Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3409

Appeal PA13-22

Ministry of Natural Resources and Forestry

October 10, 2014

Summary: The ministry received a request under the *Freedom of Information and Protection of Privacy Act* for access to records relating to its decision to sell a strip of Crown land. After notifying several individuals under section 28 of the *Act* (the affected parties), the ministry decided to grant access to many of the responsive records, in whole or in part. An affected party appealed the ministry's decision to disclose some of the records, claiming that they are exempt from disclosure pursuant to the mandatory personal privacy exemption at section 21(1) of the *Act* as well as the discretionary personal privacy exemption at 49(b) of the *Act*. The adjudicator allows the appeal, in part, and orders the ministry to withhold the majority of the information at issue in record 1, but upholds the ministry's decision to disclose the information at issue in record 2.

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(3)(f), 47 and 49.

Orders and Investigation Reports Considered: Orders MO-1524-I, MO-1323 and MO-2954

OVERVIEW:

[1] The Ministry of Natural Resources (MNR or the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> … a copy of all documents pertaining to the decision to sell the [right of way] (the Crown Land part of [named address]):
>
> - internal memos, minutes of meetings, correspondence, emails, etc. that:
> - pertain to the MNR position with respect to the decision to sell,
> - relate to the MNR's claim that the objections raised by local municipalities and residents have been addressed, and
> - address the issue of MNR's decision to sell in any way.

[2] The ministry identified approximately 550 pages of records responsive to this request. It then provided notice of the request to two towns and nine individuals (the affected parties) and sent them copies of the specific records that the ministry was proposing to disclose to the requester, the disclosure of which the ministry was of the view might affect their interests. The ministry sent each affected party only a few of the approximately 550 pages of responsive records.

[3] The ministry's notice letter to one of the purchasers of the Crown land (the appellant in the appeal before me), read in part as follows:

> Release of the following records, which are responsive to the request, may affect your interests:
>
> - A0171240_1
> - A0171681_1

[4] Two of the notified affected parties, including the appellant in the current appeal, objected to the disclosure of their personal information. The ministry then issued a decision granting partial access to the records, with some information severed on the basis of the discretionary exemptions found at sections 13(1) (advice to government) of the *Act*, 19 (solicitor-client privilege) and 49(b) (personal privacy), as well as the mandatory personal privacy exemption at section 21(1). The ministry's letter to the appellant stated in part:

> After consideration of your representations on why the records should not be disclosed, I have decided to partially disclose the records. The shaded sections in the attached copies indicate information which will be blacked out on the copy provided to the requester. This information has been severed under section 21 of the Act.
>
> Please also be aware that there are other documents contained within this request which may affect your personal interests. With regard to these additional records, the ministry has redacted your personal information under section 21 of the Act.

[5] While the requester did not appeal the ministry's decision to withhold some information, both affected parties appealed the ministry's decision to this office, objecting to the ministry's decision to grant partial access to the records. One of the appeals was resolved, and this decision addresses the other appeal.

[6] In her letter of appeal, the appellant stated that while she believed that the ministry had made appropriate severances to one of the records about which she had been notified, further information should be severed from the other record. The appellant also advised that she was uncomfortable with the knowledge that there are other documents in issue, the contents of which she is unaware.

[7] During mediation, the requester explained to the mediator that he wants the records so as to better understand what considerations the ministry took into account when making its decision to sell the strip of Crown land. The requester does not believe that any of the information is personal information, because it relates to business conducted by the Ontario government which should be conducted with openness and transparency. The appellant explained to the mediator that she was opposed to any information about her being disclosed to anyone.

[8] As no further mediation was possible, the mediator issued a mediator's report and the appeal was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. The mediator's report described the records in issue as follows:

> The records remaining at issue consist of the records listed on the Index of Records relating to the sale of the right of way and containing references to the appellant and specifically records AO171240-1 and AO171681-1.

[9] The adjudicator initially assigned to this appeal sent a Notice of Inquiry and an index of records to the appellant, the ministry and the requester, and invited representations from all parties. In the Notice of Inquiry, the adjudicator described the records at issue in the same manner as in the mediator's report set out above. The adjudicator invited submissions on the applicability of the personal privacy exemptions at sections 21(1) and 49(b) of the *Act*. In addition, given the requester's position expressed during mediation, the adjudicator added the application of the public interest override at section 23 as an issue in the appeal.

