



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2361**

**Appeal PA-030368-1**

**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 "...the complete cormorant nest count survey of 2003 for the Georgian Bay and North Channel".

The Ministry located the responsive record and issued a decision denying access to the record on the basis that it is exempt under sections 14(1)(l) (facilitate commission of unlawful act), 18(1)(a) (valuable government information) and 18(1)(b) (economic and other interests) of the *Act*.

The requester (now the appellant) appealed the Ministry's decision.

Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the Ministry, initially. In the Notice of Inquiry, I referred the Ministry to Order PO-2166, issued on July 22, 2003, in which I addressed access to various records concerning the Ministry's field records and data from the cormorant control program for 2002. I attached a copy of Order PO-2166 to the Notice of Inquiry, and invited the Ministry to address what impact, if any, that decision has on the issues raised in this appeal.

The Ministry provided representations in response to the Notice of Inquiry. The Ministry's representations did not address the application of sections 14(1)(l) and 18(1)(a) to the record. As the Ministry has not provided representations supporting the application of these discretionary exemptions, I will not consider whether they apply to the record at issue.

The Ministry provided representations on the application of section 18(1)(b). Furthermore, the Ministry identified that some information contained in the report, specifically, the name and address of the individual who collected the data, may constitute that individual's personal information, and that the mandatory exemption found in section 21 of the *Act* (invasion of privacy) applies to that information.

In light of the possible application of section 21(1), I sent a Supplementary Notice of Inquiry to the identified individual (the affected party), inviting him to provide representations on whether the disclosure of this information would constitute an unjustified invasion of his privacy. The affected party provided representations to me in response.

I then sent the Notice of Inquiry, along with the non-confidential portions of the Ministry's and the affected party's representations to the appellant, who provided representations in response.

## **RECORDS:**

The record at issue is a six-page document entitled "Final Report of Double-crested Cormorant Nests Counts for Colonies On The North Channel, Georgian Bay and Lake Huron Islands - 2003 Nesting Season". It consists of a cover page (which includes the name and address of the individual who prepared the report) and 5 pages of nest count data.

## **DISCUSSION:**

### **PERSONAL INFORMATION/INVASION OF PRIVACY**

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 part, in section 2(1) as follows:

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

(d) the address, telephone number, fingerprints or blood type of 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].

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]. However, 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].

The Ministry takes the position that the name and address of the affected person who prepared the record is that individual’s personal information for the purpose of the *Act*. The Ministry states:

The front page of the report sets out the name and address of the affected party who collected the data. Personal identifiers such as names and addresses are considered personal information under the *Act*.

It is the position of the Ministry that in these circumstances, to release the name and address of the affected party would constitute an unjustified invasion of privacy.

The Ministry goes on to identify that issues concerning of the number of cormorants on the Great Lakes has become a heated topic of debate with strong feelings on both sides, and the disclosure of the name and address of the affected party may result in that individual receiving unsolicited contact at his home. The Ministry provided some additional information in support of its view.

The affected party also provided representations on this issue, and requested that his name and address not be disclosed to the appellant. The affected party identifies that, based on the agreement he signed with the Ministry, he is unable to release any information contained in the record, nor could he discuss the substance of the record with anyone in the event he was contacted.

As set out above, previous orders of this office have established that, to qualify as personal information, the information must be about the individual in their personal, as opposed to professional, 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.

In my view, the name of the individual who prepared the report clearly relates to information about the individual in his professional, as opposed to personal, capacity. The affected party’s name appears on the cover of the report, and he has identified that he entered an agreement with the Ministry to collect the data for the report. Although I do not have a copy of the agreement referred to, I am satisfied that the affected party’s name contained on the cover page of the report does not constitute that individual’s “personal information” for the purpose of section 2(1). I am also satisfied that the disclosure of the name would not reveal something of a personal nature about the affected party.

Accordingly, the name of the affected party contained on the cover page of the record does not constitute the personal information of this individual for the purpose of section 2(1) of the *Act*.

Because the invasion of privacy exemption in section 21(1) can only apply to information that qualifies as “personal information” under section 2(1), I find that the name of the affected party is not exempt from disclosure under that section, and I will order that it be disclosed to the appellant.

However, I find that the home address of the affected party, contained on the cover page of the record, does qualify as the personal information of the affected party pursuant to paragraph (d) of section 2(1) of the *Act*.

