ORDER PO-1986

Appeal PA-010144-1 and PA-010146-1

Ministry of the Attorney General

BACKGROUND:

The Ministry of the Attorney General (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information concerning unpaid fines imposed for convictions for offences under the *Environmental Protection Act* (the *EPA*). The requester specifically sought: (i) the names of the individuals and businesses that owe the fines; (ii) the amount of the fines; (iii) the infractions; (iv) the dates and locations of the infractions; and (v) the court dates when the fines were imposed.

The Ministry informed the requester that the responsive record consists of 98 pages with 2,400 conviction entries, of which 1,770 relate to individuals (individual affected parties) and 630 relate to businesses (business affected parties).

The Ministry denied access to the individual affected party entries on the grounds that disclosure would constitute an unjustified invasion of these individuals' personal privacy under section 21 of the *Act*. Since the Ministry did not intend to disclose these entries, it did not notify the individual affected parties of the request.

The Ministry made a preliminary decision to grant access to the business affected party entries, but before doing so gave notice to those affected parties. Three of these businesses consented to the release of their information and, accordingly, the Ministry disclosed those parts of the record to the requester. Several other businesses wrote to the Ministry opposing disclosure of their information. Because six of these businesses no longer had outstanding fines, the requester agreed not to seek information relating to them. This information is therefore not at issue and should not be disclosed. Ultimately, the Ministry decided to disclose information relating to most, but not all, of the business affected parties.

NATURE OF THE APPEALS:

One of the business affected parties (the primary affected party) appealed the Ministry's decision to disclose information concerning it, relying on the exemption in section 17 of the *Act* relating to commercial information, and this office opened Appeal PA-010144-1 (the first appeal).

Later, the requester appealed the Ministry's decision to withhold some of the entries, and this office opened Appeal PA-010146-1 (the second appeal).

During the mediation process, the Ministry explained to the requester that the record does not describe the nature of the environmental infraction, the date when it occurred, or the location. On this basis the requester agreed not to pursue these parts of the request. The requester also agreed not to seek access to those entries that show the environmental fine as paid, but amounts owing for other reasons.

In the first appeal, I initially sent a Notice of Inquiry that set out the issues to the Ministry and the requester. In the Notice, I sought representations in respect of the section 17 exemption only on the issue of whether the information at issue was "supplied" to the Ministry by an affected party.

I sent the same Notice of Inquiry to the Ministry and 129 business affected parties in the second appeal, but did not send a Notice to those affected parties to which earlier notices by the Ministry were returned as undeliverable. To ensure that reasonable efforts were made to give notice to these business affected parties, this office placed an advertisement in the Toronto Star and the Globe and Mail notifying these parties of the appeal. The Ministry and 13 business affected parties provided representations.

I then sent the Ministry's complete representations to the primary affected party in the first appeal, and to the requester in the second appeal. I received representations from both.

The Ministry later provided a revised decision letter agreeing to release information relating to three additional business affected parties.

RECORD:

The record at issue is a 98-page document entitled, ICON Financial Subsystem, Outstanding Fines in Default Under Statutes '519' and '833'. The codes '519' and '833' found in the title of the record refer respectively to the *EPA* and the regulations under that statute. The appellant is seeking access to the names of individuals and businesses, the amount of the fines, and the court dates when the fines were imposed.

DISCUSSION:

PERSONAL INFORMATION

Introduction

The first issues that arise in this appeal are whether the record contains personal information for the purposes of the *Act* and, if so, to whom that personal information relates.

"Personal information" is defined under section 2(1) of the *Act* to mean recorded information about an identifiable individual, including 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 Ministry submits that the entries that relate to individual affected parties contain personal information relating to their quasi-criminal history and that the fines are financial transactions in which they have been involved. The Ministry also submits that, in some cases, entries that relate to business affected parties contain information about named individuals involved in the business, and that such information therefore is personal information.