[10] The parties' representations were shared in accordance with section 7 of the Information and Privacy Commissioner's *Code of Procedure* and *Practice Direction 7*. Portions of the appellant's representations were withheld in accordance with the confidentially criteria set out in *Practice Direction 7*.

[11] During the adjudication stage of the appeal, the ministry advised that during the mediation stage, it had provided the requester with partial access to all of the records in issue, in accordance with its access decision, save and except the two records about which it had notified the appellant, and four records that were the subject of the other affected party's appeal. The ministry explained that it had been under the impression that, with the exception of those six records, none of the records were any longer in issue.

[12] The adjudicator invited the appellant to comment upon this development in her reply submissions; however, the appellant did not do so. As a result, only the two records that the ministry sent to the appellant with its notice letter remain at issue in this appeal.[1]

[13] In this order, I find that record 1 contains the personal information of the appellant only, while record 2 contains the personal information of both the original requester and the appellant. I find that the majority of the information at issue in record 1 is exempt from disclosure pursuant to the mandatory personal privacy exemption at section 21(1) of the *Act*, and that there is no compelling public interest in the disclosure of that information. I find that while the information in record 2 falls within the discretionary personal privacy exemption at section 49(b) of the Act, the ministry appropriately exercised its discretion in deciding to disclose it.

RECORDS AT ISSUE:

[14] The records remaining at issue consist of two records listed on the Index of Records, identified as records AO171240-1 and AO171681-1. For ease of reference, I will refer to these records below as record 1 and record 2, respectively. The ministry severed portions of these documents, and the requester did not appeal the severances. Accordingly, the only information remaining at issue consists of the unsevered portions of records 1 and 2.

ISSUES:

A: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[1] While the appellant advised in her letter of appeal that she was of the view that the ministry had appropriately severed one of the records at issue, during mediation she stated that she did not want any information about her released. Therefore, in this decision I will consider the applicability of the claimed exemptions to both records.

B: Does the mandatory personal privacy exemption at section 21(1) or the discretionary personal privacy exemption at section 49(b) apply to the information at issue?

C: Did the ministry exercise its discretion under section 49(b) and if so, should this office uphold the exercise of discretion?

D: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 21(1) and/or section 49(b) exemptions?

DISCUSSION:

Issue A: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[15] 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) in part as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (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,
>
> (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,

[16] 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.[2]

[2] Order 11.

[17] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[18] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[3] However, 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.[4]

[19] In addition, to qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[5]

Representations

[20] The appellant, citing Orders PO-2084 and PO-1786-1, submits that the records in issue relate to the purchase of the strip of Crown land and therefore they contain her personal information.

[21] The ministry submits that the identifying information has been severed from record 1, leaving the body of the email which contains only an expression of opinion. It further submits that record 2 has been severed, leaving only the names of ministry staff and a reference to a particular matter.

[22] The original requester submits that any records that present the appellant's concerns and justification for buying the Crown land do not constitute her personal information, but rather, contain information about the nature of the Crown land that is the basis for the ministry's decision. The requester submits that personal information such as names, address, contact information and financial information could be severed from the records.

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[3] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[4] Orders P-1409, R-980015, PO-2225 and MO-2344.
[5] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

Analysis and findings

[23] Record 1 consists of a chain of emails passing between the appellant and ministry staff, as well as between ministry staff themselves. This record does not contain any personal information of the requester. However, although the ministry has severed the appellant's name from the email chain, I find that it is reasonable to expect that disclosure of the record would identify her, given the content of the email. Some of the unsevered portions relate to financial transactions in which the appellant has been involved, and as such, falls within paragraph (b) of the definition of personal information in section 2(1) of the *Act*. Some portions contain the names of various ministry staff.

