

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3357

Appeal PA13-414

Ministry of Natural Resources

June 26, 2014

Summary: The Ministry of Natural Resources received a request under the *Freedom of Information and Protection of Privacy Act* for records relating to the sale of Crown land. The ministry located one responsive record and denied access to it, in full, pursuant to the mandatory exemption relating to personal privacy at section 21(1). The appellant appealed the ministry's decision to withhold the record and raised the possible application of the public interest override at section 23. This order upholds the ministry's decision not to disclose the record to the appellant, finding that the mandatory exemption at section 21(1) applies to the information and that the public interest override at section 23 does not. The appeal is dismissed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of "personal information"), 21(1), 21(2)(a), (f), (h), and 23.

Orders and Investigation Reports Considered: Order PO-3353-I.

OVERVIEW:

[1] 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 information regarding the sale of a right of way located on a parcel of Crown land. The requester specifically sought access to:

... a copy of the list of concerns and supporting information contained in the adjacent landowner's original request to buy the ROW [right of way] [named address] as referenced in paragraph 5 of the [specified date] letter from [named ministry employee] to [requester].

[2] The requester requested that the ministry search for responsive records within a specified timeframe.

[3] The ministry located one responsive record, a two-page letter addressed to the ministry, and issued a decision letter denying access to it, in its entirety, pursuant to the mandatory exemption at section 21(1) (personal privacy) of the *Act*.

[4] The requester, now the appellant, appealed the ministry's decision to deny access to the record.

[5] During mediation, the appellant explained that he wants to understand the reasons underlying the ministry's decision to sell the subject land to the adjacent landowners. The appellant believes that this information might be contained in the record. He takes the position that the responsive information does not qualify as personal information. He also confirmed that he is not interested in pursuing the name, contact or financial information of any individuals named in the record. Therefore the name, contact information and financial information related to any individuals named in the record are not at issue in this appeal.

[6] Also during mediation, the ministry advised that, pursuant to section 28(1), it had notified the individual who wrote the letter to the ministry (the affected party), but that it did not receive a response. The mediator contacted the affected party to discuss the possibility of obtaining their consent to the disclosure of their information. The affected party did not provide consent.

[7] As a mediated resolution could not be reached, the file was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. In my inquiry into this appeal, I sought and received representations from both the ministry and the appellant. The ministry's representations were shared with the appellant in accordance with section 7 of this office's *Code of Procedure and Practice Direction Number 7*. I deemed that it was not necessary to share the appellant's representations with the ministry. Although invited to do so, the affected party declined to submit representations.

[8] In his representations, the appellant raised the possible application of the public interest override at section 23 of the *Act*. Accordingly, I added this issue to the appeal. I deemed that it was not necessary for me to seek the representations of the ministry or the affected party on this issue, however.

[9] In this order, I find that the letter contains the personal information of an identifiable individual other than the appellant (the affected party) and that its disclosure would result in an unjustified invasion of that individual's personal privacy, as contemplated by the mandatory exemption at section 21(1) of the *Act*. I also find that the public interest override at section 23 does not outweigh the purpose of the section 21(1) exemption. Accordingly, I uphold the ministry's decision not to disclose the letter to the appellant and I dismiss the appeal.

RECORDS:

[10] The record at issue is a two-page letter addressed to the ministry. The names, contact information and financial information of individuals named in the record are not at issue.

ISSUES:

- A. Does the letter contain "personal information" as defined in section 2(1) of the *Act*, and, if so, to whom does it relate?
- B. Does the mandatory exemption at section 21(1) of the *Act* apply to the personal information contained in the letter?
- C. Is there a compelling public interest in the disclosure of the letter that clearly outweighs the purpose of the section 21(1) exemption?

DISCUSSION:

Background Information

[11] In its representations, the ministry provides the following information as background to the appeal:

The request relates to the sale of a small piece of residual Crown land [the land] in the municipality of [named municipality] to a property owner who owns land adjacent to the Crown land. In the fall of [specified date], the adjacent property owner approached the ministry's Pembroke District office with a request to purchase the Crown land.

[On specified date], the District Manager decided to sell the subject Crown land to two adjacent landowners. As part of the process, interested parties were notified of this decision. More comments were received and there was significant coverage of the decision in the local media. As a

result, the District conducted an additional review of the proposed disposition to ensure that all views and alternatives had been considered. This review included meeting with two of the principal opponents of the disposition and correspondence with several others including the local municipality and the local MPP. It appears that there has been a good deal of acrimony between the purchasers and those opposed to the sale.

