



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2581

Appeal PA-060001-1

Ministry of Natural Resources



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NATURE OF THE APPEAL:

The Ministry of Natural Resources (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all information about a micro-hydroelectric dam on the requester's property.

The Ministry located a number of records responsive to the request. The Ministry granted access to some records, in whole or in part, and denied access to others pursuant to section 13 (advice or recommendations), section 14 (law enforcement), section 15 (relations with other governments), section 21 (invasion of privacy) alone, as well as in conjunction with section 49(b), and section 21.1 (fish and wildlife species at risk).

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

No issues were resolved during mediation and the file was referred to adjudication.

I began my inquiry by sending a Notice of Inquiry to the Ministry seeking representations. Prior to submitting representations, the Ministry issued a revised decision letter advising that it was no longer relying on the discretionary exemptions at sections 13 and 15. As a result, full access was granted to some of the records at issue and partial access was granted to other records. The Ministry also disclosed several other portions of records which they had previously withheld.

The appellant reviewed the information to which he was granted disclosure as a result of the revised decision letter, and advised that he still wished to pursue access to the remaining records.

The Ministry subsequently submitted representations on the records remaining at issue. In its representations, the Ministry advised that the only portions of records presently at issue in the appeal are those to which the Ministry applied the invasion of privacy exemptions at section 21(1) and section 49(b). The Ministry made no representations on the possible application of the discretionary exemptions at sections 14 and 21.1 to the records. The Ministry advised that the remaining records or portions of records "were or are in the process of being released to the appellant".

I then sent a Notice of Inquiry, which I had revised to reflect the records remaining at issue, to the appellant, along with a copy of the Ministry's representations. The appellant provided representations.

As the appellant's representations raised issues to which I felt that the Ministry should have an opportunity to reply, I sought reply representations from the Ministry. The Ministry advised that it did not wish to submit reply representations and stated:

The appellant raises issues about the application of sections 14 and 21.1. In the Ministry's representations...it is noted that these two sections were no longer at issue. The only sections presently at issue are 21(1)(f) and 49(b).

Accordingly, if it has not already done so, I will order the Ministry to disclose to the appellant all of the severances for which sections 21.1 and 14 were previously claimed, in addition to those for which sections 13 and 15 were claimed.

RECORDS:

The portions of the records that are at issue in this appeal are as follows:

Page	Date	Doc. Type	Subject	Disclosure	Exemption	Location of Severances
00035-00035	2005-10-03	E-mail	[Named] Dam	Partial	s.21	
00041-00050		Note to file	Handwritten Notes	Partial	s.21, s.49(b)	Severances on pages 41, 44, 46, and 49
00051-00058	1998-11-11	Note	[Named] Dam	Partial	s. 21	Severances on pages 51, 56, and 57
00059-00060	1998-07-14	Handwritten notes	[Named] Dam	Partial	s.21	
00061-00061	1998-11-05	Handwritten notes	[Named] Dam	Partial	s. 21	
00064-00072	1998-12-17	Memo	Fisheries Act Violations – [Named] Dam [Named location]	Partial	s.21	Severances on pages 67 and 68
00074-00074	1998-07-15	E-mail	[Named] Dam	Partial	s.21	
00077-00077		Handwritten notes	[Named] Dam	Partial	s.21	
00080-00081	2003-10-08	E-mail	[Named] Dam	Partial	s.21, s.49(b)	Severances on page 80
00093-00093	2004-12-20	E-mail	[Named] Dam, [Named location]	Partial	s.21	
00106-00108	2005-09-29	E-mail	[Named] Ski Trails	Partial	s.21	Severance on page 107
00109-00110	2005-09-28	E-mail	[Named] Ski Trails	Withheld	s.21	Severance on pages 109 and 110
00181-00181	2003-09-16	Note	[Named Dam] GS	Partial	s.21, s.49(b)	
00269-00283	2005-03-01	Draft Plan	Water Management Plan for Waterpower - [Named] Generating Station	Partial	s.21	Severance on page 276