[24] Record 2 consists of another chain of emails passing between the appellant and ministry staff, and between ministry staff themselves. It also contains recorded information about the requester, together with his name, and as such, falls within the introductory wording of the definition of personal information in section 2(1) of the *Act*. The unsevered portions of record 2 contain the names of various ministry staff, and a reference to a particular matter. Again, although the appellant's name has been severed, given the events which have led to this appeal, I find that the identity of the appellant and the subject matter of the email would be easily inferable from the disclosure of the unsevered passage. The subject matter relates to financial transactions in which the appellant has been involved. Accordingly, I find that the reference to this subject matter also falls within paragraph (b) of the definition of personal information in section 2(1) of the *Act*.

[25] As indicated, both records contain the names of various ministry staff, which identify these individuals in their professional capacity only, and not their personal capacity. Accordingly, I find that they do not reveal any personal information about these individuals. As these portions do not qualify for the personal privacy exemption, and no other exemption applies, they can be disclosed.

[26] I will now consider whether the remainder of the portions at issue in records 1 and 2 are exempt from disclosure, either under the mandatory personal privacy exemption at section 21(1) of the *Act*, in the case of record 1, or under the discretionary personal privacy exemption at section 49(b) of the *Act*, in the case of record 2.

Issue B: Does the mandatory exemption at section 21(1) or the discretionary exemption at section 49(b) apply to the information at issue?

[27] I have found above that record 1 contains the personal information of the appellant only, while record 2 contains the personal information of the requester and the appellant.

[28] 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 the personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 49(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[29] In contrast, under section 21(1), where a record contains personal information of another individual but *not* the requester, the institution is prohibited from disclosing that information unless one of the exceptions in sections 21(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy under section 21(1)(f).

[30] The section 21(1)(a) to (e) exceptions to the mandatory section 21(1) exemption are relatively straightforward. If any of paragraphs (a) to (e) of section 21(1) apply, the personal privacy exemption is not available. None of paragraphs (a) to (e) apply to the information at issue in this appeal.

[31] The section 21(1)(f) exception, allowing disclosure if it would not constitute an unjustified invasion of personal privacy, is more complex, and requires a consideration of sections 21(2), (3) and (4). Examination of sections 21(1) to (4) also provides guidance in determining whether the unjustified invasion of personal privacy threshold is met for the purposes of the discretionary exemption at section 49(b).

[32] 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. However, section 21(4) lists situations that would *not* be an unjustified invasion of personal privacy, even if the record falls within one of the presumptions listed in section 21(3).

[33] For records claimed to be exempt under section 21(1) (ie., records that do not contain the requester's personal information), a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if a section 21(4) exception or the "public interest override" at section 23 applies.[6] If the records are not covered by a presumption in section 21(3), section 21(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy, and the information will be exempt unless the circumstances favour disclosure.[7]

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[6] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.
[7] Order P-239.

[34] On the other hand, for records claimed to be exempt under section 49(b) (ie., records that contain the requester's personal information), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.[8]

Representations

[35] The appellant relies on the presumption in paragraph 21(3)(f), which reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

[36] The appellant also submits that the factor in favour of disclosure at section 21(2)(a) (public scrutiny) does not apply, because there was proper consultation with affected parties throughout the purchase of the strip of Crown land in question.

[37] The ministry submits that even if the records as severed still contain personal information, their release would not constitute an unjustified invasion of personal privacy, because they do not set out details of the transaction nor do they provide any personal information which is not already known to the requester or other interested members of the public.

[38] The original requester submits that there is a public interest in disclosure of the records (an argument I address separately below), but that it is appropriate under section 21(1) to sever personal information such as the appellant's name, address, contact information and financial information.

Analysis and findings

Record 1

[39] As record 1 contains the personal information of only the appellant, the appropriate personal privacy exemption to consider is the mandatory exemption at section 21(1).

[40] I find that the presumption in section 21(3)(f) applies to the information at issue in record 1, as it consists of personal information about the appellant's financial history

[8] Order MO-2954.

or activities. Since section 21(3)(f) applies, disclosure of the personal information is presumed to be an unjustified invasion of personal privacy under section 21(1). Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if one of the factors in section 21(4) applies. The parties did not argue that any of the factors in section 21(4) apply and I find that none do in the present appeal.

[41] The ministry argues that the information is already known to the requester and interested members of the public. However, while the fact that information is known to the requester could be considered as an unlisted factor favouring disclosure under section 21(2), it cannot overcome the section 21(3)(f) presumption.

