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

ORDER PO-2477

Appeal PA-050099-1

Ministry of Natural Resources

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Ministry of Natural Resources (the Ministry) received the following request under the *Freedom of Information and Protection of Privacy Act* (the *Act)*:

> My clients are seeking information alluded to in the attached press clippings from the year 2001. The press clippings describe [an] e-mail which was circulated through government e-mail at the Ministry of Natural Resources, depicting pornographic and crime-scene photos with racist comments attached.
>
> We are requesting the following information related to the incident described in the attached press clippings:
>
> > A copy of the e-mail or e-mails (including any attached pictures) which was or were the subject of a 2001 investigation into the inappropriate use of government computers, by [Ministry] staff, for the exchange of sexually explicit, pornographic or racist information.
> >
> > A list of the names of [Ministry] staff reprimanded, as a result of the 2001 investigation, for exchanging sexually explicit, pornographic and racist materials by e-mail, and information regarding what types of disciplinary actions were taken against these individuals.
> >
> > A list of the names of [Ministry] staff terminated from employment with the Ministry, as a result of the 2001 investigation, for exchanging sexually explicit, pornographic and/or racist materials by e-mail.

The Ministry issued a decision letter in response to the request, denying access to the records requested on the basis that the information was excluded from the scope of the *Act* pursuant to section 65(6).

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

During mediation, the scope of the request was narrowed to exclude disciplinary information about Ministry employees. The appellant's representative provided further clarification of the narrowed scope as follows:

> We are specifically interested in any e-mail circulated by [Ministry] staff in 2000 or 2001, including attached pictures (and including any duplicates and variations of that e-mail) depicting an Aboriginal man or woman with a racist and/or pornographic remark attached.

> We are not seeking other [Ministry] staff e-mails depicting sexually explicit, pornographic or racism information at this time.

The Ministry then provided this office with a sample electronic copy of the responsive record, and confirmed its position that the responsive record is excluded from the scope of the *Act* pursuant to section 65(6) of the *Act*.

As further mediation was not possible, the appeal was transferred to me for adjudication.

I began the adjudication process by issuing a Notice of Inquiry to the Ministry, inviting it to make representations. In my Notice of Inquiry, I asked the Ministry to make representations on the application of section 65(6) of the *Act*. In an effort to expedite this appeal, I also asked the Ministry to make representations, in the alternative, regarding the application of the mandatory exemption found at section 21 (personal privacy) of the *Act*. I further invited the Ministry to identify any discretionary exemptions which may apply to the responsive record.

The Ministry made representations and the non-confidential portions of those representations were shared with the appellant, along with a copy of the Notice of Inquiry. The appellant relied upon submissions that were made at the mediation stage of the appeal process and filed additional representations following receipt of the Notice of Inquiry, including submissions regarding the application of the section 23 public interest override to the record at issue.

RECORDS:

The sole record at issue consists of an e-mail with an attached photograph of an individual other than the appellant. The record is comprised of a series of three e-mails, all with the same caption and attaching the same photograph. Each e-mail in the chain has a sender (in each case a different individual) and multiple recipients. The senders of the second and third e-mails in the chain were recipients of the previous e-mail and apparently forwarded the e-mail and caption on to a new group of recipients.

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT-RELATED RECORDS

The Ministry raises the issue of the application of the exclusionary provisions in sections 65(6)1 and 65(6)3 of the *Act*. If sections 65(6)1 and 65(6)3 apply to the record at issue, it is excluded from the scope of the *Act* unless it is a record described in section 65(7), which lists exceptions to the exclusions.

The parties have provided detailed representations that thoroughly review the issues raised by the potential application of these provisions. The issue is of significant importance because, generally speaking, records similar to this would be subject to the provisions of the *Act* and, under normal circumstances, the individual depicted in the photograph would quite properly have a right of access to this record.

The issue of whether or not section 65(6) applies to the record at issue is a complex one that involves the interpretation of previous orders of this office and of court decisions. However, in the circumstances of this appeal, and after careful consideration of the representations of the parties, and in light of the findings set out below that the records are in any event exempt under section 21 of the *Act*, it is not necessary to decide whether section 65(6) applies, and I will not be doing so.

PERSONAL INFORMATION

The Ministry relies on section 21(1) of the *Act* and submits that disclosure of the record at issue would constitute an unjustified invasion of privacy. In order to qualify for exemption under section 21(1), a record must contain "personal information", as defined in section 2(1) of the *Act*. The definition includes a number of examples of personal information which are not exhaustive. Information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11]. For the purposes of this appeal, the relevant provisions are:

> "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,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (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;

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.)].