Page	Date	Doc. Type	Subject	Disclosure	Exemption	Location of Severances
00284-00319	2005-06-01	Draft Plan	Water Management Plan for Waterpower-[Named] Generating Station	Partial	s.21	Severance on page 292
00320-00340	2005-03-01	Draft Plan	Water Management Plan for Waterpower – [Named] Generating Station	Partial	s.21	Severance on page 327
00341-00356	2005-03-01	Draft Plan	Water Management Plan for Waterpower – [Named] Generating Station	Partial	s.21	Severance on page 348
00357-00371	2005-03-01	Draft Plan	Water Management Plan for Waterpower – [Named] Generating Station	Partial	s.21	Severance on page 364
00372-00386	2005-03-01	Draft Plan	Water Management Plan for Waterpower – [Named] Generating Station	Partial	s.21	Severance on page 379
00387-00403	2005-03-01	Draft Plan	Water Management Plan for Waterpower – [Named] Generating Station	Partial	s.21	Severance on page 395
00404-00442	2005-06-01	Draft Plan	Water Management Plan for Waterpower – [Named] Generating Station	Partial	s.21	Severance on page 413
00461-00462	2005-12-15	Memo	Comments re: Draft Scoping Report [Named Dam]	Partial	s.21	Severances on pages 461 and 462
00508-00508	1984-03-05	Note	Handwritten Notes – [Named] Mill	Partial	s.21	

Page	Date	Doc. Type	Subject	Disclosure	Exemption	Location of Severances
00509-00510	1984-03-05	Memo	Existing Dam, [Named River], Lot [#], Concession [#], [Named Township], [Named County].	Partial	s.21	Severance on page 509

DISCUSSION:

PERSONAL INFORMATION

Under the *Act*, different exemptions may apply depending on whether a record at issue contains or does not contain the personal information of the requester [see Order M-352]. Where records contain the appellant's own information along with that of other individuals, access to the records is addressed under Part III of the *Act* and the exemptions found at section 49 may apply. Where the records contain personal information belonging to individuals other than the appellant, access to the records is addressed under Part II of the *Act* and the exemptions found at sections 12 through 22 may apply.

In order to determine which part of the *Act* may apply, it is necessary to decide whether the records at issue contains "personal information" and, if so, to whom it belongs. 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.)].

The correct approach is to review the entire record, not only the portions remaining at issue, to determine whether it contains the requester's personal information. This record-by-record analysis is significant because it determines what exemptions that the records as a whole (rather than only certain portions of it) must be reviewed under [Order M-352].

Representations

The Ministry takes the position that the severed portions of the record contain personal information, as contemplated by section 2(1) of the *Act*. Specifically, the Ministry submits that paragraphs (e) (personal opinions or views of the individual), (g) (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) of the *Act* apply. The Ministry also submits:

The fact that some of the personal information appears in a workplace setting or in records created from a workplace situation does not alter the nature of the records as personal information [see Order M-486, P-1569, P-1171, P-447]. The Supreme Court of Canada has provided clear direction in *Dagg v. Canada (Department of Finance)*, (1997) 148, D.L.R. (4th) 385, with respect to personal information within a work or professional context when it said:

The purpose of these provisions is clearly to exempt [i.e. from the definition of “personal information”] only information attaching to positions and not that which relates to specific individuals. Information relating to the position is thus not “personal information” even though it may incidentally reveal something about named persons. Conversely, **information relating primarily to individual themselves or to the manner in which they choose to carry out the tasks assigned to them is “personal information”**...The fact that personnel are employed in government does not mean that their personal activities should be open to **public scrutiny**. [emphasis added]

This approach was confirmed by Adjudicator Donald Hale in P-1538 in reaching his conclusion and finding that the records at issue did not include personal information when he held:

This information is not personal in nature but may be more appropriately described as being related to the employment or professional responsibilities of each of the individuals who are identified therein. Essentially, the information is not **about** these individuals and, therefore, does not qualify as their “personal information” within the meaning of the opening words of the definition. [emphasis added]

The critical test is whether the information refers primarily to the individual themselves or the **manner** in which he or she carry out their duties or directed to the position and the nature of those duties. In other words, is the information, **about** an individual rather than the position in which he or she are employed. Applying the test to the severed portions of the records at issue it is clear that the severed portions of the records are personal information under the *Act*.

In this case, the severed records contain a variety of personal information including details around the vacation plans of employees, parental leave taken by employees and details around family issues faced by employees. This information is about the employees as individuals and should be considered personal information...The records also contain the names and addresses of individuals who are not employees of the Ministry and comments from individuals who are not employees of the Ministry. It is the submission of the Ministry that the information which has been severed is personal information.