Once it has been determined that a record contains personal information, section 21(1) of the *Act* prohibits the disclosure of this information except in certain circumstances.

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 personal privacy. Where one of the presumptions in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is if the personal information falls

under section 21(4) or where a finding is made that section 23 of the *Act* applies to the personal information.

If none of the presumptions in section 21(3) apply, I must consider the application of the factors listed in section 21(2) of the *Act*, as well as all other circumstances that are relevant in the circumstances of the case.

The appellant provided representations on why the affected party's name should be disclosed; however, the appellant did not submit representations concerning the disclosure of the affected party's home address. In my view, I have not been provided with sufficient information for me to conclude that any of the factors under section 21(2) which favour disclosure of the personal information (the address of the affected party) apply in the circumstances of this appeal.

In the absence of any factors favouring disclosure, therefore, I find that the mandatory exemption provided by section 21(1) of the *Act* applies to the home address of the affected party contained in the record.

#### **ECONOMIC AND OTHER INTERESTS**

The Ministry claims that the record qualifies for exemption under section 18(1)(b) which states:

A head may refuse to disclose a record that contains,

information obtained through research by an employee of an institution where the disclosure could reasonably be expected to deprive the employee of priority of publication;

In order to qualify for exemption under section 18(1)(b), the Ministry must demonstrate that:

- (i) the record contains information obtained through research of an employee of the institution, **and**
- (ii) its disclosure could reasonably be expected to deprive the employee of priority of publication.

[Order P-811]

For this exemption to apply, the Ministry must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified harm. To meet this test, the Ministry must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

***The Ministry's representations***

In support of its position that the record qualifies for exemption under section 18(1)(b), the Ministry states that the affected party who prepared the record was collecting the raw data as part of a study conducted by a research scientist. The Ministry then identifies the research scientist conducting the study who would be deprived of priority of publication in the event that the record was disclosed. The Ministry states:

[The research scientist] is currently completing a research and monitoring study to help understand cormorant and fish ecology in Lake Huron as part of the cormorant research and monitoring program. To that end, the Ministry entered in to a contract with the affected party, to collect data related to cormorants, i.e. an accurate count in 2003 of all cormorant nests at each of the colonies at specific locations. The data was to be compiled in a report that will form part of a paper which analyses cormorant nest numbers across years and sample sites.

As evidenced in the attached affidavit by [the research scientist], he is currently completing the first draft of the paper using this data. The final draft should be ready for internal peer review by [an identified date] and will at that time be submitted to [an identified] scientific journal for peer review and publication.

The Ministry therefore takes the position that disclosure of the record would deprive the research scientist of priority of publication.

Attached to the Ministry's representations is an affidavit sworn by the research scientist setting out his background and credentials. The affiant states that, in his view, the release of the record would deprive him of priority of publication. He also provides a brief review of the work he is doing, and a summary of the paper he is preparing to publish.

With respect to the anticipated publication date, the affidavit identifies the current status of the draft paper which relies on the data contained in the record, and specifies the expected dates when the final draft will likely be submitted for peer review and publication.

***The appellant's representations***

The appellant takes the position that the record at issue only contains a small portion of the information upon which any paper would be based, and that one would need all of the raw data (from each year of the study, and including all the supporting data) to publish parallel conclusions to the research scientist's study. The appellant states:

Since the data requested is only a small part of the overall study, no creditable conclusion can be derived from the data, one way or another. It is incomplete. It would be impossible to reach any coherent or final analysis. Therefore, it

wouldn't enable someone ... to write findings/conclusions prior to the completion of the study.

The appellant also takes the position that, as the information is being gathered by the government and funded by the public, it "belongs" to the public. The appellant identifies concerns that, if the information is not disclosed, the public may never be able to scrutinize the "hard data" such as that contained in the record at issue.

### *Findings*

As set out above, in order to qualify for exemption under section 18(1)(b), the Ministry must demonstrate that:

- (i) the record contains information obtained through research of an employee of the institution, **and**
- (ii) its disclosure could reasonably be expected to deprive the employee of priority of publication.

