



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2401**

**Appeal PA-040157-1**

**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 the file in the Ministry's possession related to the requester. Specifically, the requester sought records related to his application for certification as a Hunter Education Instructor.

The Ministry located 78 pages of records responsive to the request and granted access to some of them. The Ministry denied access to the remainder of the records pursuant to the following sections of the *Act*:

- 13(1) (advice to government)
- 18(1)(h) (examination or test questions)
- 19 (solicitor-client privilege)
- 49(c) (evaluative or opinion material)

The requester, now the appellant, appealed the Ministry's decision.

During mediation, the appellant reviewed the Index of Records provided by the Ministry and, after obtaining the Ministry's agreement regarding the retention of certain records, narrowed the scope of the appeal to records withheld pursuant to sections 13(1) and 49(c). Accordingly, any records for which section 18(1)(h) or section 19 might apply are not at issue in this appeal.

As further mediation was unsuccessful, the file was transferred to the adjudication stage of the process. Assistant Commissioner Tom Mitchinson reviewed the exemptions claimed by the Ministry and determined that section 49(a) (discretion to refuse requester's own information) might possibly apply in the circumstances of this appeal in conjunction with the Ministry's section 13(1) exemption claim. Accordingly, he added section 49(a) as an issue in this appeal.

Assistant Commissioner Mitchinson began his inquiry by sending a Notice of Inquiry setting out the facts and issues on appeal to the Ministry and seeking representations. The Ministry provided representations in return. He then sent a copy of the Notice of Inquiry to the appellant, along with a copy of the Ministry's non-confidential representations. The appellant also provided representations. On Assistant Commissioner Mitchinson's retirement, I took over carriage of this inquiry.

## **RECORDS**

The records that remain at issue in this appeal and the exemptions claimed for those records are as follows:

- Record 1 (identified on the Ministry index as pages 15 and 16) is described by the Ministry as the "Instruction to Evaluator Form" and consists of two pages. The record identifies the candidate instructor as the appellant and was used by the evaluator in the evaluation of the appellant during the Hunter Education Instructor's Course. The Ministry claims section 49(c) for this record.

- Record 2 (identified on the Ministry index as pages 26 and 27) consists of two pages of internal email messages between Ministry staff. The first message is dated January 28, 2003. It attaches an earlier email message, dated April 9, 2002, about the appellant from an employee of another government agency. The Ministry claims section 49(c) for the record in its entirety and also section 13 for a portion of the record.
- Record 3 (identified in the Ministry's index as page 39) is a one-page internal email between the same two Ministry staff as in Record 2. The email is dated February 14, 2003. It appears to be a follow-up email to the one dated January 28, 2003 in Record 2. The Ministry claims section 49(c) applies to the entire record.
- Record 4 is a two-page email chain (identified as pages 51 and 52 in the Ministry's index) with messages between the dates of March 28, 2003 and April 3, 2003, between the same two Ministry staff members as in Records 2 and 3, as well the same staff member from the other government agency as noted in Record 2. The email references and provides as an attachment a draft letter to the appellant. The draft letter was withheld under section 19 and is therefore no longer at issue in this appeal. The Ministry claims section 49(c) for the remainder of Record 4.
- Record 5 (identified as pages 70 and 71 in the Ministry's index) is a two-page internal email message between Ministry staff dated December 10, 2003. The message reveals another individual's opinions and views about the appellant's possible appointment as a Hunter Education Instructor and attaches the same email message, dated April 9, 2002, from another government agency, that is referenced in Record 2. The Ministry claims section 49(c) for this record in its entirety.

## **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.

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, R980015, PO-2225].

## **Analysis and Finding**

Neither the Ministry nor the appellant make submissions on whether the information contained in the records at issue qualifies as “personal information”. However, having closely reviewed the records, in my view, all of them contain the personal information of the appellant, as contemplated in paragraph (g) of the definition, “the views or opinions of another individual about the individual.” All five records contain information related to the appellant’s application to be appointed as a Hunter Education Instructor, either in the form of a course evaluation or in other individual’s views on the appellant’s potential appointment. Each record contains at least one other individual’s views or opinions about the appellant [paragraph (g)] placing the information clearly within the definition of “personal information”.