Representations

The Ministry submits that the record at issue contains the personal information of two individuals: the personal information of the individual in the photograph and the personal information of the employee in whose possession the e-mail was found.

With respect to the individual in the photograph, the Ministry submits the following:

> While the identity of the person in the photograph is not known to the Ministry, it is the Ministry's position that the picture contains "personal information" as defined under ss. 2(1) of the *Act*. The e-mail contains recorded information about an identifiable individual including the race or ethnic origin of the depicted person (ss. 2(1)(a)).
>
> Based on the clarity of the picture…the race or ethnic origin appears to be identifiable. Additionally, those who know the individual depicted viewing the picture could clearly identify the individual or find out who the individual is if the picture were to be released.

With respect to the employee in whose possession the record was found, the Ministry submits that the record reveals his name, his e-mail address, the fact that he possessed inappropriate materials, his opinion about the individual in the photograph and the identification of the employee as a person who was investigated and disciplined.

The appellant submits that if it is evident from the photograph of the individual that the individual is an Aboriginal person, then the photograph is the personal information of the individual and that individual's consent is required before the photograph can be released.

With respect to the information of the employee, the appellant submits that the name and e-mail address of the employee in the record at issue is not the employee's personal information. It is merely the identification of the employee as an employee of the Ministry. As already noted, the e-mail contains the names of additional government employees, either as recipients of the e-mail chain or as subsequent senders of the e-mail. Neither party has provided submissions on whether these names qualify as personal information. However, for the purposes of this appeal, I will be dealing with the names of all employees who appear on the e-mail chain.

Analysis

For simplicity, I will group the information in the record at issue into three groups: the photograph; the names of the individuals who appear in the various headers as senders and recipients of the e-mail; and the caption that appears above the photograph and in the subject line of the e-mail.

Although the Ministry made submissions about the appropriate treatment of the e-mail address of one individual, on inspecting a copy of the e-mail, I am unable to identify any e-mail addresses, although they may be embedded in the electronic version. Release of the printed text of the e-mail in this appeal will not reveal the e-mail addresses, so I will not consider them here.

a) Photograph

I find that the photograph that appears in the record at issue is the personal information of the individual depicted in the photograph. In reaching this conclusion, I agree with the submissions put forward by the Ministry. The ethnic origin of the individual is evident from the photograph. Having inspected the photograph, I am satisfied that the medical condition of the individual is evident. I am also satisfied that the quality of the photograph is such that, should it be released, the individual in the photograph would be readily identifiable. I therefore find that the photograph falls within the definition of personal information found in paragraphs (a), (b) and (h) of section 2(1) of the *Act*, and constitutes the personal information of the individual depicted.

b) Names of individuals

The name of an individual alone is not personal information as it is not recorded information "about" an individual [Order 27]. However, many orders of this office have found that information about an employee that constitutes an evaluation of the employee's performance or an investigation into his conduct is the employee's personal information. [Order P-721; M-720; P-1409]

An inspection of the record reveals a series of three e-mails, all with the same caption and attaching the same photograph. Each e-mail in the chain has a sender (in each case a different individual) and multiple recipients. The senders of the second and third e-mails in the chain were recipients of the previous e-mail and apparently forwarded the e-mail and caption on to a new group of recipients.

I find that all the names that appear in the record are the personal information of the individuals. While it may appear that the names are used in a professional or business capacity, in the circumstances of this case, they also identify the individuals who were parties to an e-mail chain that involved inappropriate behaviour and resulted in disciplinary action. Although not all of the recipients may have been subject to discipline, clearly many of the senders and recipients were. The Ministry has provided detailed information regarding the extensive disciplinary actions that were taken. I am therefore satisfied that disclosure of the names of senders and recipients would disclose something personal about these individuals, that is, that they were, or may have been, parties to an e-mail chain that involved inappropriate behaviour and resulted in disciplinary

action, and I find that their names are personal information as they fall within paragraph (h) of the definition of personal information in section 2(1) of the *Act*.

c) Caption

The text that appears in the subject line of the e-mail and the caption to the photograph is identical. I am satisfied that this text constitutes the personal information of the individual depicted in the photograph. It is clearly a statement of opinion that the senders of the e-mail have about the individual in the photograph or the ethnic group to which the individual in the photograph belongs and falls within paragraph (g) of the definition of "personal information" in section 2(1). Having reviewed the photograph and the caption, I am satisfied that the caption is designed to reflect negatively on the individual and hold that individual up to ridicule.