[42] Because of the ministry's heavy reliance on its submission that the requester and the interested public are already aware of the information at issue, I will also address the possible application of the "absurd result" principle to the information at issue.

Absurd result

[43] The ministry argues that the records do not set out any personal information that is not already known to the requester and interested members of the public. Whether or not 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) or section 21(1), as the case may be, because to find otherwise would be absurd and inconsistent with the purpose of the exemption.[9] This is known as the "absurd result principle". This principle was originally developed by this office to address situations where the requester originally supplied the information (for example, the requester's own witness statement) and yet could not have access to it under the *Act* because it contained the personal information of others. The absurd result principle is thus consistent with the *Act's* emphasis on a person's right to have access to his or her own personal information.

[44] The absurd result principle has been applied, therefore, in appeals where, for example, the requester was seeking access to his or her own witness statement;[10] where the requester was present when the information was provided to the institution;[11] or where the information was clearly within the requester's knowledge.[12] However, the absurd result principle may not apply even if the information was supplied by the requester or is clearly within the requester's knowledge, if disclosure would be inconsistent with the purpose of the section 21(1) or 49(b) exemptions.[13]

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[9] Orders M-444 and MO-1323.
[10] Orders M-444 and M-451.
[11] Orders M-444 and P-1414.
[12] Orders MO-1196, PO-1679 and MO- 1755.
[13] Orders M-757, MO-1323, MO-1378.

[45] As noted above, the absurd result principle had its genesis in cases where the record at issue contains the requester's own personal information. In Order MO-1323, former Adjudicator Cropley stated:

> In general, I find that the fact that a record does not contain the appellant's personal information weighs significantly against the application of the "absurd result" to the record. However…all of the circumstances must be considered in determining whether this is one of those "clear cases" in which the absurdity outweighs the privacy protection principles.

[46] More recently, this office's approach to the application of the absurd result principle in appeals involving the personal information of individuals other than the requester has been described as follows (again by former Adjudicator Laurel Cropley):

> One of the primary purposes of the *Act* (as set out in section 1(b)) is to protect the privacy of individuals. Indeed, there are circumstances where, because of the sensitivity of the information, a decision is made not to apply the absurd result principle (see, for example, Order PO-1759). In other cases, after careful consideration of all of the circumstances, a decision is made that there is an insufficient basis for the application of the principle (see, for example, Orders MO-1323 and MO-1449). In these situations, the privacy rights of individuals other than the requester weighed against the application of the absurd result principle.[14]

[47] While record 1 does not contain any personal information of the requester, and the requester did not supply to the institution the information in this record, it does appear from my review of the record, as well as the records that the ministry has released to the requester, that some, but not all of the unsevered material in record 1 may be within the knowledge of the requester. However, while the ministry argues that the information is within the requester's knowledge, it does not elaborate on how this is the case, nor does it expressly submit that the absurd result principle should apply to this information. In the absence of such submissions, and taking into account the fact that the record does not contain any personal information of the requester, I find that this is not one of those "clear cases" in which the absurd result principle outweighs the personal privacy protection principles set out in section 21(1) of the *Act*. Therefore, I find that all of the personal information at issue in record 1 is exempt from disclosure under the mandatory personal privacy exemption at section 21(1) of the *Act*.

[48] The requester argues, however, that the "public interest override" at section 23 of the *Act* applies to the records. I will consider below under heading "D" whether section 23 applies to the information in issue in record 1.

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[14] Order MO-1524-I.

Record 2

[49] Record 2 contains the personal information of both the requester[15] and the appellant and so the discretionary exemption at section 49(b) is the appropriate personal privacy exemption to consider.