The records also contain the names of other identifiable individuals; however, I find that the information contained in the records relates to these individuals in their professional or official capacities, and does not qualify as the “personal information” of those individuals.

## **RIGHT OF ACCESS TO ONE’S OWN PERSONAL INFORMATION/EVALUATIVE OR OPINION MATERIAL**

As I have found that the information at issue qualifies as the “personal information” of the appellant under the *Act*, I must now determine if it falls within the exemption provided by section 49(c) of the *Act*.

### **General Principles**

Under section 49(c), an institution may refuse to disclose evaluative or opinion material in certain circumstances. The Ministry claims that section 49(c) applies to exempt all of the records remaining at issue contained in the appellant’s file.

Section 49(c) reads:

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

that is evaluative or opinion material compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of government contracts and other benefits where the disclosure would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence.

Section 49(c) attempts to address two competing interests. These are:

- (1) the right of an individual to have access to his or her personal information, and
- (2) the need to protect the flow of frank information to provincial or municipal institutions so that appropriate decisions can be made respecting the awarding of jobs, contracts or other benefits (Order M-132).

For a record to qualify for exemption under section 49(c), the institution must satisfy each part of a three-part test. Failure to meet any part of the test means that section 49(c) is not available to exempt the information from disclosure. The three-part test is as follows:

1. The personal information is evaluative or opinion material;
2. The personal information was compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of government contracts and other benefits;
3. The information was supplied to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence **and** the disclosure of the record would reveal the identity of the source of the information.

[Order 157, Order M-132]

## **Representations**

The Ministry submits as follows:

It is the position of the Ministry of Natural Resources that subclause 49(c) of the *Act* applies to the records at issue. ...

...

An examination and analysis of the records in light of the [three-part] test reveals that records clearly fall within subclause 49(c). With respect to the first part of the test, all the records contain evaluative and opinion material about the requester's abilities as a potential Hunter Education Instructor.

With respect to the second part of the test, the records were compiled as part of this individual's request /application to become a Hunter Education Instructor and to determine his suitability/eligibility as an instructor.

With respect to the third part of the test, some of the records were sent in confidence as indicated on the e-mails. The other records clearly indicate, explicitly or implicitly, that they are of a confidential nature.

With respect to the final part of the test, if the evaluative portion of the records were disclosed along with the comments made it would reveal the identity, as the requester knows who was evaluating his performance.

Based on the above analysis, it is the position of the Ministry that subclause 49(c) applies to the records and that they are exempt from disclosure under the *Act*.

Responding to the Ministry's submissions on section 49(c), the appellant submits:

The Ministry submits that the remaining records, evaluator's form, emails and a draft letter are exempt from disclosure pursuant to section 49(c). The Ministry confirms that each record contains information about [the appellant].

...

[The appellant] is unable, of course to review the records and therefore requests the Assistant Commissioner review the records to determine if there was any request to keep the records confidential. More specifically, [the appellant] asks the Assistant Commissioner to review whether the evaluator requested that the Evaluation Form be kept in confidence and whether the emails are marked confidential as specific to preventing the individual to whom the information relates from accessing the information or whether they are marked with a standard clause at the bottom of each email in the event that the email is sent to someone not intended to receive it.

It is submitted that the Ministry has set out in their representations the factors considered when determining whether material was supplied to the institution in circumstances where it may have been assumed that the identity of the source be held in confidence without adequately applying those factors and therefore it cannot be determined whether the records were sent in confidence.

It is respectfully submitted that the Ministry has not discharged its burden of proving that the remaining records fall within one of the specified exemptions. The Ministry has not demonstrated that all material is: (1) evaluative or opinion material (2) was compiled solely to determine suitability, eligibility or qualification (3) was supplied to the institution in circumstances where it may have been assumed that the identity of the source would be held in confidence or (4) that disclosure of the record would reveal the identity of the source of the information.

