



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2360**

**Appeal PA-040088-1**

**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*) for access to all records relating to a specified property covering the period 1965 to 2003. The property has been owned by members of the requester's family since at least 1922 and they have been involved in an on-going dispute over an easement with the Ministry and the local Board of Education since at least 1965.

The Ministry located a number of records and granted partial access to them. Access to the remaining records, and parts of records, was denied under the following exemptions contained in the *Act*:

- advice or recommendations – section 13(1);
- third party information – section 17(1);
- solicitor-client privilege – section 19; and
- invasion of privacy – section 21(1)

The requester, now the appellant, appealed the Ministry's decision and took the position that additional records beyond those identified by the Ministry ought to exist.

During the mediation stage of the appeal, the Ministry provided the appellant with more legible copies of some of the older records and advised her as to how to obtain copies of certain publicly-available documents. In addition, the Ministry also provided the appellant with access to additional information that it had originally severed under sections 13(1) and 19 in the older records or had deemed to be non-responsive to the request. The Ministry continued to deny access to the remaining records, in whole or in part, on the basis that they were exempt under sections 13(1), 17(1), 19 and 21(1).

Also during mediation, the appellant withdrew her appeal with respect to certain documents and raised the possible application of the "public interest override" in section 23 of the *Act*.

As further mediation was not possible, the appeal was moved into the adjudication stage of the process. I sought and received the representations of the Ministry initially. Those submissions were then shared with the appellant, who also provided me with representations. Only the relevant portions of the appellant's voluminous submissions were then shared with the Ministry, which made additional representations by way of reply.

## **RECORDS:**

The records remaining at issue are described in an Index prepared by the Ministry that accompanied its July 5, 2004 decision to the appellant. These records consist of various emails, correspondence, memoranda and notes.

## **DISCUSSION:**

### **PERSONAL INFORMATION**

#### **General principles**

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,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (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, and
- (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].

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].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

I must now determine if the records or parts of records contain “personal information” as that term is defined in section 2(1) and if so, to whom does it relate. In the case of Records 9 to 11, 27, 28, 35, 38, 43, 49, 84, 85, 86, 87, 88, 89, 95, 96, 97, 99, 100, 136-137, 139, 140, 154, 168 and 211, the only information that was not disclosed by the Ministry was the name and address of one of the former owners of the lands that are the subject of the records. I find that this information qualifies as the personal information of this individual within the meaning of section 2(1) as it includes his name and address (section 2(1)(d)), his personal opinions and views (section 2(1)(e)) and his name, along with other personal information relating to him (section 2(1)(h)).

Record 12, reproduced in the undisclosed portion of Record 79, represents the personal views or opinions of a Ministry employee which are unconnected to his duties as a Ministry conservation officer. Although this document dates back to 1969, I find that the undisclosed portion qualifies as the personal information of this individual within the meaning of section 2(1)(e).

Record 19, which is duplicated in part at Record 127, is a transcribed excerpt from an abstract of title prepared in 1964. The undisclosed portions of this record refer to certain transactions involving the subject property that occurred in 1903 and 1922 involving several identifiable individuals. The undisclosed portions of Records 160 and 194 also refer to these land transactions. I find that these records contain the personal information of the individuals involved in the transactions under section 2(1)(b).

Record 25 is a letter from a Ministry employee to the Secretary-Treasurer of the school board dated July 20, 1966. The contents of the letter have been disclosed to the appellant but certain hand-written notes were not. It would appear that the notes contain the name, address and telephone number of an employee of the Government of Canada’s Public Works Department. I find that this information does not qualify as the personal information of this individual as it relates to him only in his capacity as a public servant. Because this information does not qualify

as personal information under section 2(1) it cannot be exempt under section 21(1), which is the only exemption claimed for it. As a result, I will order that the undisclosed portions of Record 25 be released to the appellant.

The undisclosed portions of Records 140, 141, 142 and 143 consist of the name of another individual who was involved in the land dispute with the Ministry and the school board. I find that this information qualifies as the personal information of this individual within the meaning of section 2(1)(g).

In addition, I find that the undisclosed portion of Record 151 represents the personal information of the surveyor who performed a survey on the subject property in 1954 under section 2(1)(g).

Finally, the undisclosed portion of Record 186 indicates that a Ministry employee is not available until a specified date. I find that this information qualifies as the personal information of the employee under section 2(1)(g) as well.