The appellant agrees with the Ministry's submissions concerning individual affected parties, but disagrees that information relating to business affected parties is personal information as defined in the *Act*.

Most of the business affected parties that objected to disclosure made no representations with respect to whether the information at issue was personal information. However, one affected party submits that since its business is "small", disclosure of information about the business would disclose information about its owner. The primary affected party submits that it is a privately owned company and therefore public disclosure is not mandatory.

Individual affected parties

I am satisfied that the names of the individuals, together with the amounts of the fines and the dates they were imposed by the court constitute information "about" these individuals. In these circumstances, disclosure of this information would reveal the fact that these individuals were convicted of environmental offences, had fines imposed on them as a penalty, the amounts of those fines, and the dates on which the court imposed the fines. In addition, disclosure of the names would reveal the fact that the individuals have not paid the fines. Therefore, in the case of the individual affected parties, the three categories of information all qualify as "personal information" under section 2(1) of the *Act*.

Business affected parties

Information is "personal information" for the purposes of the *Act* only if it relates to an identifiable individual. The information in the record about the business affected parties includes their business names and the amount of their outstanding fines. On its face, this is not information "about an identifiable *individual*".

The Ministry agrees in its submissions that, as a general rule, information about a business is not personal information. It submits, however, that this office has found exceptions to that rule in limited circumstances, for example, where a business has a sole owner and thus information about that business may constitute information about the individual owner.

As discussed above, one affected business party submits that disclosure of information about the business would disclose information about its owner because it is a small business.

Previous orders have found that, in exceptional circumstances, information about a business entity may also relate to an identifiable individual and, accordingly, that information might qualify as that individual's personal information (Order 113). Assistant Commissioner Tom Mitchinson in Order P-364 found that information in a record containing detailed facts about a cattle farm qualified as information about identifiable individuals. He emphasized that the circumstances of that appeal represented the type of exceptional circumstance described in Order 113. In Order P-364, the affected persons were a couple who owned the cattle farming operation described in the record. Their business was the buying and selling of cattle and therefore their livelihood depended largely on the health and condition of their herd. The record set out the history, management, and health of the cattle, including a description of all purchases and sales made over a two-year period. In that order, the Assistant Commissioner stated:

> In my view, there is a sufficient nexus between the affected parties' personal finances and the contents of the report to properly consider the information contained in the record to be the personal information of the affected persons.

> Therefore, I find that the record qualifies as the personal information of the affected persons under section 2(1) of the *Act*, in the particular circumstances of this appeal.

The information at issue in that order concerned the very essence of the cattle farming operation and thus the individuals' livelihood. It is clear that disclosure of that information could have had a significant impact on the financial situation of the individuals who owned and operated the business, and that there was little if any distinction between the financial circumstances of the business and the individuals.

The circumstances in this appeal are quite different. Based on the material before me, the information at issue relating to the business affected parties does not describe the personal finances or other circumstances of any individuals to such a degree that the information "crosses over" into the personal realm, as was the case in Order P-364. This information is not comparable to that in the earlier order. Accordingly, I find the business entries in the record do not contain personal information as defined in section 2(1) of the *Act*.

To conclude, the information at issue relating to the business affected parties does not constitute personal information and therefore the exemption at section 21(1) cannot apply. The information relating to the individual affected parties does qualify as personal information and I will consider whether it is exempt under section 21.

INVASION OF PRIVACY

If information sought by a requester is found to be personal information of another individual for the purposes of the *Act*, section 21(1) of the *Act* prohibits an institution from releasing that information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. In the circumstances, the only exception under section 21(1) which could apply is paragraph (f) which permits disclosure of personal information where the disclosure would not constitute an unjustified invasion of personal privacy.

Sections 21(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the institution to consider in making this determination. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy.

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

The Ministry submits that the personal information in the record "describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness" and therefore falls within the presumption in section 21(3)(f) that disclosure would constitute an unjustified invasion of personal privacy.

