

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3866

Appeal PA16-261

Ministry of the Environment, Conservation and Parks

July 20, 2018

**Summary:** The appellant appeals the ministry's decision to disclose certain records to a requester. The appellant claims the records contain their personal information and should therefore be exempt under section 21(1) (personal privacy) of the *Act*. The appellant also claims the ministry was required to notify them under section 28(1)(b) of the *Act* of other records the ministry intends to disclose. In this order, the adjudicator upholds the ministry's decision and dismisses the appeal. Specifically, the adjudicator finds the ministry fulfilled its notice obligations under section 28(1)(b) and the records at issue do not contain the appellant's personal information.

**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*), 22(a) and 28(1)(b).

**Orders and Investigation Reports Considered:** Orders P-1137, PO-1657, PO-1694-I and PO-3545.

### OVERVIEW:

[1] Appeal PA16-261 stems from the related Appeal PA15-75.

#### PA15-75

[2] The requester in PA15-75 submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of the Environment and Climate Change (now the Ministry of the Environment, Conservation and Parks) (the ministry) for records related to the polychlorinated biphenyls (or PCBs) in the West

Lincoln/Smithville area. For the sake of clarity, I will refer to the requester as the *individual* in this order.

[3] The ministry located records responsive to that request and notified an affected party under section 28(1) of the *Act* for their position on the disclosure of the records. The affected party, who I will refer to as the *company*, submitted representations to the ministry.

[4] The ministry issued an access decision to both the company and the individual, granting the individual partial access to the records. The ministry did not disclose any of the responsive records to the individual, pending a potential appeal by the company.

[5] The company appealed the ministry's decision to this office and the IPC opened Appeal PA15-75. The company claimed the application of the mandatory exemption in section 17(1) (third party information) to some of the records.

[6] During mediation, the individual asked the ministry to disclose all the records that were not the subject of Appeal PA15-75, i.e. the records for which the company was not notified. The ministry advised the mediator it would not release the records that were not the subject of the appeal until the appeal resolved. After further discussions, the ministry indicated it would release the records not subject to the appeal if the company (the appellant in PA15-75) did not object to their disclosure. The ministry shared the index of records identifying the records not subject to third party notification with the company.

[7] Upon review of the index, the company advised the mediator the records it was not notified of may contain information that would be subject to section 17(1) of the *Act*. The company indicated that without receiving notice, it could not indicate whether it objected to the disclosure of these records to the individual.

[8] The ministry took the position that notice was not needed, as section 17(1) of the *Act* does not apply to these records. The company indicated the ministry should have notified it of these records under section 28(1) prior to making its decision.

[9] The company asked the ministry for a copy of the records for which it had not been notified. The ministry refused. The company then filed an access request for these records. In light of its request and subsequent Appeal PA16-261, the company asked for Appeal PA15-75 to be put on hold, pending the resolution of Appeal PA16-261. The adjudicator originally assigned placed Appeal PA15-75 on hold. Appeal PA15-75 was transferred to me to complete the inquiry and I decided to keep the appeal on hold pending the resolution of this appeal.

### **PA16-261**

[10] As noted above, the company (the appellant in Appeal PA15-75) submitted a request to the ministry under the *Act* for the records listed in ministry's index of records for PA15-75. The ministry identified the responsive records and provided notice under

section 28 of the *Act* to the individual (the requester in Appeal PA15-75) as an affected party. The individual submitted representations to the ministry.

[11] After considering the individual's representations, the ministry issued a decision to the company and the individual granting the company partial access to the responsive records. The ministry advised the parties it withheld portions of some of the records claiming the application of the mandatory personal privacy exemption in section 21(1) of the *Act*. The company did not appeal the ministry's decision to withhold parts of the record.

[12] However, the individual appealed the ministry's decision to this office and Appeal PA16-261 was opened. The individual claims that none of the records the ministry notified them of should be disclosed to the company because they contain their personal information.

[13] During mediation, the company confirmed its interest in all the records the ministry decided to disclose to it. The individual took the position that none of the records responsive to the request should be disclosed because they are subject to the section 21(1) exemption.

[14] The ministry indicated it would disclose the records the individual had not been notified to the company if the individual consented. The individual did not consent to the disclosure of these records. The ministry provided the individual a copy of an index of records identifying the records not subject to third party notification. The individual claimed the ministry should have notified them of these records prior to issuing a decision pursuant to section 28(1) of the *Act*. The ministry asserts it was not required to notify the individual of these records because section 21(1) does not apply to these records.

[15] The individual confirmed their position the ministry should have notified them of all the records under section 28 and that section 21(1) applies to all the records the ministry intends to disclose.