The appellant submits that the information that he requests “is related to the employment or professional responsibility of [the Ministry] and its employees”. The appellant states:

I am not requesting “personal information”: such as vacation plans, parental leave taken by employees or details around family issues faced by employees. I am very much interested in seeing the severed records containing comments about how I treated [Ministry] employees and any alleged verbal abuse that I made toward any [Ministry] employee. I flatly deny any such verbal abuse and I have the right to know what a [Ministry] employee has said about me. Any such comments were made in the context of the employee’s employment or professional responsibilities which does not classify them as “personal information”.

Analysis and finding

I have carefully reviewed all of the records identified by the Ministry to determine whether they contain information that qualifies as personal information within the meaning of the definition of that term at section 2(1) of the *Act*. I find that some of the records contain information that qualifies as the personal information of identifiable individuals other than the appellant, other records contain information that qualifies as the personal information of identifiable individuals other than the appellant, together with the personal information of the appellant, and still other records contain information that I find does not qualify as personal information at all.

In the appellant’s representations as quoted above, he clearly states that he is not requesting the personal information of Ministry employees when it consists of information about their vacation plans, about their plans to take other types of leave, or about their family issues. The severances made on pages 35, 93, 107, 109 and 110 describe exactly this type of information about Ministry employees, which, in my view, qualifies as the personal information of those individuals. The information includes the employees’ names along with other information about them in their personal capacity and, I find that it qualifies as personal information within the meaning of paragraph (h) of the definition. However, as the appellant has made it clear that he is not interested in obtaining access to this type of information, the severances on pages 35, 93, 107, 109 and 110 are not at issue and I will not consider them further in this order.

Although it appears from the index provided by the Ministry and the records themselves that there are severances made under section 21(1) that remain at issue in pages 59 and 60, the Ministry has not specifically identified that any of the severed portions are exempt under section 21. Rather, it has identified that they are exempt under other, no longer relevant, exemption claims. Additionally, my review of the severed portions on those pages reveals that they do not contain any information that would qualify as “personal information” within the meaning of that term. Accordingly, I find that the severances on pages 59 and 60 do not contain personal information belonging to any identifiable individuals and, therefore, section 21(1) cannot apply to the severances on those pages. As a result, I will order that the severances on pages 59 and 60 be disclosed to the appellant, if they have not already been disclosed.

I find that some of the other records contain the personal information of identifiable individuals other than the appellant. In some instances, this information includes their names with contact information (including home addresses and telephone numbers) (paragraph (e)), or their names along with other personal information about the individual or where the disclosure of the name would reveal other personal information about the individual (paragraph (h)). In other instances, the information consists of the personal opinions and views of an identifiable individual where such opinions and views do not relate to another individual (paragraph (e)). I find that pages 51, 56, 61, 67, 68, 74, 77, 80, 181, 276, 292, 327, 348, 364, 379, 395, 413, 461, 462, 508 and 509 describe these types of personal information that relate to identifiable individuals other than the appellant and do not contain the personal information of the appellant.

I also find that there are some records that contain information that qualifies as the personal information of identifiable individuals other than the appellant together with the personal information of the appellant. The severed information on pages 41, 44, 45, 46, 49 and 50 contain both the personal information of the appellant and the personal information of other identifiable individuals. This information consists of the name of the appellant, along with other personal information about him (paragraph (h)), the views or opinions of another individual about the appellant (paragraph (g)), and the personal information of other identifiable individuals such as their names with contact information (paragraph (e)), their names along with other personal information about the individual or the personal opinions and views of an identifiable individual where such opinions and views do not relate to another individual (paragraph (e)).

Previous orders have established that if a record contains the personal information of one individual, a decision regarding access must be made in accordance with the exemptions at section 21(1) of Part II of the *Act* [Orders M-352 and MO-1757-I]. However, in the circumstances where a record contains both the personal information of the appellant and another individual, the request falls under Part II of the *Act* and the relevant personal privacy exemption is the exemption at section 49(b) [Order M-352]. Some exemptions, including the invasion of privacy exemption at section 21(1) are mandatory under Part II but discretionary under Part III, and thus, in the latter case, an institution may disclose information that it could not disclose if Part II applied [Order MO-1756-I].

As I have found that some the records at issue in this appeal contain the personal information of individuals other than the appellant (pages 51, 56, 61, 67, 68, 74, 77, 80, 181, 276, 292, 327, 348, 364, 379, 395, 413, 461, 462, 508 and 509), I must review that information under Part II, to determine whether it qualifies for exemption under the mandatory exemption at section 21(1).