PERSONAL PRIVACY

Having found that the photograph, the names of senders and recipients and the caption contain personal information as defined by section 2(1) of the *Act*, I will now consider whether this information is exempt from disclosure under section 21(1).

Once it has been determined that a record contains personal information, section 21(1) prohibits the disclosure of this information except in certain circumstances. Specifically, where a requester seeks the personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the six 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 of this appeal, section 21(1)(f) is the only exception that could apply. That provision reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > (f) if the disclosure does not constitute an unjustified invasion of personal privacy;

In order to establish that the section 21(1)(f) exception to the exemption applies, it must be shown that disclosure of the personal information would not constitute an unjustified invasion of personal privacy. The factors and presumptions in sections 21(2), (3) and (4) provide guidance in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 21(1)(f). Section 21(2) provides some criteria for the head to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to 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 21(2) (Order P-1456, citing *John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767). Section 21(4)

identifies information whose disclosure is not an unjustified invasion of personal privacy, and where it applies, the information is not exempt under section 21(4).

Section 21(3)

I will initially consider the application of section 21(3) of the *Act*. Section 21(3) states, in part:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
>
> (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
>
> (d) relates to employment or educational history;
>
> (g) consists of personal recommendations or evaluations, character references or personnel evaluations; or
>
> (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

Analysis

a) Photograph

The Ministry, in its representations, submits that disclosure of the photograph would constitute an unjustified invasion of privacy:

> It is MNR's position that several of the presumptions in ss. 21(3) apply, specifically paragraphs (a), (b) and (h). With respect to ss. 21(3)(a), the information relates to a medical condition. Although unconfirmed, the attachment appears to be part of a criminal investigation, which would be captured under ss. 21(3)(b). Finally, the photograph indicates the individual's race and/or ethnicity and reveals that he or she is a member of a minority group (Aboriginal), which would be captured by ss. 21(3)(h). The individual shown on the photograph did not consent to its disclosure to or use [by] the MNR employee.

The appellant submits that there is no indication that the person photographed is explicitly identified in writing as a person of Aboriginal ancestry. Due to this lack of specificity, the presumption contained in section 21(3)(h) does not apply. Further, with regard to the presumption in section 21(3)(a), the appellant submits:

> We note that comments about an individual's health, including general observations made by those not qualified to assess a medical condition, and which are not accompanied by a diagnosis or determination as a medical condition, is not information to which this presumption applies. [Order P-1014] There must be a medical assessment evident in the record for the information to be excluded from disclosure. For instance, the mere presence of physical markings, scars or wounds on the individual in the photograph, without a medical assessment by someone qualified to make a medical determination, would not be sufficient information for the release [of the] record to be a presumed invasion of personal privacy.

Finally, the appellant notes that the Ministry is not definitive that the record was compiled and is identifiable as part of an investigation into a possible violation of law. If the photograph is not clearly identifiable as such, then the presumption contained in section 21(3)(b) is not applicable.

Having inspected the photograph, I find that the presumptions of unjustified invasion of privacy found in sections 21(3)(a) and (h) apply. I accept the Ministry's submission that the photograph reveals the medical condition of the individual and it is highly intrusive of their personal privacy. I do not agree with the submission of the appellant that a medical assessment must be evident in the record before section 21(3)(a) is applied. Nor do I accept that Order P-1014, cited by the appellant, supports the appellant's position. In that appeal, the record at issue contained "comments about a condition which could relate to the health of an identifiable individual" but there was no evidence before the Senior Adjudicator John Higgins that the condition had ever been diagnosed or determined to be a medical condition. In those circumstances, Senior Adjudicator Higgins found that the section did not apply. In this appeal, the medical condition of the individual is obvious on the face of the record and no further evidence is necessary to draw that conclusion.