None of the undisclosed personal information in the records relates to the appellant.

### **INVASION OF PRIVACY**

I have found above that many of the records at issue contain the personal information of individuals other than the appellant. Where an individual seeks the personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21. In the circumstances, it appears that the only exception that could apply is paragraph (f). The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be “an unjustified invasion of privacy” under section 21(1)(f).

The appellant has not provided me with any evidence to support a finding that the disclosure of the unreleased information in the records described above would not result in an unjustified invasion of the personal privacy of the individuals whose personal information appears in the records. I have not been provided with any evidence supporting the application of the factors, listed or unlisted, under section 21(2) or the exceptions listed in section 21(4). As a result, I find that the information contained in the records qualifies for exemption under section 21(1).

### **Absurd result**

However, in circumstances where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 21(1), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451, M-613]
- the requester was present when the information was provided to the institution [Order P-1414]
- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]

If disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is in the requester's knowledge [Orders M-757, MO-1323, MO-1378].

The appellant has provided me with abundant evidence setting out her knowledge of the facts and issues surrounding the land dispute that is the subject of the records. The appellant has also provided me with a great deal of documentary evidence which demonstrates that she is aware of the factual underpinnings of the dispute, including certain information that is not readily apparent from the records at issue. Because the appellant is familiar with the circumstances surrounding the creation of the records, the identity and address of the individuals involved in the dispute that have been severed from the records are well known to her. In my view, an absurd result would occur if I were to uphold the Ministry's decision to deny access to the name and address that have been severed from many of the records. In some cases, the appellant has provided me with unsevered copies of the same documents that she obtained from the record-holdings of the individuals involved.

Accordingly, I will order that the Ministry disclose the severed personal information relating to the individual who is known to the appellant that is contained in Records 9 to 11, 27, 28, 35, 38, 43, 49, 84, 85, 86, 87, 88, 89, 95, 96, 97, 99, 100, 136-137, 139, 140, 154, 168 and 211.

Again, the appellant has provided me with detailed submissions describing her first hand knowledge of all of the circumstances surrounding the property transactions that have given rise to the dispute in question. I have no difficulty in finding that the appellant is aware of the identity of the individuals who are referred to in Records 19 and 127, 140, 141, 142, 143, 160 and 194. Accordingly, I find that the disclosure of this information to her would not constitute an unjustified invasion of the personal privacy of these individuals and the severed portions of these records ought to be disclosed to her.

In conclusion, I uphold the Ministry's decision to deny access to the undisclosed personal information contained in Records 12, 79, 151 and 186 and order the disclosure of all of the remaining records, and parts of records, to which the Ministry has applied section 21(1).

### THIRD PARTY INFORMATION

The Ministry claims that Records 37, 38, 39, 42, 43 and 44 are exempt from disclosure, in whole or in part, under the mandatory exemption in section 17(1). These records consist of three letters and a two-page attachment dating from 1966 sent by a firm of consulting engineers to the Department of Lands and Forests, as the Ministry was then known. Section 17(1) 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.

The Ministry's sole submission on this issue states as follows:

The Ministry adopts the position that the information would be considered scientific and/or technical information of the affected party [the consulting engineering firm]. The Ministry has no information relating to the circumstances in which the record was supplied to the Ministry; therefore, in an abundance of caution given the mandatory nature of the exemption, presumes that it was supplied [by the affected party to the Ministry] in confidence; and that the disclosure of the information could give rise to a reasonable expectation of harms identified in subsections (a) of subsection 17(1) of the *Act*. As section 17 is a mandatory exemption, [the] Ministry appears to have no alternative under section 17 of the *Act* but to refuse to disclose the information.

I disagree with the position taken by the Ministry with respect to these records. Clearly, the exemption in section 17(1) does not apply to them. I agree with the Ministry that the records may contain information that qualifies as "technical" information for the purposes of section 17(1). However, in the absence of any evidence that the records were supplied with an expectation of confidentiality, I find that the second part of the test under section 17(1) has not been satisfied. In addition, based on my review of the contents of the records and considering their age, I find that the Ministry has not provided me with sufficient evidence to reach the conclusion that the disclosure of this information could reasonably be expected to result in the harms contemplated by section 17(1)(a), as claimed by the Ministry.

Accordingly, I will order the disclosure of Records 37, 38, 39, 42, 43 and 44 to the appellant.