As I have found that one of the records at issue in this appeal contain the personal information of both the appellant and other identifiable individuals (pages 41, 44, 45, 46, 49 and 50), I must review that information under Part III to determine whether it qualifies for exemption under the discretionary exemption at section 49(b).

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/PERSONAL PRIVACY

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. In circumstances where a record contain both personal information of the appellant and another individual, the request falls under Part III of the *Act* and the relevant exemptions are found at section 49.

Section 49(b) is the relevant personal privacy exemption under Part III of the *Act*. Section 49(b) provides:

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

where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

As noted above, the personal privacy exemptions under the *Act* are *mandatory* at section 21(1) under Part II of the *Act* when the information at issue contains the personal information of identifiable individuals other than the requester and *discretionary* at section 49(b) under Part III when the information at issues contains the personal information of the appellant together with the personal information of other identifiable individuals.

I found that some of the records at issue contained both the information of the appellant and that of other identifiable individuals. I will therefore consider whether the disclosure of the personal information in pages 41, 44, 45, 46, 49 and 50 would be an unjustified invasion of the personal privacy of other individuals and is exempt from disclosure under Part III of the *Act* by virtue of the application of section 49(b).

If the information falls within the scope of section 49(b), that does not end the matter. Section 49(b) introduces a balancing principle, which involves weighing the requester's right of access to his own personal information against the other individual's right to protection of their privacy. On appeal, I must be satisfied that disclosure of the information **would** constitute an unjustified invasion of another individual's personal privacy [see Order M-1146].

In this appeal, I have found that some of the information at issue contains the personal information of identifiable individuals other than the appellant. I will therefore consider whether the disclosure of the information in pages 51, 56, 61, 67, 68, 74, 77, 80, 181, 276, 292, 327, 348, 364, 379, 395, 413, 461, 462, 508 and 509 would be an unjustified invasion of the personal privacy of those other individuals and is exempt from disclosure under Part II of the *Act* by virtue of the application of section 21(1).

Unlike section 49(b), section 21(1) is a mandatory exemption, and if it is found that disclosure would result in an unjustified invasion of the personal privacy of the individual to whom the information relates that ends the matter. The Ministry does not balance competing interests and does not have the discretion to disclose the information to the requester.

Accordingly, analyses under both sections 49(b) and 21(1) require that I determine whether disclosure of the remaining information would result in an unjustified invasion of the personal privacy of the individuals other than the appellant, to whom the information relates. In both these situations, sections 21(2), (3), and (4) provide guidance in determining whether the threshold for an “unjustified invasion of personal privacy” is met.

Section 21(2) lists criteria for the Ministry to consider in making a determination as to whether disclosure of personal information would result in an unjustified invasion of personal privacy of the individual to whom the personal information relates. 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, disclosure of which does *not* constitute an unjustified invasion of personal privacy.

If none of the presumptions at section 21(3) applies, the Ministry must consider the application of the factors listed in section 21(2), as well as other considerations that are relevant in the circumstances of the case.

If a presumption listed in section 21(3) has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2). A presumption can, however, be overcome if the personal information at issue falls under section 21(4) of the *Act*, or if a finding is made under section 23 of the *Act* that a compelling public interest exists in disclosure of the record in which the personal information is contained that clearly outweighs the purpose of the section 21(1) exemption [*John Doe v. Ontario (Information and Privacy Commissioner)*(1993), 13 O.R. (3d) 767].

Neither party take the position that any of the presumptions at section 21(3) apply nor do they submit that any of the exceptions under section 21(4) apply, in the circumstances of this appeal. Accordingly, the factors listed at section 21(2) must be considered to determine whether disclosure of the information at issue may result in an “unjustified invasion of personal privacy” of the individuals to whom the information relates.

Representations, analysis and finding

The Ministry submits that the factors weighing against disclosure listed at sections 21(2)(f) and (h) are relevant considerations in the circumstances of this appeal. The appellant takes the position that the factors favouring disclosure at sections 21(2)(a) and (d) are relevant. These sections provide:

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,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence.

In my consideration of the possible relevance of the identified factors in section 21(2), I will begin by addressing the factors weighing against disclosure, specifically, sections 21(2)(f) and (h).