Similarly, having reviewed the record, I accept the Ministry's submission that the race and/or ethnicity of the individual photographed is revealed in the record and therefore section 21(3)(h) applies. Previous orders of this office have held that photographs may contain personal information of the individuals depicted in them (see, for example, Orders MO-1378 and MO-1410.) Also, in Order M-528, Senior Adjudicator John Higgins found that photographs contained personal information because they "indicate the race and sex" of identifiable individuals. A similar result was reached in Reconsideration Order R-980036, upheld in *Attorney General of Ontario v. Holly Big Canoe, Inquiry Officer and James Doe, Requester*, Toronto Docs. 233/99 & 132/00, Consolidation No. 316/98 (Div. Ct.). Similarly, previous orders have held that videotapes may contain personal information of the individuals seen and/or heard in them (see, for example, Order MO-1305, as well as Orders P-1140, PO-1928 and PO-1966).

I also find that section 21(4) does not apply. Given the application of sections 21(3)(a) and (h), I find that disclosure of the photograph would constitute an unjustified invasion of personal privacy and it is exempt from disclosure pursuant to section 21(1). Later in this order, I will consider whether the section 23 public interest override applies to this part of the record.

b) Names of individuals

I am not satisfied that section 21(3)(d) applies in these circumstances to the names that appear in the e-mail. The e-mail is not part of these individuals' employment or educational history. The fact that the e-mail, which I have already found to be personal and not work-related, may have led to disciplinary action against the named individuals does not elevate the e-mail itself to become part of the individuals' employment history. Even disciplinary action for improper work-related behaviour has been found not to fall within the definition of employment history as it relates to actions that fall outside the scope of employment [Orders P-1117; M-1053]. I will therefore consider the impact of section 21(2) on this information.

c) Caption

As mentioned previously, neither the Ministry nor the appellant provided submissions on whether the disclosure of the caption would constitute an unjustified invasion of personal privacy. Similarly, neither party has commented on the applicability of the section 21(3) presumptions to the caption. Based on the record and the other material before me, I am satisfied that the caption to the photograph, and the identical subject line of the e-mail do not fall within any of the section 21(3) presumptions. I will therefore consider the impact of section 21(2) on this information.

Section 21(2)

Given my findings that none of the section 21(3) presumptions are applicable to the names of the senders and recipients of the e-mail, or to the caption, I must now consider whether their disclosures would constitute an unjustified invasion of personal privacy having regard to the factors set out in section 21(2).

The following criteria in section 21(2) are potentially applicable in this appeal:

(a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

(f) the personal information is highly sensitive;

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

Representations

The Ministry submits that the fact that the sender of the e-mail was subject to discipline raises the factor found at section 21(2)(f). The Ministry submits that the same argument is applicable to the caption, or as the Ministry terms it, "the views expressed in the e-mail."

The appellant relies on section 21(2)(a) and submits that it is desirable to disclose the record in order to subject the activities of the Ministry to public scrutiny and in order to ensure public

confidence in the integrity of the institution. In this regard, the appellant submitted the following representations:

> The matter of the allegedly wide distribution of racist material amongst MNR and OPP staff was brought to public attention in a series of media reports in 2001…These widely circulated reports caused considerable concern among Aboriginal communities across Ontario, providing evidence of allegedly racist activities by department staff which could greatly affect day to day relationships which Aboriginal communities and individuals have with the department.
>
> …
>
> The lack of disclosure to the public about the breadth and nature of the circulation, amongst MNR staff, of racist materials depicting Aboriginal individuals, has resulted in a situation where Aboriginal communities continue to consider this issue unresolved. The lack of public information about what was circulated and how the department dealt with the situation continues to bring into question the integrity of the MNR and has lead to decreased confidence, by Aboriginal communities, regarding the ability of the MNR to fulfill its responsibilities in an equitable fashion when dealing with Aboriginal individuals and communities.
>
> The release of the record in question would allow Ontario First Nations to, themselves, assess the evidence of the circulation of racist materials amongst MNR staff, rather than relying on dated media reports and continued speculation about the nature and breadth of this problem.

With regard to the names of the senders and recipients of the e-mail, the appellant submits that:

> …it does not appear that anything on the face of the record identifies the employee as subject to an investigation and disciplinary action. The fact that the employee could be embarrassed by the release of the material, furthermore, is not sufficient ground for disclosure to be denied.

Analysis

a) Caption

The appellant submitted that disclosure of the content of the e-mail is necessary in order to subject the activities of the Ministry to public scrutiny (section 21(2)(a)). The Ministry submits that the personal information of the person photographed is highly sensitive and that this factor weighs against disclosure.