Previous orders dealing with this exemption have upheld its application where cogent evidence was provided to support the position that an employee intended to publish a specific record. For example, in Order P-811 section 18(1)(b) was claimed for a record entitled "A Review of the Biological and Conservation Implications of Game Farming". Adjudicator Donald Hale was provided with an affidavit, sworn by the author of the record, wherein she stated that she intended to publish the record following an internal peer review of it. Based on the information contained in the affidavit, Adjudicator Hale was satisfied that the identified employee intended to publish the record in an appropriate scientific forum, and that the premature release of the record could reasonably be expected to deprive her of priority of publication.

In Order PO-2166 I dealt with the possible application of section 18(1)(b) to information similar to that contained in the record at issue in this appeal. In Order PO-2166, the records contained raw data from a partially completed study relating to the cormorant control program. I found that the Ministry had not provided sufficiently detailed and convincing evidence to support its position that section 18(1)(b) applied to those records. In making that finding, I stated:

The Ministry's representations do not state that the information in the records will be published. It specifically states that the records contain raw data, and that the study will be published after further data is gathered and the study is completed. The Ministry has not identified the employee who could reasonably be expected to be deprived of the priority of publication, nor has the Ministry provided detailed and convincing evidence that disclosing the record will affect priority of publication.

The Ministry's main concern appears to be that individuals will take the raw data from the partially completed study and publish their own (possibly conflicting) findings or conclusions, based on that raw data, prior to completion of the study. The information in the records consists of the raw data from one year of a five-year study. Even if I had been provided with detailed and convincing evidence that an identified employee of the Ministry intends to publish a study based on the information, the information contained in the records comprises only a portion of the raw data upon which any such future study will be based. I do not consider this to be detailed and convincing evidence that the disclosure could deprive the employee of priority of publication.

I adopt the approach taken to the application of section 18(1)(b) in these previous orders, and apply it to this appeal.

In this appeal, I have been provided with affidavit evidence from the research scientist who intends to publish a paper based in part on the information contained in the record at issue. The scientist provided a précis of the paper which he intends to publish, and takes the position that disclosure of the record would deprive him of priority of publication under section 18(1)(b).

The record at issue in this appeal contains raw data relating to only one year of a multi-year study. Based on Order PO-2166, in the absence of other information, this record would not qualify for exemption under section 18(1)(b), notwithstanding the research scientist's assertion that he intends to publish a paper based partially on the information which the record contains.

However, the appellant has confirmed that the raw data and the specific cormorant nest counts for the previous years of the study are available to the public. Furthermore, the appellant has also provided me with information that confirms that a précis of the paper which the research scientist intends to publish was also made available to the public at an identified conference.

In the circumstances of this appeal, I find that the disclosure of the record, if combined with other publicly available information relating to the cormorant study, could reasonably be expected to deprive the research scientist of priority of publication. Specifically, the disclosure of the record would disclose the data relating to the final year of the multi-year study. The nest count data from each year of the study would then be publicly available. In my view, this information, combined with the précis of the paper the research scientist intends to publish, could enable someone familiar with this subject matter to publish a paper that could reasonably be expected to result in the research scientist being deprived of priority of publication.

With respect to the appellant's concern that the information in the record "belongs" to the public, and that the public may never be able to scrutinize this sort of "hard data", the sole exemption claim made for the information at this time is section 18(1)(b), which is based on the priority of publication. The Ministry has identified the anticipated completion and publication timelines. Once publication occurs, the exemption claim in section 18(1)(b) would presumably no longer apply.



Accordingly, I am satisfied that the criteria for the exemption have been met, and I find that the nest count data contained in the record (not including the cover page) qualifies for exemption under section 18(1)(b) of the *Act*. I am also satisfied that the Ministry has not erred in exercising its discretion to apply section 18(1)(b) in the circumstances of this appeal.

**ORDER:**

1. I order the Ministry to disclose the name of the affected party contained on the cover page of the record to the appellant by **February 24, 2005** but not before **February 18, 2005**.
2. I uphold the Ministry's decision to deny access to the address of the affected party contained on the cover page of the record on the basis of section 21(1) of the *Act*.
3. I uphold the Ministry's decision to deny access to the remaining pages of the record on the basis of the exemption in section 18(1)(b).
4. In order to verify compliance with this order, I require the Ministry to provide me with a copy of the record disclosed to the appellant pursuant to Provision 1, upon my request.

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

\_\_\_\_\_  
January 20, 2005