's subjective views regarding the appellants' possible involvement in the removal of his promotional posters. Accordingly, I find that these records do not consist of "personal evaluations" or "personnel evaluations" within the meaning of the presumption in section 21(3)(g). I do not find that any of the other presumptions in section 21(3) apply and so I must consider and weigh the factors in section 21(2).

Factors weighing against disclosure

The Ministry has raised the application of the factors in sections 21(2)(f) and (h) in support of its decision to not disclose the information at issue in the records to the appellants. The Ministry states that the records contain information that is "highly sensitive" and that was provided "in confidence" by the affected person.

Past decisions of this office have determined that in order for information to be considered "highly sensitive" for the purpose of section 21(2)(f), it must be demonstrated that disclosure of the information could reasonably be expected to cause "excessive personal distress" to the subject individual [see Orders M-1053, P-1681 and PO-1736]. This factor has been found to apply, for example, to information relating to "allegations of improper professional misconduct" [Order P-1055].

Due to the competitive and, perhaps, adversarial relationship between the appellants and the affected person and the nature of his allegations against the appellants, I am satisfied that disclosure of some of the withheld personal information of the affected person in the records

would cause excessive personal distress to him. Therefore, I find that section 21(2)(f) is a consideration strongly favouring privacy protection in relation to the affected person's personal information.

I acknowledge that the affected person likely initiated his complaint in confidence. However, as previously stated under my discussion of "personal information", in situations involving the initiation of complaint of misconduct against another individual along with a request for action, a certain degree of disclosure is required. Therefore, while I find that section 21(2)(h) is a relevant consideration weighing against disclosure, I only give moderate weight to it.

Factors weighing in favour of disclosure

In counterbalance, the appellants have raised the application of section 21(2)(d).

Former Assistant Commissioner Tom Mitchinson stated the test for the application of section 21(2)(d) in Order P-312 [upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)]:

In my view, in order for section 21(2)(d) to be regarded as a relevant consideration, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

The appellants suggest in their representations that they need the information at issue in order to defend themselves against the allegations put forward by the affected person in his complaint. However, the appellants have not provided me with any information respecting an existing or contemplated proceeding to which the information at issue may be relevant. As a result, I find that section 21(2)(d) does not apply.

In addition, I find that there are no other relevant factors, either listed under section 21(2) or unlisted, which are relevant to the balancing exercise.

I find that none of the exceptions under section 21(4) applies. The application of the “public interest override” at section 23 of the Act was not raised, and I find that it has no application in the circumstances of this appeal.

Conclusion

On balance, I am satisfied, with some exceptions in record 1, that disclosure of the withheld information in the records would constitute an unjustified invasion of the affected person’s personal information pursuant to section 49(b). Accordingly, I find this information exempt under section 49(b).

I find, however, that certain information in record 1 contains the personal opinions or views of the affected person relating to the appellants and this represents the personal information of the appellants. This information is severable from the exempt information and, once it has been severed, it is the personal information of the appellants only, and should be disclosed to the appellants.

EXERCISE OF DISCRETION

The section 49(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

The exercise of discretion under section 49(b) involves a balancing principle. The institution must weigh the appellant’s right of access to his or her own personal information against the other individual’s right to the protection of their privacy. If the institution determines that the 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 appellant.

The Ministry states that it considered the circumstances surrounding the request and the purposes of the *Act* regarding the protection of privacy, and it chose to exercise its discretion not to disclose the information at issue. The Ministry felt that in the circumstances, because the records contain the observations of the affected person about the appellants regarding the removal of his posters, the affected person’s right to privacy outweighed the appellants’ right of access.

The appellants do not make any submissions on this issue.

In the circumstances, I am satisfied that the Ministry has properly balanced the appellants' right of access against privacy considerations in denying the appellants access to the portions of the records that I have found exempt under section 49(b).

ORDER:

1. I order the Ministry to disclose portions of records 1 and 2, no later than **March 18, 2005** but not before **March 13, 2005**, in accordance with the highlighted versions of these records included with the Ministry's copy of this order. To be clear, the Ministry should not disclose the highlighted portions of these records.
2. In order to verify compliance with provision 1 of this order, I reserve the right to require the Ministry to provide me with copies of these records, as disclosed to the appellants.

Bernard Morrow
Adjudicator

February 11, 2005