The requester submits that since the personal information was "compiled from public court documents" and is part of a public record, disclosure cannot constitute an unjustified invasion of personal privacy. The requester also submits that, while the information may describe "finances, liabilities, and financial history or activities" under section 21(3)(f), each entry in the record refers only to a single fine and, as such, does not expose an individual's "overall financial situation to the public".

The primary affected party submits that the information in the record relating to its business should not be disclosed because it is "incomplete" and "inconclusive".

Findings

The appellant contends that the source of the information at issue is a public record and, as a result, disclosure of the information cannot be an invasion of personal privacy. In a number of previous orders, this office has found that personal information that may have been disclosed at one time as part of a public process is not necessarily considered "public" for all time under the *Act* (Orders 180, M-68, M-849, and M-1053). In Order MO-1378, Senior Adjudicator David Goodis found that even where photographs may have been disclosed in court proceedings open to the public, the section 21(3)(b) [the municipal equivalent of 14(3)(b)] presumption may still apply. I accept the reasoning in these previous orders and am satisfied that, in the circumstances of this appeal, disclosure of the information in the record may constitute an unjustified invasion of personal privacy even though the information was earlier disclosed in a court process.

The record provides information about unpaid fines owed by named individuals. These fines are liabilities of the individuals. The disclosure of liabilities is presumed to be an unjustified invasion of personal privacy under section 21(3)(f) of the *Act*. Accordingly, the information at issue fits squarely within the presumption.

The appellant comments that disclosure of the information in the record will reveal only a single liability and not an individual's entire financial situation. However, the presumption in section 21(3)(f) applies if the information relates to, among other things, "liabilities" or "financial history or activities". In Order PO-1834, Senior Adjudicator David Goodis stated that:

> I do not accept that the section 21(3)(f) presumption requires that the information describe the individual's "finances or income as a whole" [Orders P-1502, PO-1705, M-1154].

I adopt the reasoning in this order and accordingly, find that the presumption in section 21(3)(f) applies, and the personal information is exempt from disclosure under section 21(1)(f) of the *Act*.

In its submissions, the primary affected party states that the information in the record relating to its company was "incomplete" and "inconclusive". I assume that this submission is referring to

the factor in section 21(2)(g), that the personal information is "unlikely to be accurate or reliable". The criteria in section 21(2) are to be considered only where a presumption against disclosure has not been established under section 21(3). In this case, a presumption against disclosure has been established and therefore the section 21(2) criteria cannot be considered.

The exception in section 21(4) does not apply in the circumstances of this appeal.

THIRD PARTY INFORMATION

Section 17 of the Act prohibits a government institution from disclosing certain kinds of information obtained from third parties if, among other things, the information was "supplied in confidence" to the institution. In the Notice of Inquiry I asked for representations only on the issue of whether the information at issue was "supplied" to the Ministry. The Ministry and the primary affected party provided no representations on this issue, while the appellant submitted that the information was not supplied to the Ministry, but rather was "compiled from public court records".

I agree with the appellant that the information in the record was not supplied to the Ministry in confidence, but was derived from information in court records. Therefore I find that the exemption in section 17(1) does not apply to the record.

PUBLIC INTEREST IN DISCLOSURE

The appellant submits that the exemption in section 21 of the *Act* does not apply to the information sought in this appeal because, as provided in section 23 of the *Act*, there is a compelling public interest in disclosure of the information contained in the record.

Section 23 of the *Act* provides as follows:

> 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. [emphasis added]

It has been established in a number of prior orders that section 23 applies only if two requirements are met. First, there must exist a *compelling* public interest in the disclosure of the record. Second, that public interest must *clearly* outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.)].