[16] Mediation did not resolve the issues in this appeal and the appeal moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. I began my inquiry by inviting the ministry and the individual to make submissions. Both made submissions. I then invited the individual to make further submissions in response to the ministry's submissions, which were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The individual submitted supplementary representations.

[17] In the discussion that follows, I uphold the ministry's decision and dismiss the appeal. I order the ministry to disclose the records in accordance with its decision.

## **RECORDS:**

[18] The following records identified in the ministry's index of records are at issue: 2-3, 9, 10-16, 17, 18-29, 30-35, 36-42, 43-46, 47, 48-52, 56-72, 73-75, 76-79, 80-84, 97, 98-102, 115-126, 127, 160, 161-171, 197-198, 199-200, 201 and 202.

## **PRELIMINARY ISSUE**

[19] In their representations, the individual raises the application of section 22(a) to the email records in duplicate form in Records 98-102, 115-120 and 121-126. Section 22(a) is a discretionary exemption and states,

A head may refuse to disclose a record where the record or the information contained in the record has been published or is currently available to the public.

The individual submits that the vast majority of these records contain publicly available information such as quotes from public newspapers and a ministry report. The individual submits these portions should be withheld from disclosure on the basis of section 22(a).

[20] The IPC has considered whether an affected party may raise the possible application of discretionary exemptions in the context of the *Act* numerous times. The IPC has found, generally, that parties other than the institution are not permitted to raise discretionary exemptions not raised by the institution.<sup>1</sup> The leading statement on this principle can be found in Order P-1137:

Because the purpose of the discretionary exemptions is to protect institutional interests, it would only be in the most unusual of cases that an affected party could raise the application of an exemption which has not been claimed by the head of an institution. Depending on the type of information at issue, the interests of such an affected person would usually only be considered in the context of the mandatory exemptions in section 17 or 21(1) of the *Act*.

Based on my review of the circumstances, I am not satisfied this is one of those *most unusual of cases* in which I should consider the application of section 22(a) to Records 98-102, 115-120 and 121-126.

[21] In any case, I reviewed the information the individual claims to be exempt under section 22(a) and I find it would not be exempt. Section 22(a) is intended to provide institutions with the option of referring a requester to a publicly available source of information where the balance of convenience favours this method of alternative

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<sup>1</sup> See Orders PO-1705 and MO-2792 among others.

access. It is not intended to be used to avoid an institution's obligations under the *Act*.<sup>2</sup> In order to rely on the section 22(a) exemption, an institution must take adequate steps to ensure that the records alleged to be publicly available are the records responsive to the request.<sup>3</sup>

[22] In this appeal, it appears the individual is raising the application of section 22(a) to avoid disclosure of Records 98-102, 115-120 and 121-126. Furthermore, while portions of the records may have been taken from disparate publicly available sources, the responsive records themselves (i.e., the emails) are not publicly available. Therefore, I find that section 22(a) has no application in this appeal.

## **ISSUES:**

- A. Was the ministry required to provide notice to the individual pursuant to the notice requirements in section 28(1) of the *Act* regarding Records 2-3, 10-16, 18-29, 36-42, 43-46, 47, 48-52, 56-72, 73-75, 76-79, 80-84, 97, 98-102, 127, 160, 197-198, 199-200, 201 and 202?
- B. Does the information at issue contain *personal information* as defined in section 2(1) and, if so, to whom does it relate?

## **DISCUSSION:**

**Issue A: Was the ministry required to provide notice to the individual pursuant to the notice requirements in section 28(1) of the *Act* regarding Records 2-3, 10-16, 18-29, 36-42, 43-46, 47, 48-52, 56-72, 73-75, 76-79, 80-84, 97, 98-102, 127, 160, 197-198, 199-200, 201 and 202?**

[23] According to the ministry's Index of Records, the ministry did not notify the individual of and decided to disclose the following records, either in whole or in part: 2-3, 10-16, 18-29, 36-42, 43-46, 47, 48-52, 56-72, 73-75, 76-79, 80-84, 97, 98-102, 127, 160, 197-198, 199-200, 201 and 202. Section 28(1) sets out an institution's obligations under the *Act* to provide notice of an access request in the following circumstances:

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

(a) that the head has reason to believe might contain information referred to in subsection 17(1) that affects the interest of a person other than the person requesting information; or

(b) 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),

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<sup>2</sup> Orders P-327, P-1114 and MO-2280.

<sup>3</sup> Order MO-2263.

the head shall give written notice in accordance with subsection (2) to the person to whom the information relates.

I will consider whether the ministry fulfilled its requirements under section 28(1)(b) because the individual submits the records contain their personal information. In order to discharge his or her responsibilities under section 28(1)(b), a head must provide notice with respect to any responsive record that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of section 21(1).