[12] The appellant filed a similar request for other information related to the same Crown right of way. This request ultimately gave rise to Appeal Number PA13-242 which was recently addressed by Adjudicator Diane Smith in Order PO-3353-I.

A. Does the record contain “personal information” as defined in section 2(1) of the *Act*, and, if so, to whom does it relate?

[13] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except 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;

[14] 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.¹

[15] The ministry submits that the letter at issue was written by an identifiable individual and sets out proposals for the purchase and sale of a small piece of Crown land. In addition, the letter describes in detail a history of the land in question and that of the proposed purchaser. The ministry submits that this information falls within paragraphs (b) and (e) of the definition of "personal information set out in section 2(1) of the *Act*.

[16] The appellant does not specifically address whether the letter might contain "personal information" within the meaning of that term, but reiterates that he is not seeking access to personal information of any identifiable individuals such as their name, address, contact or financial information. However, he takes the position that withholding information used as "fact" to influence the ministry's decision to sell the Crown land is inappropriate and not consistent with the letter" or "spirit" of the *Act* or the Ontario government's policies on "openness and transparency."

[17] I have reviewed the letter at issue and accept that the information that it contains qualifies as "personal information" within the meaning of that term as defined in section 2(1) of the *Act*.

[18] Even if the affected party's name, contact information, address and financial information is severed from the letter, in my view the remaining information contains that individual's personal views or opinions as contemplated by paragraph (e) of the

¹ Order 11.

section 2(1) definition of "personal information." Additionally, I find that it is correspondence sent to the ministry by the affected party that is implicitly of a private or confidential nature as contemplated by paragraph (f) of the definition of "personal information."

[19] Accordingly, I find that the letter contains the "personal information" of the affected party within the meaning of the definition set out in section 2(1) of the *Act*.

B. Does the mandatory exemption at section 21(1) of the *Act* apply to the personal information contained in the record?

General principles

[20] Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

[21] In the circumstances, it appears that the only exception that could apply is section 21(1)(f), which allows disclosure if it would not be an unjustified invasion of personal privacy. That section reads:

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.

[22] Sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy.

[23] In the circumstances it does not appear that either section 21(3) or (4) are relevant.

[24] 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.² In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure in section 21(2) must be present. In the absence of such a finding, the exception in section 21(1)(f) is not established and the mandatory section 21(1) exemption applies.³

² Order P-239.

³ Orders PO-2267 and PO-2733.

[25] 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).⁴

[26] In the circumstances it appears that the factors weighing against disclosure at 21(2)(f) (highly sensitive), (h) (supplied in confidence) might apply, while the factor weighing in favour of disclosure at section 21(2)(a) (public scrutiny) might also apply.

Factor weighing in favour of disclosure: sections 21(2)(a)

21(2)(a): public scrutiny

[27] This section contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.⁵ In order for this section to apply, it is not appropriate to require that the issues addressed in the records have been the subject of public debate; rather, this is a circumstance which, if present, would favour its application.⁶

[28] The letter at issue contains information provided by the affected party. I do not accept that the ministry would have relied upon it solely to justify the proposed sale of the Crown lands without its own independent study. I do not accept that its disclosure would subject the activities of the ministry to public scrutiny. Accordingly, I find that the factor at section 21(2)(a) does not apply in the circumstances of this appeal.

Factors weighing against disclosure: sections 21(2)(f) and (h)

21(2)(f): highly sensitive

[29] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.⁷

[30] Having reviewed the letter that was provided to the ministry by the affected party, I find that given the personal nature of the content of the letter, its disclosure could reasonably be expected to cause significant personal distress to the affected party. Accordingly, I find that the factor weighing against disclosure at section 21(2)(f) is relevant in the circumstances of this appeal.

⁴ Order P-99.

⁵ Order P-1134.

⁶ Order PO-2905.

⁷ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

21(2)(h): supplied in confidence

[31] This factor applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 21(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.⁸

[32] Having reviewed the letter at issue, I accept that it was supplied to the ministry in confidence and both the affected party and the ministry had a reasonably held expectation that the specific information contained in that letter was to be kept in confidence. Accordingly, I find that the factor weighing against disclosure at section 21(2)(h) is relevant in the circumstances of this appeal.

Conclusion

[33] In conclusion, I find that there are no relevant factors weighing in favour of the disclosure of the letter at issue, but there are two relevant factors weighing against its disclosure. Therefore, I find that disclosure would give rise to an unjustified invasion of the affected party's personal privacy as contemplated by the mandatory exemption at section 21(1) of the *Act*. I will now consider below whether there exists a compelling public interest in the disclosure of the letter that overrides the purpose of that exemption.

