



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

ORDER PO-2969-I

Appeal PA10-335

Ministry of Natural Resources



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NATURE OF THE APPEAL:

An individual submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*), to the Ministry of Natural Resources (the ministry) for “all information and letters pertaining to property on [an identified island]... on Lake Temagami from 2005 to present.”

Prior to making its decision on access to the records identified as responsive to the request, the ministry notified a number of individuals whose interests may be affected by disclosure under section 28(1)(b) of the *Act*. Section 28(1)(b) provides an opportunity to an affected person whose personal information may be contained in a record to communicate their views on disclosure before the institution makes its final decision on access.

One of the individuals who had been notified objected to the disclosure of all of the records, not just the four pages the ministry identified as relating to that individual.

The ministry subsequently issued an access decision to the requester and the affected parties, advising that it intended to provide the requester with partial access to the records. Access to the remaining records, or portions of the records, was denied pursuant to section 21(1) (personal privacy) of the *Act*. Other information was severed from the records as it was not responsive to the request.

The individual who had objected to the disclosure of all of the records relating to the property in question appealed the ministry’s decision to this office and a third party appeal was opened to address the issue of notification under section 28(1)(b).¹

This office appointed a mediator to explore the possibility of resolution. During mediation, the ministry maintained its position that the only records that affect the appellant’s interests are the four pages he was notified about, which were partially withheld under section 21(1).

The original requester has not appealed the ministry’s decision to partially withhold the records under section 21(1). Further, the ministry has not yet disclosed any records to the original requester in view of the appellant’s objection to disclosure of any and all of them.

As a mediated resolution of this appeal was not possible, it was transferred to the adjudication stage where it was assigned to me to conduct an inquiry. I sent the appellant a Notice of Inquiry outlining the facts and the issues, initially, to seek representations from him on the notification issue. I received brief comments from the appellant in response. The appellant’s representations do not address section 28(1)(b) of the *Act*.

I then decided that an interim order on the notification issue was necessary for this appeal to proceed. Accordingly, the only issue before me for determination in this order is whether the appellant was entitled to receive notice under section 28(1)(b) of the *Act* in relation to all of the records and not just those for which he was initially provided notice by the ministry. A determination that the appellant is entitled to such notice would mean that the appellant has a

¹ The individual who appealed the ministry’s decision is referred to throughout this order as the appellant.

corresponding right to object to, by filing an appeal of, the ministry's access decision on disclosure of those records. It should be noted that I will not be reviewing the ministry's denial of access to information pursuant to section 21(1) of the *Act* in this interim order.

Further, and as I advised the appellant in the Notice of Inquiry, my inquiry under the *Freedom of Information and Protection of Privacy Act* will only address access to information (records) related to the island identified in the request. I have no authority or jurisdiction to make any decisions respecting the identified island property itself (including matters to do with its sale), and I will not be commenting upon such issues.

RECORDS:

The ministry identified approximately 171 pages of records as responsive to the request, some of which are duplicates of one another. These records consist of emails, correspondence, reports and other documents related to the identified island property.

DISCUSSION:

IS THE APPELLANT ENTITLED TO RECEIVE NOTICE UNDER SECTION 28(1)(b)?

The notification provision under which the appellant was notified by the ministry in this appeal is section 28(1)(b) of the *Act*, which provides:

Before a head grants a request for access to a record, ...

that is **personal information** that the head has reason to believe **might** constitute an unjustified invasion of personal privacy for the purposes of clause 21(1)(f), the head shall give written notice in accordance with subsection (2) to the **person to whom the information relates** [emphasis added].²

The purpose of the notification obligation in section 28(1)(b) of the *Act* was reviewed by Senior Adjudicator David Goodis in Order PO-1657, in a situation where records containing the personal information of both an appellant and an affected person were disclosed without notification under section 28(1)(b). Senior Adjudicator Goodis stated:

In my view, the purpose of these provisions of section 28 is to ensure that procedural fairness is accorded to individuals whose privacy interests may be at stake. Adherence to these provisions permits the subject individual to make representations as to whether or not the information should be disclosed and, if the head decides to disclose information, to appeal the matter to the Commissioner before disclosure actually takes place.