I have a great deal of sympathy for the view put forward by the appellant. Having reviewed the record, I consider its content to be highly offensive and racist. If the Ministry has not properly

accounted to the Aboriginal community for the resolution of this unfortunate incident, I agree that disclosure of the e-mail, including the caption and subject line, would assist in subjecting the Ministry's actions to public scrutiny.

However, I have no evidence in relation to the adequacy of the Ministry's accounting to the Aboriginal community, and moreover, section 21(2)(a) must be weighed against the need to protect the personal privacy of the individual photographed and her family. That individual's personal information, including the caption, is highly sensitive (section 21(2)(f)). Disclosure of the caption and subject line would potentially subject the individual to ridicule, as was clearly intended by the senders of the original e-mail. Ordering the disclosure of that caption and subject line would, in my opinion, once again unnecessarily expose the individual and her family to yet more ridicule.

I therefore find that the highly sensitive nature of the personal information outweighs the benefits of subjecting the Ministry's actions to public scrutiny. As a result, I am satisfied that disclosure of the caption and subject line would be an unjustified invasion of personal privacy pursuant to section 21(1).

b) Names of E-mail Senders and Recipients

Although I am sympathetic to the view of the appellant that public confidence in the integrity of public institutions is desirable, I cannot conclude that the release of the names of these individuals is necessary to subject the activities of the Ministry to public scrutiny.

In its representations, the Ministry outlines some of the actions taken as a result of its investigation into the circulation of the e-mail:

> The evidence gathering component of the investigation was a very long process and involved collecting documents from the computer accounts of 189 employees. Approximately 90 employees were respondents in the investigation. Responses to the findings ranged from 18 non-disciplinary letters of counsel, 8 disciplinary letters of reprimand, 51 disciplinary suspensions without pay (ranging from 1 to 20 days), to 6 dismissals from employment.

Clearly, the Ministry undertook significant disciplinary actions as a result of this incident. In addition, the proceedings that followed the discovery of the inappropriate use of information technology services by Ministry employees were the subject of much publicity both locally and in the national news media. I do not believe that the release of the names of the individuals will significantly contribute to the debate about the appropriate treatment of the employees for their conduct or the action or inaction of the Ministry in responding to the conduct. The appropriateness of that discipline can be assessed without the disclosure of the names of the actual employees disciplined.

I also find that the disclosure of the names of the senders and recipients may unfairly damage the reputation of some of those individuals (section 21(2)(i)). While one can surmise that disciplinary action was taken against some of the individuals whose names appear on the e-mail,

it is not necessarily the case that every employee identified as a recipient was disciplined. Releasing all the names appearing on the e-mail could therefore cast a shadow of suspicion on someone who was not found to be involved in wrongdoing.

Finally, I accept that the personal information of the individuals whose names appear in the e-mail could be highly sensitive (section 21(2)(f)) in the context of this appeal as it clearly identifies the employees as individuals who were or who may have been subject to disciplinary proceedings. To have those names exposed to public scrutiny could cause excessive personal distress to the individuals concerned given the nature of the e-mail that was circulated. Given the inappropriateness of the e-mail, I place less weight on this factor for those individuals who were involved in wrongdoing. However, for those individuals who may have been innocent recipients of the e-mail, I place moderate weight on this factor. I acknowledge that there may be circumstances where the disclosure of the identity of public servants who have been the subject of discipline will not constitute an unjustified invasion of personal privacy. However, I am satisfied that this is not one of those cases.

When weighing all the relevant factors from section 21(2), I have concluded that the factors in sections 21(2)(f) and (i) are more compelling than section 21(2)(a) in the circumstances of this appeal. Section 21(4) does not apply. I therefore find that disclosure of the names of senders and recipients of the e-mail would constitute an unjustified invasion of the privacy of the named individuals and as such the names are exempt from disclosure pursuant to section 21(1). Later in this order, I will consider whether the section 23 public interest override applies to this part of the record.

In summary, I have found that the presumed unjustified invasion of privacy in section 21(3) applies to the photograph, and disclosure is therefore an unjustified invasion of personal privacy. As regards the names of the employees, the caption and the subject line, in weighing the factors listed in section 21(2), I have concluded that their disclosure would constitute an unjustified invasion of personal privacy. Section 21(4) does not apply to this information, and subject to the possible application of the section 23 public interest override, the entire record is exempt from disclosure pursuant to section 21(1).