C. Is there a compelling public interest in the disclosure of the letter that clearly outweighs the purpose of the section 21(1) exemption?

[34] Section 23 states:

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.

[35] For section 23 to apply, two requirements must be met. First there must be a compelling public interest in disclosure of the record. Second, this interest must clearly outweigh the purpose of the exemption.

[36] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the

⁸ Order PO-1670.

records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.⁹

[37] The appellant submits that it is in the public interest and consistent with the Ontario government's policies with respect to openness and transparency to disclose information that was used as "factual material" by the ministry to justify the sale of Crown land. He further submits that any information used as "fact" should not be withheld pursuant to section 21(1) as these statements of fact are already in the public domain as a result of a related law suit and settlement.

Finding

[38] In considering whether there is a "public interest" in the disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government.¹⁰ Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, 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.¹¹ A public interest does not exist where the interests being advanced are essentially private in nature.¹² Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.¹³

[39] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".¹⁴

[40] Any public interest in *non*-disclosure that may exist also must be considered.¹⁵ A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".¹⁶

⁹ Order P-244.

¹⁰ Orders P-984 and PO-2607.

¹¹ Orders P-984 and PO-2556.

¹² Orders P-12, P-347 and P-1439.

¹³ Order MO-1564.

¹⁴ Order P-984.

¹⁵ *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

¹⁶ Orders PO-2072-F, PO-2098-R and PO-3197.

[41] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation¹⁷
- the integrity of the criminal justice system has been called into question¹⁸
- public safety issues relating to the operation of nuclear facilities have been raised¹⁹
- disclosure would shed light on the safe operation of petrochemical facilities²⁰ or the province's ability to prepare for a nuclear emergency²¹
- the records contain information about contributions to municipal election campaigns²²

[42] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations²³
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations²⁴
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding²⁵
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter²⁶

¹⁷ Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).

¹⁸ Order PO-1779.

¹⁹ Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805.

²⁰ Order P-1175.

²¹ Order P-901.

²² *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.

²³ Orders P-123/124, P-391 and M-539.

²⁴ Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

²⁵ Orders M-249 and M-317.

²⁶ Order P-613.

- the records do not respond to the applicable public interest raised by appellant²⁷

[43] In Order PO-3353-I, Adjudicator Smith considered whether a compelling public interest in the disclosure of other records relating to the same right of way existed. In that appeal, there were a number of different types of records relating to the sale of the Crown land and the appellant took the same position, alleging that a compelling public interest existed in the disclosure of any information provided to the ministry that was used as “fact” to justify its position with respect to the sale of the land.

[44] In that order, Adjudicator Smith found:

Only Records 6 and 7, which are records prepared by the landowner, could be said to contain factual information about the land. Record 6 is dated 2008 and is a draft PowerPoint presentation about the history of the land. Record 7 is dated 2009 and is a letter to the Minister attaching a chronology of the neighbourhood dispute about the land.

There is no indication in these records that they were actually used by the ministry to justify its position with respect to the sale of the land. I find that the records do not respond to the applicable public interest raised by appellant. I find that the interests being advanced in Records 6 and 7 are essentially private in nature and do not raise issues of more general application.

...

I find that the personal information in Records 6 and 7 do not serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, 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.

[45] I agree with Adjudicator’s Smith’s reasoning and finding in Order PO-3353-I and find it to be relevant in the circumstances of the current appeal.

[46] The record at issue in the current appeal is a letter drafted by the affected party who was ultimately one of the individuals to whom the Crown land was sold. There is no evidence before me that any of the information contained in the letter was used by the ministry as the basis upon which it made its decision with respect to the sale of the land. As with the records at issue in PO-3353-I, in my view, the letter does not respond

²⁷ Orders MO-1994 and PO-2607.

to the public interest raised by the appellant, but addresses interests that are essentially private in nature and not of a more general application. As a result, I find that the disclosure of the information in the letter would not serve the purpose of informing or enlightening the citizenry about the activities of government or its agencies, 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.

[47] Accordingly, I find that there is not a compelling public interest in the disclosure of the letter under section 23 of the *Act*. As I have found that no compelling public interest exists in its disclosure, there is no need for me to go on to the second stage of the test to establish whether there is compelling public interest in the disclosure of the letter that clearly outweighs the purpose of the personal privacy exemption in section 21 of the *Act*.

ORDER:

I uphold the ministry's decision that the record is exempt from disclosure and dismiss the appeal.

Original Signed by: _____
Catherine Corban
Adjudicator

_____ June 26, 2014