## **Analysis and findings**

### ***Part one***

To meet part one of the test under section 49(c), the records must contain personal information that is evaluative or opinion material. In Order 157, Commissioner Sidney Linden stated the following regarding the first part of the test:

In my view, the words “evaluative” and “opinion” connote a personal or subjective interpretation of an objective set of facts and circumstances. Typical of evaluative or opinion material would be test scores, ratings and grades.

Record 1, the Instruction to Evaluator Form, which consists of the evaluation of the appellant’s performance during the Hunter Education Instructor’s Course clearly contains the opinions of the evaluator with respect to the appellant in the context of his meeting the requirements of, and suitability for, appointment as a Hunter Education Instructor. The standard form document outlines objective components of the candidate’s performance that are to be evaluated and has been completed to identify the level at which the candidate instructor, the appellant, was subjectively evaluated by the evaluator. The record also contains the evaluator’s handwritten notes and comments on the appellant’s performance during the course. I find that this record is equivalent to a test score, rating or grade as contemplated by Commissioner Linden in Order 157. Therefore, I find that Record 1 contains personal information that is evaluative or opinion material, satisfying the first part of the test.

Records 2, 3, 4, and 5 are email messages between various individuals discussing the views and opinions of those individuals as to the suitability of the appellant for appointment as a Hunter Education Instructor. Having reviewed the records, the messages reveal personal or subjective interpretations of how the appellant performs and an objective set of facts and circumstances. While these emails are not test scores, rating or grades, they reflect subjective comments on how the appellant meets certain objective requirements for appointment as a Hunter Education Instructor. I am satisfied that Records 2, 3, 4 and 5 contain personal information that is evaluative or opinion material within the meaning of part one of the section 49(c) test.

### ***Part two***

To meet part two of the test under section 49(c), the records must contain personal information that was compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of government contracts or other benefits.

As an evaluation form used to evaluate a candidate instructor’s performance during the Hunter Education Instructor’s course, it is clear that the personal information contained in Record 1 was compiled solely for the purpose of determining the appellant’s suitability, eligibility or qualifications for appointment as a Hunter Education Instructor, which I find to be a benefit for the purpose of section 49(c).



As emails, Records 2, 3, 4, and 5, are less clear on their face. However, after a careful review of the information contained in those records, I have concluded that they were compiled solely for discussing and ultimately determining the appellant's suitability or eligibility for appointment as a Hunter Education Instructor. The emails, while not formal evaluation forms, contain information compiled for no other purpose than to determine the appellant's suitability and eligibility for the appointment. The emails themselves note that the issues considered in those emails are factors that are to be taken into consideration in the determination of the appellant's suitability for appointment as a Hunter Education Instructor. I am therefore satisfied that the records meet part two of the test.

***Part three***

To meet part three of the test under section 49(c), the records must contain personal information that was supplied to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence.

In Order M-132, former Assistant Commissioner Irwin Glasberg outlined four factors that are relevant in determining part three of the test, that is, whether the information was supplied to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence:

1. The expectations of the provider of the opinion or evaluative material and the institution regarding the confidentiality of the provider's identity at the time that the information was supplied to the institution.
2. The ordinary practice and/or experience of the individual who provided the information and of the institution which sought the information with respect to maintaining the confidentiality of the source of the information.
3. The knowledge of the individual about whom the information relates as to the identity of the provider of the specific opinion or evaluative material and the individual's expectation as to whether the identity of the provider would be held in confidence.
4. The nature of the opinion or evaluative material, itself, insofar as it would identify the provider of the information.