...

² Section 21(1)(f) states: A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except, ... if the disclosure does not constitute an unjustified invasion of personal privacy.

If a record does not contain an individual's personal information, disclosure of the record cannot result in an unjustified invasion of personal privacy under section 21(1). In this appeal, therefore, unless the records contain the appellant's personal information, the appellant does not have the right to appeal the proposed disclosures of other records to the original requester.

It should be noted that past orders of this office have indicated that the threshold for notification under section 28(1) is low. In Order PO-1694-I, former Assistant Commissioner Tom Mitchinson addressed the importance of the word "might" in the notification provision respecting the third party information exemption in section 17(1), which is section 28(1)(a):

In order to trigger the notification requirements under section 28(1)(a), a head must first have reason to believe that a record **might** contain one of the types of information listed in section 17(1) (ie. a trade secret or scientific, technical, commercial, financial or labour relations information). If it does, the head must then consider whether disclosure of this information **might** affect the interest of a person other than the person requesting the information. In addressing this second requirement, the head should be guided by the provisions of section 17(1).

...

I agree with the former Assistant Commissioner. In my view, this threshold has equal application to section 28(1)(b). Where the head has reason to believe that a record might contain personal information of an individual, the head must then consider whether disclosure of this information might result in an unjustified invasion of personal privacy for the purpose of section 21(1), thereby triggering the notification requirement under section 28(1)(b).

I will now review the definition of personal information for the purpose of determining which of the approximately 171 pages of records contain the appellant's personal information. The term "personal information" is defined in section 2(1) of the *Act* 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 if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. 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.)).

Based on my review of the records identified as responsive to the request submitted by the original requester, I find that the appellant's personal information appears on pages 113-116, as the ministry has already identified. These are the pages for which the ministry previously provided notice to the appellant. However, from my review, I conclude that there are three other pages (of the 171 responsive pages) that also contain information about the appellant that qualifies as his personal information for the purpose of paragraphs (c), (d) and (h) of the definition of personal information in section 2(1) of the *Act*. These are pages 121, 126 and 127.

Specifically, I find that pages 113-116, 121 (a duplicate of 116), 126 and 127 contain the appellant's personal information. Accordingly, the ministry's obligation to notify the appellant pursuant to the notification requirements in section 28(1)(b) of the *Act* is triggered solely with respect to those pages. In addition to the notice already provided to him respecting pages 113-116, the appellant is also entitled to notice under section 28(1)(b) as well as the opportunity to make representations on pages 126 and 127, prior to any decision respecting their disclosure. The ministry is not required to provide notice under section 28(1)(b) for page 121 because I am satisfied that this page is a duplicate of page 116, for which notice has already been provided.

As previously noted, the ministry has issued an access decision with respect to the records, but the original requester has not appealed this decision. It appears that this individual is awaiting the outcome of this appeal prior to filing an appeal of the ministry's access decision. The original

requester's appeal rights having been preserved, therefore, I will order the ministry to disclose all other records to the original requester in accordance with the terms of its access decision dated October 18, 2010.

Following notification regarding pages 126 and 127 to the appellant, and consideration of the appellant's views, the ministry is required to issue an access decision to the original requester accordingly, with the parties' right of appeal being preserved in the interim. Specifically, the appellant may appeal the ministry's final decision on those pages and that appeal will be processed with his existing appeal of the ministry's decision respecting pages 113-116.

ORDER:

1. I order the ministry to disclose all responsive records identified in this interim order as not requiring notice, and pursuant to the terms of the ministry's October 18, 2010 decision letter, by **June 17, 2011** but not before **June 10, 2011**.
2. I order the ministry to provide notice to the appellant under section 28(1)(b) of the *Act* with respect to pages 126 and 127, and then issue a supplemental decision respecting access in accordance with the *Act*.
3. In order to verify compliance with this interim order, I reserve the right to require the ministry to provide me with a copy of the records disclosed to the requester.
4. I remain seized of this matter to deal with any issues outstanding or arising as a result of the provisions of this order.

Original signed by: _____
Daphne Loukidelis
Adjudicator

_____ May 12, 2011