Factors weighing against disclosure

Section 21(2)(f): highly sensitive

Addressing the relevance of section 21(2)(f), the Ministry submits:

The general test for whether [this criterion] should be considered is whether the **release of the information would cause excessive personal distress to persons other than the appellant.** The information must be such a nature that it would cause the affected party to become more distressed than in the ordinary course of events. While the affected parties are in a better position to articulate or set out the distress caused by release of these statements, logic dictates after a review of the severances that their release would acutely distress the affected party; thus the severed portions are highly sensitive. Details around family issues, parental leave and personal matters of an employee are by their nature highly sensitive. Similarly, where individual have made comments concerning events on the rivers in hopes that the Ministry will take action, release of the information is likely to result in anxiety or distress to those individuals who have made comments to the Ministry and may also be subject to such abuse which is not something that they would have expected in the normal course of events.

For personal information to be considered highly sensitive within the meaning of the factor listed at section 21(2)(f), it must be found that disclosure of the information could reasonably be

expected to cause significant personal distress to the subject individual [Order PO-2518]. It is not sufficient that release might cause some level of embarrassment to those affected [Order P-1117].

Apart from the information that relates to family issues, parental leave and other personal matters to which the appellant has clearly indicated he does not wish to have access, the remaining information that consists of the personal information of identifiable individuals other than the appellant consists primarily of comments, and concerns about events on the river. In some instances, the comments or concerns have been released and the name and contact information of the individual has been severed. In other instances, where disclosure of the comment or concern would reveal the identity of the commentator or the complainant, the name and contact information as well as the comment or concern has been severed.

The Ministry has only provided general representations to support their claim that disclosure of this information is likely to result in anxiety or distress to individuals who have made comments to the Ministry. However, having reviewed the information itself and having considered the circumstances of this appeal, that there are some differences of opinion among a number of local individuals with respect to certain matters related to the relevant river. I accept that disclosure would reveal to members of the community, concerns and views held by identifiable individuals who may not wish their views to be publicly known and who might suffer some retaliation by members of the community. However, having considered those circumstances and the nature of the specific information at issue, I am not satisfied that it would be reasonable to expect that, in this case, disclosure of specific comments and/or concerns made by identifiable individuals would cause *significant* personal distress to those who made them, as required.

Accordingly, I conclude that the factor at section 21(2)(f) does not apply in the circumstances of this appeal.

Section 21(2)(h): supplied in confidence

Addressing the relevance of the factor at section 21(2)(h), the Ministry submits:

The information supplied such as individual names, addresses and comments to the Ministry were implicitly supplied in confidence. Individuals are generally aware of the [Act]. They are aware that the Act has provisions which control the dissemination of personal information. When they provide comments and personal information, they do so on the understanding that the Ministry is tasked with carefully guarding such information and has notice requirements setting the possible uses of such information. They made their comments with the expectation that the Ministry may/may not act on the comments but would not disclose them to outside parties such as the appellant.

In many ways, this situation is similar to that of order M-1435-I. The Ministry, like the Conservation Authority in that appeal, has a mandate to address and

reflect public interest with respect to environmentally sensitive lands. Although parties who participate in public processes do so with the knowledge that their identities and views will be open to at least some public scrutiny, the Commission found that this does not preclude members of the public from making their views known to the Authority privately and in confidence. In that case, the Commission upheld the Conservation Authority's decision to deny access to correspondence, received implicitly in confidence, from individuals expressing concern about the building of a road for a ski resort. It is the submission of the Ministry that the same line of reasoning applies in this case.

In summary, it is the Ministry's view that given the fact that the information is highly sensitive and that the person[al] information was supplied in [confidence], and that there are no apparent factors or criteria under subsection 21(2) which favour disclosure of the information, that the Ministry came to the correct conclusion that disclosure of the severances would amount to an unjustifiable invasion of personal privacy and that should be exempt from disclosure in this case.

There is no tangible evidence on the records, such as markings, to indicate that the comments and or complaints were supplied to the Ministry with an expectation of confidentiality. However, I accept the Ministry's submission that individuals are generally aware of the *Act* and that when they provide comments or views about certain matters to the Ministry they do so on the understanding that such information is not disclosed to the general public. In my view, given the nature of the comments and concerns submitted by identifiable individuals in the circumstances of this appeal, it would be reasonable for the individuals who submitted them to expect that they were submitted "in confidence".