### **ADVICE OR RECOMMENDATIONS**

The Ministry claims the application of the discretionary exemption in section 13(1) for the undisclosed portions of Record 154-155, a two-page memoranda dated April 26, 1983 that was prepared by a Ministry employee at its Lands Section, Napanee District. Section 13(1) reads:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The record was created in April 1983 and is, therefore, more than twenty years old. Accordingly, I find that the exception set out in section 13(3) applies to the record and that it cannot be exempt under section 13(1). Section 13(3) states:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where the record is more than twenty years old or where the head has publicly cited the record as the basis for making a decision or formulating a policy.



I will, therefore, order that Record 154-155 be disclosed to the appellant.

## **SOLICITOR-CLIENT PRIVILEGE**

The Ministry has claimed the application of the discretionary exemption in section 19 to Records 169, 179, 180, a portion of Record 197 and Records 204 and 205 on the basis that these records represent confidential communications between a solicitor and her client. This section reads:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

### **Branch 1: common law privileges**

This branch applies to a record that is subject to “solicitor-client privilege” at common law. The term “solicitor-client privilege” encompasses two types of privilege:

- solicitor-client communication privilege
- litigation privilege

#### ***Solicitor-client communication privilege***

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to “a continuum of communications” between a solicitor and client:

. . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

## **Branch 2: statutory privileges**

Branch 2 is a statutory solicitor-client privilege that is available in the context of Crown counsel giving legal advice or conducting litigation. Similar to Branch 1, this branch encompasses two types of privilege as derived from the common law:

- solicitor-client communication privilege
- litigation privilege

The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies.

### ***Statutory solicitor-client communication privilege***

Branch 2 applies to a record that was “prepared by or for Crown counsel for use in giving legal advice.”

### **The representations of the parties**

The Ministry submits that the records contain legal advice received by Ministry employees from Ministry counsel and:

. . . provides documentation to counsel in order for counsel to provide advice, contains instructions or confirmation of instructions to counsel, is communication between Ministry staff and counsel around advice provided by counsel. As such, based on the above, they fall within the continuum referred to in *Balabel* op. cit., and thus subject to solicitor client privilege.

The appellant’s representations do not address this issue.

### **Findings under section 19**

Based on my review of the contents of Record 169 (a letter dated October 17, 2002 from an employee of Ontario Parks to Ministry Legal Counsel) and Records 179, 180, 204 and 205 (email messages to and from Ontario Parks staff and Legal Counsel), I find that these documents represent confidential communications between a solicitor and her client directly related to the seeking and giving of legal advice about a legal issue. As such, these records qualify for exemption under the solicitor-client communication component of Branch 1 of section 19.

Similarly, the undisclosed portion of Record 197 contains a summary of the legal advice provided by legal counsel to Ontario Parks staff and also qualifies for exemption under section 19 as the information represents part of the continuum of communications between Ministry staff and its counsel.

In conclusion, I find that Records 169, 179, 180, the undisclosed portions of Record 197 and Records 204 and 205 qualify for exemption under section 19.

## **PUBLIC INTEREST IN DISCLOSURE**

The appellant takes the position that there exists a public interest in the disclosure of the information contained in the records within the meaning of section 23 of the *Act*. Section 23 states:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

Section 23 does not apply to records exempt under section 19. Accordingly, I need only consider the application of this section to the personal information in Records 12, 79, 151 and 186 found to qualify for exemption under section 21(1).

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

### **Compelling public interest**

In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*’s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

In my view, there does not exist any compelling public interest in the disclosure of the personal information contained in Records 12, 79, 151 and 186. I find that its disclosure would not serve the purpose of informing the public about the activities of government. Accordingly, I find that section 23 has no application to the information found to be exempt under section 21(1).

**ORDER:**

1. I uphold the Ministry's decision to deny access to the undisclosed portions of Records 12, 79, 151 and 186 under section 21(1) and Records 169, 179, 180, the undisclosed portions of Record 197 and Records 204 and 205 under section 19.
2. I order the Ministry to disclose all of the remaining records, or parts of records, at issue by providing the appellant with copies by February **11, 2005** but not before **February 4, 2005**
3. In order to verify compliance with Order Provision 2, I reserve the right to require the Ministry to provide me with copies of the records that are disclosed to the appellant.

Original Signed By: \_\_\_\_\_

Donald Hale  
Adjudicator

January 07, 2005 \_\_\_\_\_