### ***Representations***

[24] The ministry submits the records for which it did not notify the individual consist of a Provincial Officer's notes, remediation program summary reports prepared by the ministry, internal email correspondence exchanged between ministry staff, decision documents and staff meeting notes. The ministry submits these records were created internally and exchanged between ministry staff for purposes internal to the ministry's review process.

[25] The ministry takes the position that the records for which it did not provide notice do not contain personal information relating to the individual as defined in section 2(1) of the *Act*. As such, disclosure of these records cannot result in an unjustified invasion of the individual's personal privacy.

[26] The ministry submits it fulfilled the notification requirements under section 28(1) by providing notice to the individual for records the ministry had reason to believe contained their personal information.

[27] The individual did not make submissions on the notice requirement in section 28(1)(b) in their original representations. I shared the ministry's representations with the individual and invited them to make submissions in response. The individual submits the ministry should have notified them of Record 97 and 160, at least. The individual submits Record 97 contains their personal information and Record 160 is an attachment to an email they sent to the ministry.

### ***Analysis***

[28] The responsibility to fulfil the notification requirements in section 28 rests with institutions and not the IPC.<sup>4</sup> Generally, the IPC does not play a role in reviewing that decision. In this case, however, the issue was raised by the individual in their third party appeal and I have reviewed the above-noted records.

[29] The purpose of the notification obligation in section 28(1)(b) of the *Act* was considered in Order PO-1657. In Order PO-1657, the adjudicator considered a situation where records containing the personal information of both an appellant and an affected

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<sup>4</sup> See Orders PO-1694-I and PO-3545.

individual were disclosed without notification under section 28(1)(b). The adjudicator 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.

[30] 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 or information at issue might contain the individual's personal information, the individual did not have the right to be notified of the proposed disclosures of them to the company.

[31] I note that past orders of this office have found that the threshold for notification under section 28(1) is low. In Order PO-1694-I, the adjudicator considered the word *might* in section 28(1)(a), which relates to section 17(1):

In order to trigger the notification requirements under section 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 in section 17(1).

This analysis was adopted by the adjudicator in PO-3545 who elaborated further:

The Supreme Court of Canada, in *Merck Frosst Canada Ltd. v. Canada (Health)*, also considered the proper threshold for notification of a third party, stating that disclosure without notice is only justified in clear cases where the institution concludes that there is "no reason to believe that the record might contain exempted material."<sup>5</sup> In that case, the court also noted that section 27(1) of the *Access to Information Act* [which is similar to the equivalent notification provision in the *Act*] "does not refer to particular categories of documents but rather to particular types of information that are or may be contained in records otherwise subject to disclosure."<sup>6</sup>

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<sup>5</sup> 2012 SCC 3, at para. 72.

<sup>6</sup> *Ibid.*, at para. 64.

I agree with the above analyses and find them equally applicable to section 28(1)(b).<sup>7</sup> Where a head has reason to believe a record might contain the personal information of an individual, the head must 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).

[32] I reviewed the records the individual did not receive notice of, specifically Records 2-3, 10-16, 18-29, 36-42, 43-46, 47, 48-52, 56-72, 73-75, 76-79, 80-84, 97, 98-102, 127, 160, 197-198, 199-200, 201 and 202. In particular, I reviewed all of the information in those records the ministry proposes to disclose to the company. None of the information the ministry proposes to disclose to the company contains personal information relating to the individual. As the ministry states, these records consist of officer's notes, internal ministry correspondence, official reports, maps, official plans, decision documents, meeting notes, site plans and internal comments. The majority of these records are internal ministry communications, official reports or maps that do not contain any personal information relating to the individual. Upon review of the information at issue in the above-noted records, I find the ministry was not required to notify the individual under section 28(1)(b) because none of it contains personal information relating to them.

[33] I note the individual submits the ministry was required to notify them about Record 97. However, I reviewed Record 97 and the only information relating to the individual is their name. The ministry severed the individual's name from the record and none of the remainder of the record contains information relating to the individual. Given the ministry's severance, I find it was not required to notify the individual of Record 97.

[34] In addition, I find the ministry was not required to notify the individual of Record 160. While the individual may have attached this record to an email they sent, the record itself does not contain the individual's personal information. Furthermore, it does not appear the individual created this record; rather, it is an official plan relating to the Town of West Lincoln. I find the ministry was not required to notify the individual of Record 160 under section 28(1)(b).

[35] Accordingly, I find the above-noted records did not trigger an obligation on the part of the ministry to notify the individual pursuant to section 28 and, in accordance with the ministry's decision, must be disclosed to the company with the exception of the severances made by the ministry which the company did not appeal.