Accordingly, I find that the factor at section 21(2)(h) a relevant consideration favouring the privacy protection of the names, contact information, comments and concerns submitted by individuals to the Ministry.

Factors weighing in favour of disclosure

The appellant has raised the application of sections 21(2)(a) and (d) which weigh in favour of disclosure.

Section 21(2)(a): public scrutiny

The appellant argues that the factor at section 21(2)(a) is relevant for the following reason:

The disclosure [of the information at issue] is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies (MNR) to public scrutiny. The public has the right to know whether MNR [the Ministry] has committed the tort of deceit. The records severed with show that [three

named Ministry employees] conspired to force dam repairs on an owner using the pretence of discussing low water conditions and the implementation of a water management plan. An email from [named employee] to [named employee] dated August 17, 2005 before [named employee's] visit to the Scone Dam states: "*It would be useful to visit the site and talk to the owner re: the need for rehabilitation of the structure. Let me know your thought processes.*" Also the email dated September 8, 2005 (2 days before their visit) states: "*Yes, [named employee], [named employee] and I are both free on Friday and we would like to have the Scone Dam checked out ASAP. Would you like [named employee] to let the owners know we are coming in the afternoon or would you prefer to make a surprise visit?*" This once again clearly demonstrates that [the Ministry] engaged in deceit by telling me this visit was to discuss low water conditions and to sign the water management plan.

In order for section 21(2)(a) to be a relevant consideration, I must be satisfied that the activities of the Ministry have been called into question, and that disclosure of the personal information found in the severed portions is desirable for the purposes of subjecting the activities of the Ministry to public scrutiny [see, for example, Orders P-828, M-1704 and PO-1978].

In my view, the appellant has not demonstrated that disclosure of the information would be desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny. First, the appellant has not provided me with sufficient evidence to satisfy me that the activities of the Ministry have been publicly called into question. Second, even if it could be shown that the Ministry's actions with respect to its review of activities along the river had been called into question, having carefully reviewed the information that remains at issue I do not find that disclosure of these specific parts of the record would assist the appellant in subjecting the activities of the Ministry to public scrutiny. Finally, in my view, the appellant's representations have rather served to demonstrate that the reason for which he seeks the information is related to a personal interest rather than matters of public concern.

Accordingly, I do not find that section 21(2)(a) is a relevant factor in the circumstances of this appeal.

Section 21(2)(d): fair determination of rights

The appellant also argues that the factor at section 21(2)(d) is relevant. He submits:

The rights in question here involved my occupied water privileges and rights which were part of conversations with [named employee] and other [Ministry] officials. Discussion on the recognition (or lack of recognition) of these rights is critical for my continued operation of the dam. I also should have the right to be informed as to how [the Ministry] is trying to usurp or negate these rights that I purchased with the property. [The Ministry] has suggested that section 21(f) applies or that the personal information severed is highly sensitive. I am not

concerned about the release of information concerning the other dam owner [named individual] mentioned by [the Ministry] or vacation plans or parental issues. However, [the Ministry] states: “*Similarly, the comments about the character of [a Ministry]employee which questions the honesty of the employee and summarizes the verbal abuse suffered by the employee also clearly should be considered highly sensitive and their disclosure could unfairly affect the person’s reputation. The comments are a very personal nature and cast an unfavourable shadow on the employee’s reputation.*” It should be pointed out again that I did not in any way verbally abuse any [Ministry] employee. I should have the right to see what I allegedly stated that was not a true statement. [The Ministry] states that there is no evidence in the records to support conclusions reached. The conclusion I reached was that [named employee] arranged a visit by [named employee] to inspect my dam and order repairs. I was informed by email from [named employee] and subsequent telephone conversations that the visit was “to discuss low water conditions” and sign the Water Management Plan.

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 to demonstrate that his “right in question is drawn from the concepts of common law or statute law;
- he has not provided evidence that a proceeding related to this subject matter is “either existing or contemplated”;

- 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.

Accordingly, I am not satisfied that the factor under section 21(2)(d) is a relevant factor in the circumstances of this appeal.

Finding

I have found that the factor weighing against disclosure at section 21(2)(h) is a relevant factor that carries some weight, while the factors weighing in favour of disclosure at section 21(2)(a) and (d), and the factor weighing against disclosure at section 21(2)(f), do not apply at all. Balancing the relevant factors I find that disclosure of the information that has been severed from the records that relates to identifiable individuals other than the appellant would constitute an unjustified invasion of the personal privacy of those individuals.

