



**Information and Privacy
Commissioner/Ontario**

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

INTERIM ORDER PO-2578-I

Appeal PA-050170-1

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 a copy of letters expressing opposition to the construction of a boathouse on the requester's property.

The Ministry located responsive records and contacted the affected parties (the parties whose interests may be affected by disclosure) under section 28 of the *Act*. One affected party consented to the release of his or her letter, and that letter was released to the requester in its entirety. The other affected parties either did not reply, or replied and did not provide consent to release their letters. The Ministry granted partial access to the letters, claiming the application of the exemption found under section 21(1) (personal privacy) of the *Act* to deny access to the withheld portions of the letters, consisting primarily of the authors' names, addresses and signatures.

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

During mediation, the Ministry clarified that it relied specifically on the factors in sections 21(2)(e), (f) and (h) as well as the presumptions in sections 21(3)(d),(f) and (g) of the *Act* to deny access to the information remaining at issue. At the conclusion of mediation, the Mediator advised that the discretionary exemption in section 49(b) of the *Act* (personal privacy) may apply in the circumstances of this appeal, rather than the mandatory personal privacy exemption in section 21(1), because "the appellant's personal information may be contained in the records". No further resolution of the appeal was possible at mediation and it was transferred to the adjudication stage of the appeal process, where it was assigned to me to conduct an inquiry.

I commenced my inquiry by issuing a Notice of Inquiry to the Ministry, outlining the facts and issues in the appeal, and inviting it to provide representations. In reviewing the records at issue, I decided to raise the possible application of the discretionary exemption under section 49(b) as an issue in this appeal for the reason identified by the Mediator, and I asked the Ministry to provide representations under this section. The Ministry provided representations in response to the Notice.

I then sent a Notice of Inquiry, with a complete copy of the Ministry's representations, to the appellant. I also invited the appellant to provide representations under section 49(b). Through counsel, the appellant provided me with representations in response to the Notice. For ease of reference, I will refer to the actions and positions taken by the appellant's counsel as being actions and positions taken by the appellant.

DISCUSSION:

RECORDS AT ISSUE

The records consist of 13 pages of letters of opposition to the construction of a boathouse on the requester's property. The vast majority of the body of the letters, containing the views expressed by the authors, was disclosed to the appellant. Most of the remaining information consists of the

authors' names, addresses and signatures. Also at issue in some letters is information which the Ministry states would identify individuals other than the appellant. The appellant's personal information was also disclosed.

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "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 if 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, 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.)].

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

Do the records contain personal information and if so, to whom do they relate?

The appellant's representations are brief, consisting of a single statement that he does not challenge that the names of the individuals who signed the letters are "personal information" under the *Act*.

The Ministry submits that the records contain the personal information of the authors of the letters, specifically names, telephone numbers and descriptive information that would allow for the identification of the individuals. The Ministry states that past orders from this office have found "that if there is a reasonable expectation that the individual can be identified from ... information, then such information qualifies as 'personal information' under the definition" of personal information.

With respect to whether the records contain the appellant's personal information, the Ministry states:

A review of the exempted material fails to disclose anything that could be considered the personal information of [the appellant]. All of the information related to the affected parties, except one reference to a third party. Accordingly, it is the position of the Ministry ... there is no personal information of the [appellant] and that [appellant] has no right of access.

In adopting this approach, the Ministry appears to focus only on the withheld information, ignoring the issue of whether the disclosed portions of the records contain his personal information. This determination is significant in terms of whether the information falls under Part I or II of the *Act*. The appellant has a higher right of access to records containing his own personal information, as reflected in Part II of the *Act*. This is explained in detail in Order M-253, which also sets out the approach to take in making this determination:

In order to give effect to the legislature's intention to distinguish between requests for an individual's own personal information and other types of requests, the Commissioner's office has developed an approach for determining whether Part I or Part II of the *Act* applies. In that approach, the unit of analysis is the record, rather than individual paragraphs, sentences or words contained in a record.

This approach has been applied in many past orders, and it is set out in detail in the October 1993 edition of IPC Practices entitled "Responding to Requests for Personal Information". That publication states, in part, as follows:

Generally, an individual seeking access to a record that contains his or her personal information has a greater right of access than if the record does not contain any such information. ... Part II of the municipal *Act* oblige[s] institutions to **consider** whether records should be released to an individual, regardless of the fact that they may otherwise qualify for exemption under the legislation.

In my view, the record-by-record analysis best reflects the special character of requests for records containing one's own personal information, and it provides a practical, uniform procedure which all institutions can apply in a consistent manner.

It requires institutions to analyze records which are identified as responsive to a request in order to determine whether any of them contain personal information pertaining to the requester. For records which are found to contain the requester's own personal information, the institution's access decision is to be made under Part II of the *Act*. For records which do not contain the requester's own personal information, the decision would be under Part I.