As described above, Record 1 consists of two pages. Page 1 is a standard form document that outlines factors on which the candidate instructor is to be evaluated. This page has been completed by the evaluator, who has noted the level of his evaluation of the appellant's performance. Page 2 contains the evaluator's handwritten notes and comments on the appellant's performance during the course. The Ministry has not submitted representations with respect to either the expectations or ordinary practice and experience of the individual who

provided the institution or the Ministry itself regarding maintaining the confidentiality of the provider's identity.

From my review of the record, the standard form on page 1 requests that if the evaluator has any additional comments on the candidate's performance he is to note them on the back of the form. The form states that such notes "will be kept confidential at [the evaluator's] request." In my view, such wording reveals that the normal practice of the Ministry, as well as the concomitant expectation of the evaluator, is that the information subscribed on page 1, the standard form evaluation, might, if not will, be disclosed to the candidate. With respect to the comments from the evaluator on page 2 of the record, he has specifically requested that they remain confidential. Accordingly, in my view, the wording on the standard form reveals that with respect to page 2, the normal practice of the Ministry and the expectation of the evaluator was that the handwritten comments would be kept in confidence and not revealed to the candidate.

However, the provider of the evaluative material contained in Record 1 is clearly the individual who evaluated the appellant during the Hunter Education Instructor Course, and it is clear that the appellant would be aware of the identity of the instructor who conducted the course. It is equally clear that the instructor could not have reasonably expected that his identity, as evaluator of the course, would be kept in confidence. Although it could be argued that disclosure of this information could have a "chilling effect" in that evaluators could become reluctant to provide candid assessments were such assessments subject to disclosure, in my view, if the Legislature had intended that evaluative information of this sort should not be subject to disclosure, section 49(c) would have been worded differently. The current wording of the *Act* only protects the disclosure of information where it is evaluative or opinion material **and** where it is provided by a **confidential source**. Accordingly, I cannot find that Record 1 meets the requirements of part three of the section 49(c) test. Record 1, therefore, cannot qualify for exemption under this section, and I will order that it be disclosed.

Records 2, 4 and 5 are internal emails that have been specifically marked as confidential by their authors in their headings. The emails are forwarding, with additional comments, an email message from another government agency, which from its content, is clearly intended to be confidential. Record 3 is an internal Ministry email that contains a reference to conversations with a staff member of that other government agency. Although the Ministry has provided very little evidence as to the ordinary practice or the expectations of the provider of the information and the Ministry, from the content of the emails, including those forwarded from the other government agency, it is clear that there was an expectation on all sides that this information would remain confidential. Based on the circumstances surrounding the communication of the information that is at issue, it is my view that the information was provided in circumstances where it may reasonably have been assumed by the sources that their identities would be held in confidence.

Finally, it must be determined whether disclosure of Records 2, 3, 4 and 5 would reveal the identity of the source of the information. It is clear that the appellant is not necessarily aware of the identities of the individuals who have provided the opinions, and that disclosure of the

records would reveal the identities of the providers. Having carefully reviewed the records, I also find that if the information contained in the records were to be disclosed, the appellant has enough knowledge of the decision-making process that disclosure would reveal the identities of the sources of the information. Accordingly, for Records 2, 3, 4 and 5, I find that the third part of the test is satisfied.

As I have found that all three parts of the test have been met for Records 2, 3, 4 and 5, it is my view that the information at issue is exempt from disclosure pursuant to section 49(c) of the *Act*. Since I have concluded that Record 2 is exempt in its entirety from disclosure under this section, I do not need to consider the Ministry's position that a portion of the record is exempt from disclosure pursuant to sections 13 and 49(a) of the *Act*.

**ORDER:**

1. I order the Ministry to disclose to the appellant a copy of Record 1 by **July 22, 2005**.
2. I uphold the Ministry's decision to deny access, in full, to Records 2, 3, 4 and 5.
3. In order to verify compliance with Provision 1, I reserve the right to require the Ministry to provide me with a copy of the records that are disclosed to the appellant.

Original signed by: \_\_\_\_\_  
Brian Beamish  
Assistant Commissioner

\_\_\_\_\_  
June 16, 2005