Accordingly, I find that the information in the records that contain the personal information of individuals other than the appellant and does not contain any personal information relating to the appellant (pages 51, 56, 61, 67, 68, 74, 77, 80, 181, 276, 292, 327, 348, 364, 379, 395, 413, 461, 462, 508 and 509) qualifies for exemption under the mandatory personal privacy exemption at section 21(1) under Part II of the *Act*.

With respect to the information in the record that contains the personal information of both the appellant and another identifiable individual (pages 41, 44, 45, 46, 49 and 50) subject to my findings below on the application of the absurd result principle and on the Ministry’s exercise of discretion, I find that the severances on these pages also qualify for exemption under the discretionary personal privacy exemption at section 49(b) under Part III of the *Act*.

Absurd result

Whether or not the factors or circumstances in section 21(2) or the presumptions in section 21(3) apply, where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 49(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

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

- the requester sought access to his or her own witness statement [Orders M-444, M-451]

- the requester was present when the information was provided to the institution [Orders M-444, P-1414]
- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]

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

The Ministry takes the position that the absurd result principle does not apply in the circumstances of this appeal because:

This is not a case such as a witness statement or document authored by the appellant. The records are notes of what the note taker heard the appellant say. The appellant did not write or dictate the statement contained in the record. These are perception of the perceptions of the appellant. As with any such record, there is a subjective element which is outside of the appellant's control. Release of the records may provide the perceptions of the appellant with greater weight than there otherwise would have.

My review of the information on page 49 reveals that the information that has been severed is a statement made by the appellant to a Ministry employee. While it is not a formal statement made by the appellant, but rather a comment that was made in an ongoing discussion between the appellant and the Ministry employee, I disagree that the statement represents only the Ministry employee's perception of the appellant. The statement is written as a factual recount of a comment the appellant made. It is clearly written to reflect what the appellant said, not to reflect the Ministry employee's perception of what the appellant said. Moreover, since the statement was made by the appellant, it is clearly within his knowledge.

Accordingly, I find that it would amount to an absurd result if the severance made on page 49 were not disclosed to the appellant. I will order that the severance made on page 49 be disclosed.

I do not find that the absurd result principle has any application to the severances on pages 41, 44, 45, 46, and 50 or the severed information that is subject to the section 21(1) exemption.

EXERCISE OF DISCRETION

As indicated above, section 49(b) is a discretionary exemption and permits the Ministry to disclose information despite the fact that it could be withheld. This involves a balancing of interests between the appellant's right of access to his own personal information and the other identifiable individuals' right to protection of his or her privacy.

Because section 49(b) is a discretionary exemption, I must also review the Ministry's exercise of discretion in deciding to deny access to the withheld information. On appeal, this office may review the decision taken by the Ministry, in order to determine whether it erred in doing so [Orders PO-2129-F and MO-1629].

I may find that the Ministry erred in exercising its discretion where, for example:

- they do so in bad faith or for an improper purpose
- they take into account irrelevant considerations
- they fail to take into account relevant considerations

In these cases, I may send the matter back to the Ministry for an exercise of discretion based on proper consideration [Order MO-1573].

In the circumstances of this appeal, I conclude that the exercise of discretion by the Ministry to withhold the information that I have not ordered to be disclosed was appropriate, given the circumstances and nature of the information.

ORDER:

1. I order the Ministry to disclose to the appellant the information contained in all severances made pursuant to the exemptions at sections 13, 14, 15, and 21.1, if that information has not previously been disclosed. The Ministry must disclose these records to the requester by July 3, 2007 but not before June 28, 2007.
2. I order the Ministry to disclose to the appellant the information contained in the severance that has been made on page 49. The Ministry must disclose this record to the requester by July 3, 2007 but not before June 28, 2007.
3. I uphold the Ministry's decision to withhold the information contained in the severances made on pages 41, 44, 45, 46, 50, 51, 56, 61, 67, 68, 74, 77, 80, 181, 276, 292, 327, 348, 364, 379, 395, 413, 461, 462, 508 and 509.
4. In order to verify compliance with the terms of this order, I reserve the right to require the Ministry to provide me with a copy of the pages disclosed to the appellant, upon request.

Original signed by: _____
Catherine Corban
Adjudicator

_____ May 29, 2007