**Issue B: Does the information at issue contain *personal information* as defined in section 2(1) and, if so, to whom does it relate?**

[36] The information remaining at issue is found in Records 9, 17, 30-35, 98-102, 115-126 and 161-171, which the ministry notified the individual of but decided to disclose to the company. The individual argues that the personal privacy exemption in

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<sup>7</sup> The adjudicator in Order PO-2969-I also adopted this analysis in her assessment of section 28(1)(b).



section 21(1) applies to these records. Since section 21(1) can only apply if the records contain personal information, it is necessary to decide whether the records contain *personal information* and, if so, to whom it relates. The term *personal information* 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 individual 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. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.<sup>8</sup> To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>9</sup>

[37] To qualify as personal information, the information must be about the individual

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<sup>8</sup> Order 11.

<sup>9</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] OJ No. 4300 (C.A.).

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.<sup>10</sup> 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.<sup>11</sup>

[38] The ministry submits the following records at issue contain personal information relating to the individual: 9, 17, 98, 102, 115, 120, 121, 126, 161, 165 and 166. The ministry states it withheld this personal information from disclosure in order to protect the individual's personal privacy. The ministry submits that other than the information it withheld under section 21(1), the records do not contain personal information.

[39] The individual submits the information at issue (i.e. the information the ministry proposes to disclose) contains their personal information, including their personal views, opinions and concerns regarding the project (referring to paragraph (e) of section 2(1)). The individual also states they sent the correspondence at issue to the ministry with the implicit expectation it would be kept confidential, referring to paragraph (f) of section 2(1).

[40] The individual submits they prepared the information at issue in their capacity as a private citizen seeking information, "help and protection" from their elected officials against a "potential breach of integrity of the operation system for a toxic waste site" in their community in relation to the construction and operation of a wind project. The individual submits the records contain their personal concerns regarding the project. The individual states they did not expect these concerns to be accessible and used by private corporations through the FOI process. The individual asserts the request is intrusive.

[41] I reviewed the records and the representations submitted by the ministry and the individual. Upon this review, I find the information at issue does not contain the *personal information* of the individual. I confirm the ministry has severed the individual's name and contact information from the records at issue. For the information at issue to qualify as *personal information*, it must be reasonable to expect the individual may be identified if the information is disclosed.<sup>12</sup> In my view and as the individual submits, the statements and concerns raised in the records relate to the PCBs in the West Lincoln/Smithville area, the environmental impact of a wind project and the ministry's responses. I am not satisfied the disclosure information at issue, including the individual's questions and statements, may reasonably be expected to reveal their identity.

[42] Record 9 is a letter sent from the ministry to an individual. The ministry severed the name and contact information of the recipient. Upon review of the information that

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<sup>10</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-R and PO-2225.

<sup>11</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] OJ No. 4300 (C.A.).

<sup>12</sup> *Ibid.*

remains at issue in Record 9, I find there is nothing that may reasonably be expected to identify a specific individual. Therefore, I find the information at issue in Record 9 does not contain personal information within the meaning of section 2(1) of the *Act*.

[43] For similar reasons, I find that the information at issue in Record 17, which is an email from the ministry to an individual, does not relate to an identifiable individual. The ministry severed the name and contact information of the recipient. Without this information, I find that Record 17 does not contain personal information within the meaning of section 2(1) of the *Act*.

[44] Records 30-35, 98-102, 115-126 and 161-171 consist of correspondence sent by the individual to the ministry. The ministry severed the individual's name and contact information from these records. Based on my review of the information at issue, I find it does not relate to an identifiable individual. While the individual submits these records contain their "personal concerns", I find the disclosure of the individual's questions or concerns and statements, with their name and contact information severed, could not reasonably be expected to reveal their identity. Therefore, I find the information at issue does not fit within the definition of *personal information* in section 2(1) of the *Act*.

[45] Therefore, I find the information at issue in Records 9, 17, 30-35, 98-102, 115-126 and 161-171 does not contain *personal information* within the meaning of section 2(1) of the *Act*. In addition, as noted above, I find that none of the records considered under *Issue A* contain the individual's personal information. As the information the ministry decided to disclose does not contain *personal information*, the mandatory personal privacy exemption in section 21(1) of the *Act* cannot apply to it.

[46] I uphold the ministry's decision to disclose this information to the company and dismiss the individual's appeal.

## ORDER:

1. I uphold the ministry's decision and dismiss the appeal.
2. I order the ministry to disclose the records in accordance with its original access decision to the company by **August 27, 2018** but not before **August 21, 2018**.

Original Signed by: \_\_\_\_\_  
Justine Wai  
Adjudicator

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July 20, 2018