I find that, in applying the record-by-record approach, all the records in the present appeal clearly contain the personal information of the appellant. The letters contain the address of the appellant's property, and/or his name. Accordingly, I find that the appellant is clearly identified and/or identifiable in the records at issue. The information about him qualifies as his personal information under paragraphs (d) (address and telephone number), and (h) (the appellant's name along with other personal information relating to him) of the definition in section 2(1) of the *Act*.

In addition, I find that all of the records also contain the personal information of other identifiable individuals. This information qualifies as personal information for the purposes of the definition in section 2(1) of the *Act* because it includes information that fits within paragraphs (a) (age, sex, marital or family status), (c) (identifying number, symbol or other particular), (d) (addresses and telephone numbers), (e) (personal opinions or views of the individual), (f) (correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature), and (h) (name along with other personal information about them).

In summary, I find that each of the records contain the personal information of the appellant and other identifiable individuals. Because the records contain the personal information of the appellant, I must review whether the withheld portions qualify for exemption under the discretionary personal privacy exemption at section 49(b) of the *Act*.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/PERSONAL PRIVACY OF ANOTHER INDIVIDUAL

I have found that the records contain the personal information of the appellant as well as other identifiable individuals. Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

Sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 49(b) is met. Section 21(2) provides some criteria for the institution to consider in making this determination. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy.

If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy under section 49(b) or 21 [Order P-239].

The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2) [Order P-99].

Presumptions under Section 21(3)

In the present appeal, the Ministry relies on the presumptions under sections 21(3)(d) (employment or educational history), (f) (individual's finances and other financial matters) and (g) (personal recommendations or evaluations). I have not received representations from either the Ministry or the appellant regarding the possible application of these presumptions. In turning to the records themselves, I do not find that any of these presumptions can reasonably apply to the withheld portions of the records, for the reasons that follow.

21(3)(d): employment or educational history

Information contained in resumes [Orders M-7, M-319, M-1084] and work histories [Order M-1084, MO-1257] falls within the scope of section 21(3)(d). A person's name and professional title, without more, does not constitute "employment history" [Order P-216]. In the records before me, there is no personal information which relates to employment and/or educational history, and this presumption does not apply.

21(3)(f): finances

In order for this presumption to apply, the personal information must relate to an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness. Again, the personal information withheld in the records is not related to this type of information, and accordingly, I find that this presumption does not apply.

21(3)(g): personal recommendations

The terms "personal evaluations" or "personnel evaluations" refer to assessments made according to measurable standards [Order PO-1756].

The personal information withheld does not consist of personal recommendations or evaluations, character references or personnel evaluations. Accordingly, this presumption does not apply.

I find that none of the other presumptions in section 21(3) apply, and I will now consider and weigh the application of the factors in section 21(2).

Discussion

The Ministry takes the position that the factors under sections 21(2)(e), (f) and (h) apply to the information at issue. The appellant argues that the factor favouring disclosure in section 21(2)(d) applies. These sections provide:

- (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
 - (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
 - (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
 - (f) the personal information is highly sensitive;

- (h) the personal information has been supplied by the individual to whom the information relates in confidence;

Analysis and Findings

The appellant submits that disclosure of the personal information withheld would not constitute an “unjustifiable invasion of privacy” of other identifiable individuals.

I have carefully reviewed the records and the representations of the Ministry and the appellant. For the reasons that follow, I have concluded that the disclosure of the personal information **would** constitute an unjustified invasion of privacy and the information is, therefore, exempt under section 49(b).

Factors weighing against disclosure

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

21(2)(e)

The Ministry does not provide specific representations regarding section 21(2)(e). The appellant submits that disclosure of the withheld personal information would not “cause harm to the complainants or cause them to be unfairly exposed”. While the appellant acknowledges that the disclosure of their personal information “may indeed cause the complainants to be exposed to possible damages”, he states that “this potential exposure would not be unfair within the meaning of subsection 21(2)(e) of the *Act*.” The appellant does not make specific reference as to how the potential exposure would not be “unfair within the meaning of subsection 21(2)(e) of the *Act*”. Nevertheless, in the circumstances of this case, and based on the evidence before me, I am not satisfied that this factor applies.

21(2)(f)

In order for information to be considered “highly sensitive” for the purpose of section 21(2)(f), it must be demonstrated that disclosure of the information could reasonably be expected to cause “significant personal distress” to the subject individual [Order PO-2518].

The records that were disclosed to the appellant clearly indicate that his neighbours were opposed to his plans to build a boathouse on his property. As noted, the appellant has received the substance of the records, and the only information withheld is the identifying personal information of the letter writers.

The appellant’s representations make it clear that relations between himself and his neighbours are strained at best. For example, the appellant identifies a specific individual who objects to his plans to build a boathouse and suggests that the authors of the letters are members of the

individual's "faction". The appellant later refers to the letter writers as "followers". I am satisfied that it would be reasonable to expect, in the circumstances of this appeal, that disclosure of the withheld personal information would cause significant personal distress to the authors of the letters.

Accordingly, I conclude that section 21(2)(f) is a consideration favouring privacy protection in relation to the affected parties' personal information, and in the circumstances, it carries significant weight.