I should add that, had I found that a section 21(3) presumption was not raised with regard to the photograph, I would have no difficulty in concluding that disclosure of the photograph would be an unjustified invasion of personal privacy. Even more than the caption and subject line and the names, disclosure of the photograph would represent a serious intrusion into the privacy of the individual involved and her family. The photograph is highly sensitive and invasive and would potentially subject the individual to yet more ridicule. Weighing the factors found in section 21(2), I would conclude that its disclosure would represent an unjustified invasion of personal privacy and it would be exempt from disclosure under section 21(1).

PUBLIC INTEREST IN DISCLOSURE

Section 23 of the *Act* provides that:

> 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.

The appellant submits that it is appropriate to apply section 23 in this appeal:

> There is a compelling public interest in the revelation and public scrutiny of incidents which show pervasive racism in the Ministry of Natural Resources, particularly where one of the groups most affected by MNR decisions and most likely to regularly deal with MNR officials (namely, Aboriginal individuals and groups) are the target of that racism. Lack of public scrutiny and attention to this problem makes it easier for systemic problems of racism to continue and, in this case, severely undermine the credibility and trust relationship between the Ministry and the Aboriginal communities in Ontario.
>
> First Nations in Ontario are aware of the alleged circulation of racist materials amongst MNR staff. In the wake of the many media reports in 2001 confirming this problem, there was never further public disclosure of how the department addressed such a serious concern which fundamentally undermines the trust between the Ministry and the Aboriginal communities it often deals with. Lack of resolution of this issue allows Aboriginal communities to continue to question the integrity of the Ministry's operations, and has lead to seriously decreased confidence in the ability of the Ministry staff to exercise their responsibilities in a non-prejudicial manner. Release of the record in question would greatly assist First Nations in Ontario, and the public at large, to understand the nature of the problem with racism in the department, and would assist in a process of ensuring that the problem is adequately addressed and this behaviour is no longer tolerated.

In Order P-1398 (upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused [1999] S.C.C.A. No.134), Senior Adjudicator John Higgins made the following statements concerning the potential application of section 23:

> An analysis of section 23 reveals two requirements which must be satisfied in order for it to apply: (1) there must be a **compelling** public interest in disclosure, and (2) this compelling public interest must **clearly** outweigh the **purpose** of the exemption. If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply.
>
> Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.

Turning now to whether this clear public interest is a compelling one, former Adjudicator Holly Big Canoe interpreted the phrase "compelling public interest" in Order P-984, as follows:

> "Compelling" is defined as "arousing strong interest or attention" (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the Act's central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a 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.

For the purposes of this appeal, I too adopt the dictionary approach to the definition of "compelling" originally articulated by former Adjudicator Big Canoe in Order P-984.

In my opinion, racist actions and comments such as the one revealed in the record at issue are matters of grave concern to all citizens of Ontario and not just a matter of concern to the Aboriginal people of this province. Attitudes and behaviours reflected in the record at issue erode the trust and confidence that the entire public has in the institutions that they fund by the payment of taxes.

However, I find that the disclosure of the photograph, subject line and caption would not serve the purpose of informing the citizens of Ontario about the activities of the employees of the Ministry for whom the Ministry is responsible and it would not add to the information available for use by members of the public in expressing public opinion. The fact that some employees of the Ministry were found to have in their possession inappropriate information and were using the information technology services of the Ministry for improper purposes has already been publicly disclosed and has engendered much public debate. The photograph, subject line and caption would not add anything further to that debate. For these reasons, I find that there is not a compelling public interest in disclosure of the photograph, subject line and caption contained in the record.

Similarly, I am not satisfied that there is a compelling public interest in the disclosure of the names of the senders and recipients of the e-mail. As has been noted earlier, this issue received a significant amount of media coverage, including the fact that disciplinary action was taken by the Ministry. I have already outlined the scope of this disciplinary action. While I acknowledge that there will be instances where it is in the public interest to identify individuals who have been disciplined as a result of their actions as public servants, I am not satisfied that this is such a case. This conclusion is strengthened by the fact that, as noted earlier, some individuals listed on the e-mail may have been innocent recipients and may not have been disciplined for their role in this unfortunate event.

My finding that there is no compelling public interest in disclosure is sufficient to dispose of the section 23 argument, since the absence of such an interest means the section cannot apply. Accordingly, I find that the record is exempt from disclosure under the *Act* and section 23 of the *Act* does not apply.

ORDER:

I uphold the decision of the Ministry.

Original Signed by
Brian Beamish
Assistant Commissioner

June 19, 2006