The appellant submits:

> Environmental laws are written and enforced in the public interest. Everyone breathes the same air. Everyone drinks the same water. Everyone eats food grown in the same soil. Environmental pollution taints these common resources. In extreme cases, environmental pollution can cause illnesses and even death. It is clearly in the public

> interest to punish polluters and, more importantly, to deter people and companies from polluting.
>
> If environmental laws are not enforced, there is no deterrent to polluters. If people and companies know they can get away with an environmental offence without paying their fines, they will do so.
>
> Publishing the fact that polluters have not paid their fines can pressure them into paying, in order to preserve their good reputation. It can also pressure the government into enforcing the law.
>
> There is clearly a compelling public interest in publishing this information.

The protection of the environment is obviously a matter of public interest. However, in order for section 23 to apply there must be a "*compelling* public interest" in disclosure of the record.

In order to find a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, 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 (Order P-984).

In Order P-1398, former Inquiry Officer John Higgins stated:

> Order P-984 relies on the Oxford dictionary's definition of "compelling" to mean "rousing strong interest or attention". I agree that this is an appropriate definition for this word in the context of section 23.

In upholding former Inquiry Officer Higgins's decision in Order P-1398, the Ontario Court of Appeal in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A), leave to appeal refused (January 20, 200), Doc. 27191 (S.C.C.) stated:

> . . . in our view the reasons of the inquiry officer make clear that in adopting a dictionary definition for the term "compelling" in the phrase "compelling public interest", the inquiry officer was not seeking to minimise the seriousness or strength of that standard in the context of the section [at 342].

Accordingly, I adopt former Inquiry Officer Higgins's interpretation of the word "compelling" contained in section 23.

Previous orders of this office have found a "compelling public interest" in the disclosure of nuclear safety records (Orders P-270, P-1190, P-956), and records indicating the impact of proposed air emissions (Order PO-1688).

The appellant became aware of the existence of the record through the Special Report of the Provincial Auditor of Ontario that was delivered to the Legislative Assembly in 2000. In this report, the auditor states:

> We conclude that the Ministry did not have satisfactory systems and procedures in place to administer approvals and enforce compliance with environmental legislation. Over $10 million in fines that had accumulated over many years remained unpaid.

The appellant submits that publishing the information in the record may deter individuals and businesses from polluting, pressure the convicted polluters into paying their fines, and pressure the government into enforcing the law.

The appellant relies on a number of assumptions to conclude that disclosure of the names will deter future polluters and lead to a safer, cleaner environment. These assumptions include the publication of the names, widespread circulation of the information, general public outrage in reaction to the information, awareness by future polluters of the public opprobrium, and sufficient concern about such negative publicity to cause a change in behaviour. I find the link between publishing the names of polluters and deterring future polluters is too remote since it relies on a number of assumptions that may or may not be realized.

The appellant also suggests that publication may pressure the polluters into paying their fines. This can happen only if the individual is able to pay. If the individual is impecunious or if for some other reason unable to pay, no amount of publicity will result in payment.

As the appellant has indicated, the Provincial Auditor of Ontario in his report has already revealed that the government has allowed over $10 million in environmental fines to remain in arrears. Since the aggregate amount of the outstanding fines has been made public, there is less interest in knowing what the individual fines are, and unlikely that this further publicity will change the government's attitude about delinquent fines.

I am therefore not satisfied that disclosure of the names is reasonably likely to lead to the results suggested by the appellant.

As well, the appellant has indicated that although the request is for release of all the records, she will "settle for the information relating to businesses". There has already been disclosure of information relating to some business affected parties and there will be further extensive disclosure of these names. In fact, the appellant's request has largely been granted. Accordingly, I find that the appellant has not met the onus of establishing that there is a "*compelling* public interest" in the disclosure of the information in the record.

ORDER:

1. I order the Ministry to disclose the names of the businesses with unpaid environmental fines, the amount of the fines owing, and the court dates when the fines were imposed, by no later than **February 19, 2002** but not before **February 14, 2002.**

2. I uphold the Ministry's decision to withhold the information in the record that relates to unpaid fines owed by named individuals.

Original signed by: January 15, 2002
Dawn Maruno
Adjudicator