[50] I find that the presumption in section 21(3)(f) applies to the information at issue in record 2, as it consists of personal information about the appellant's financial history or activities. The significance of this presumption differs between the section 49(b) and section 21(1) analyses. As noted above, the Divisional Court has held that under the mandatory exemption at section 21(1), a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if one of the factors in section 21(4) applies (or if the public interest override at section 23 applies).[16]

[51] However, in determining whether disclosure would be an unjustified invasion of personal privacy under the discretionary exemption at section 49(b), this office has recently adopted a different approach. In Order MO-2954, former Adjudicator Cropley noted that section 38(b) of the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* (the equivalent of section 49(b) of the *Act*) does not directly incorporate by reference the analysis under section 14 of MFIPPA (the equivalent of section 21 of the *Act*). Adjudicator Cropley explained that, unlike section 14, section 38(b) is discretionary and permissive in nature, which reflects the intention of the legislature that a careful balancing of privacy rights versus the right to access one's own personal information is required in cases where a requester is seeking his own personal information. She concluded that the approach taken under section 38(b) in assessing whether disclosure of the personal information in the record would constitute an unjustified invasion of privacy must involve a full balancing of the two competing interests, taking into consideration the factors and presumptions in sections 14(2) and (3) as part of that analysis.

[52] The ministry argues that the personal information is already known to the requester and interested members of the public. I find that the fact that the information is known to the requester could be considered as an unlisted factor favouring disclosure under section 21(2).

[53] In the particular circumstances of this appeal, however, I find that the factor under section 21(3) favouring privacy protection outweighs this unlisted factor favouring disclosure. In so deciding, I have considered the fact that the requester's

[15] Although the portion of record 2 that contains the requester's person information has been severed by the ministry, the approach of this office is to view the record as a whole in order to determine which personal privacy exemption might apply. In this case, since the record as a whole relates in part to the requester, the appropriate personal privacy exemption to consider is the discretionary exemption under section 49(b) of the *Act* and not the mandatory exemption under section 21(1).

[16] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

personal information appears in the portion of the record that the ministry severed. The information at issue contains only the appellant's personal information. I find this to be a significant factor weighing against disclosure. Also significant is the fact that, unlike in Order MO-2954, the requester in the appeal before me does not argue that withholding the information would prevent him from exercising his legal rights. These factors diminish the weight I give to the fact that the requester knows the nature of the information at issue.

[54] I conclude that the appellant's interest in privacy protection outweighs the requester's interest in disclosure. Therefore, subject to my discussion of the absurd result principle and the ministry's exercise of discretion, I find that the personal information at issue in record 2 is exempt under section 49(b).

Absurd result

[55] Having reviewed record 2 and the records that were disclosed to the requester, it appears that the personal information in the unsevered portion of record 2 is already within the knowledge of the requester. However, as I found with record 1, I find that this is not a "clear case" in which the absurd result principle would apply to this information. Although this record as a whole does contain the requester's personal information, his personal information is contained within the portion of the record that the ministry decided to withhold pursuant to section 49(b). The portion that the ministry proposes to disclose does not contain the requester's personal information. Therefore, the policy reason for the development of the absurd result principle – to grant individuals access to their own personal information where otherwise the *Act* would not permit such access – does not apply in this case. The ministry does not expressly submit that the absurd result principle should apply to this information. In the circumstances, I decline to apply the absurd result principle. Therefore, I find that the personal information at issue in record 2 falls within the discretionary personal privacy exemption at section 49(b) of the *Act*.

[56] I conclude that, subject to my review of the ministry's exercise of discretion, the personal information at issue in record 2 is exempt from disclosure pursuant to the discretionary exemption at section 49(b) of the *Act*.

Issue C: Did the institution exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

General principles

[57] 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.

[58] 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.

[59] 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)].

Relevant considerations

[60] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons

- whether disclosure will increase public confidence in the operation of the institution

- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person

- the age of the information

- the historic practice of the institution with respect to similar information.

[61] The appellant submits that the ministry should take into account the relevant circumstances of this case in exercising its discretion.

[62] The ministry did not make submissions specifically on its exercise of discretion in respect of its decision to disclose the unsevered portion of record 2, perhaps because of its reliance on its submission that this information is not exempt from disclosure under section 49(b) to begin with. In the particular circumstances of this appeal, I am prepared to take a holistic view of the ministry's representations in determining whether it properly exercised its discretion when it decided to disclose the information at issue in record 2.

[63] In its submissions relating to the issue of whether disclosure of the information at issue would constitute an unjustified invasion of personal privacy, the ministry submits as follows:

- the records relate to a land sale that has been the subject of public consultation and some public debate, and the information is already public;

- the records do not set out any personal information that is not already known to the requester; and

- the records do not set out the details of the financial transaction in issue.