21(2)(h)

In responding to the Ministry's reliance on section 21(2)(h) (supplied in confidence), the appellant states:

...where an individual writes to a government body to accuse or complain about another individual, and with the intent of advocating against that person's rights and freedom ... [they] have no reasonable expectation of confidentiality. To hold otherwise would violate the subject's rights to procedural fairness. Failure to disclose in these circumstances reduces public confidence in the openness and fairness of the system.

The appellant goes on to conclude that where individuals "voluntarily" advocate against "someone's rights, or interests with a government agency, anonymity is an unreasonable expectation".

The letters themselves do not contain evidence to indicate that they were supplied to the Ministry with an expectation of confidentiality. The Ministry did not provide me with evidence to substantiate its position that the factor in section 21(2)(h) is applicable in this case. In my view, however, it would be reasonable to expect that identifying information concerning the authors of the complaint letters would be treated confidentially, and I find that this factor applies, but with low weight given that the letters are not marked "confidential".

Factors weighing in favour of disclosure

In favour of disclosure, the appellant raised the application of section 21(2)(d).

The appellant submits that the release of the personal information in this instance is relevant to the "fair determination" of his rights, as contemplated in section 21(2)(d). The appellant goes on to argue that he has a "right to know the case against him and to respond to it". According to the appellant, while he was issued a work permit to proceed with construction on his property, a neighbour brought "an application to the Superior Court of Justice". The appellant submits further that not having all of the information that the Ministry had available to it does not comply with "a basic principle of procedural fairness which all government decision makers ... must follow when making decisions..." The appellant also submits that he cannot "properly defend himself" without knowing the identity of the complainants.

I am not persuaded by the appellant's statement that he has a "right to know the case against him and to respond to it" and that he cannot "properly defend himself" without knowing the identity of the affected parties. As previously noted, the **only** information withheld is the personal information of the affected parties. The appellant has received access to the substance of the letters and, accordingly, is aware of the concerns and comments articulated in all of the letters. As such, I find that the appellant **knows** the case against him. I agree with the Ministry that disclosure of the personal information is unlikely to be of significant assistance in that regard. I also note that the appellant successfully obtained the building permit he needed for the boathouse.

Moreover, in order for section 21(2)(d) to be regarded as a relevant consideration, previous orders have determined that an appellant must establish that:

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

[See Orders P-312 [upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)] and PO-1764]

I adopt this approach to the application of section 21(2)(d). I am not satisfied that the appellant has brought himself within the requirements of section 21(2)(d) because:

- he has not provided me with persuasive evidence that his "right in question is drawn from the concepts of common law or statute law;
- he has not provided evidence that the application to the Superior Court of Justice brought by one of his neighbours has resulted in a proceeding with is "either existing or contemplated";
- as noted, I find that the personal information he seeks, in light of the disclosure he has received, is not significant to the determination of his "right in question";
- and I have not been provided with persuasive evidence that the personal information is required to prepare for any proceeding or to ensure an impartial hearing. In fact, as noted, I have no evidence that there is any anticipated proceeding or hearing.

Accordingly, because the appellant knows the case against him, in that he received the entire substantive content of the letters, I conclude that disclosure of the withheld personal information is not relevant to a fair determination of his rights. I am not satisfied that the factor under section 21(2)(d) applies.

Conclusion

On balance, I find that section 21(2)(f), a factor weighing against disclosure for highly sensitive information, applies with considerable weight, and the factor in section 21(2)(h) relating to information received in confidence applies with low weight. The only possible factor favouring disclosure (section 21(2)(d)) does not apply. Accordingly, balancing the relevant factors leads me to the conclusion that disclosure of the withheld information in the records would constitute an unjustified invasion of the affected parties' personal information and, therefore, the records qualify for exemption under section 49(b).

EXERCISE OF DISCRETION

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

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

The Ministry did not provide representations on its exercise of discretion with respect to section 49(b) of the *Act* because it was of the view that the records at issue do not contain the appellant's personal information and were therefore exempt under the mandatory personal privacy exemption found at section 21(1). However, based on my findings that the records contain the personal information of both the appellant and other identifiable individuals, the Ministry's position was erroneous and the relevant personal privacy exemption is section 49(b), which is a discretionary exemption. As the Ministry has not exercised discretion in this regard, I have decided to return this matter to the Ministry in order for it to exercise its discretion under section 49(b) regarding the disclosure of the personal information contained in the record.

INTERIM ORDER:

1. I uphold the decision of the Ministry that the undisclosed information in the records qualifies for exemption under section 49(b) of the *Act*.
2. I order the Ministry to exercise its discretion under section 49(b) taking into account relevant considerations. I order the Ministry to provide me with representations on its exercise of discretion no later than **June 11, 2007**.
3. I will defer my final decision with respect to disclosure of the personal information in the record at issue pending my review of the Ministry's exercise of discretion as required by Provision 2.

Original signed by: _____
Beverly Caddigan
Adjudicator

_____ May 18, 2007