[64] Although the ministry did not make representations specifically on its exercise of discretion, I find that the ministry did exercise its discretion and that above factors are relevant to the ministry's exercise of discretion. In deciding to disclose the information at issue in record 2, it was legitimate for the ministry to take into account both the fact that the information is already in the public domain, as well as the fact that the information does not set out details of the financial transaction in issue – in other words, the information, relatively speaking, is not highly sensitive.

[65] Under the circumstances, I uphold the ministry's exercise of discretion and its decision to disclose the personal information at issue in record 2, notwithstanding the fact that it could have withheld it pursuant to section 49(b) of the *Act*.

[66] The ministry's exercise of discretion does not come into play with respect to the personal information at issue in record 1, because, as noted above, that information is exempt under section 21(1), a mandatory exemption. I will now consider whether the information in record 1 that I have found to be exempt under section 21(1) is nonetheless subject to disclosure under the public interest override at section 23.

Issue D: Is there a compelling public interest in disclosure of record 1 that clearly outweighs the purpose of the section 21(1) exemption?

[67] The original requester submits that it is in the public interest to release any information that was used as "factual material" by the ministry to justify the sale of Crown land. He relies on the "public interest override" in section 23 of the *Act* applies in this case. This section reads:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[68] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.[17]

[69] 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 Information and Privacy Commissioner reviews the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[18]

Compelling public interest

[70] In considering whether there is a "public interest" in 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.[19] Previous orders have stated that in order to find a compelling public interest in disclosure, the

[17] Order P-1398.
[18] Order P-244.
[19] Orders P-984, PO-2607.

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.[20]

[71] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[21]

[72] Some examples of where compelling public interest has been found to exist are

- the records relate to the economic impact of Quebec separation[22]
- the integrity of the criminal justice system has been called into question[23]
- public safety issues relating to the operation of nuclear facilities have been raised.[24]

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

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations[25]
- the records do not respond to the applicable public interest raised by appellant.[26]

Representations

[74] The original requester submits:

> It is my contention that it is in the 'public interest' to release, in a manner consistent with the Ontario Government's and the MNR's policies with respect to openness and transparency, any information that was used as 'factual material' by the MNR to justify the sale of the Crown land.

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[20] Orders P-984 and PO-2556.
[21] Order P-984.
[22] 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.)].
[23] Order PO-1779.
[24] 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.
[25] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[26] Orders MO-1994 and PO-2607.

> This applies to any information provided by the appellant that was used by the MNR as 'fact' to justify its position with respect to the sale of the Crown land, especially the MNR's position with respect to 'personal privacy'. For example, I learned, through an FOI request filed with the OPP, that between 2008 and 2010, the appellant filed three complaints.

[75] The ministry did not make representations on the public interest issue. The appellant disputes that the strip of Crown land was ever public land, and asserts that only three individuals, including the requester, believe that there is a public interest in the disposition of the land.

[76] In this case, I find that record 1 does not respond to the public interest raised by the requester. While the requester claims that there is a public interest in the release of any information provided by the appellant that was used by the ministry to justify its position with respect to the sale of the Crown land, it is clear from my review of record 1 that it does not contain any such information.

[77] Furthermore, the requester has now received considerable information from the ministry as a result of this freedom of information request. Having reviewed the information that was released to him, I am satisfied that it is adequate to address any public interest considerations.

[78] I conclude that there is no compelling public interest in the disclosure of record 1. That being the case, the public interest override at section 23 of the *Act* does not apply to it.

ORDER:

1. I allow the appeal in part. I order the ministry to withhold the information at issue in record 1, being the unsevered portions of record AO181240-1. The names of the ministry staff, however, are to be disclosed. This disclosure is to take place by **November 18, 2014** but not before **November 12, 2014**.

2. I dismiss the appeal in part and order the ministry to disclose the information at issue in record 2, being the unsevered portions of record AO171681-1. This disclosure is to take place by **November 18, 2014** but not before **November 12, 2014**.

3. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with copies of the records disclosed to the requester.

Original Signed By: October 10, 2014
Gillian Shaw
Adjudicator