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

ORDER PO-2060

Appeal PA-010356-1

Ministry of Natural Resources

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NATURE OF THE APPEAL:

The appellant, his wife and another individual initiated an application for an investigation under section 74 of the *Environmental Bill of Rights, 1993* (the *EBR*) relating to a named complex of gravel pits (the site). An investigation was conducted by an investigator from the Evaluation Special Services Unit of the Ministry of Natural Resources (the Ministry), which resulted in an investigation report dated August 6, 1999 (the report).

The appellant subsequently submitted a request to the Ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the report. The Ministry granted partial access to most of the report, withholding six pages on the basis of section 14 (law enforcement) of the *Act*. The withheld pages pertain to an interview conducted by the investigator with two individuals who are employed by or associated with the operator of *Aggregate Resources Act* licenses at the site (the affected persons).

The appellant appealed this decision.

During mediation of the appeal, the Ministry withdrew its reliance the section 14 discretionary exemption, and indicated that instead it would rely on the mandatory exemption in section 21 (invasion of privacy).

The matter was subsequently referred to adjudication. This office initially sent a Notice of Inquiry setting out the issues in the appeal to the Ministry and the affected persons. The Ministry and the affected persons provided representations in response. This office then sent a Notice of Inquiry to the appellant, together with a copy of the representations of the Ministry and a summary of the representations of the affected persons. The appellant, in turn, provided representations. No further representations were made.

CONCLUSION:

The information at issue constitutes the personal information of the affected persons, and this information falls within the scope of the privacy exemption in section 49(b) of the *Act*. In addition, there is no compelling public interest in the disclosure of this information that clearly outweighs the purpose of the exemption. However, because the Ministry has not exercised its discretion under section 49(b) to decide whether or not the information should be disclosed, I am sending the matter back to the Ministry to exercise its discretion accordingly.

DISCUSSION:

PERSONAL INFORMATION

Introduction

The first issue for me to determine is whether or not the report contains personal information and, if so, to whom that information relates. The term "personal information" is defined in section 2(1) of the *Act*, in part, to mean " recorded information about an identifiable individual".

Personal versus professional/official government capacity

Previous decisions of this office have drawn a distinction between an individual's personal, and professional or official government capacity, and found that in some circumstances, information associated with a person in his or her professional or official government capacity will not be considered to be "about the individual" within the meaning of the section 2(1) definition of "personal information" [Orders P-257, P-427, P-1412, P-1621].

The distinction between whether information is "about the individual" within the meaning of the section 2(1) definition of "personal information" or whether information is merely associated with a person in his/her professional capacity or official government capacity such that it is not "personal information" rests on whether that information is *personal to the individual* or *personal in nature*. In Reconsideration Order R-980015, Adjudicator Donald Hale reviewed the history of the Commissioner's approach to this issue and the rationale for drawing this distinction. He also extensively examined the approaches taken by other jurisdictions and considered the effect of the decision of the Supreme Court of Canada in *Dagg* v. *Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385. In applying the principles that he described in that order, Adjudicator Hale came to the following conclusion:

> I find that the information associated with the names of the affected persons, which is contained in the records at issue, relates to them only in their capacities as officials with the organizations that employ them. Their involvement in the issues addressed in the correspondence with the Ministry is not personal to them but, rather, relates to their employment or association with the organizations whose interests they are representing. This information is not personal in nature but may be more appropriately described as being related to the employment or professional responsibilities of each of the individuals who are identified therein. Essentially, the information is not about these individuals and, therefore, does not qualify as their "personal information" within the meaning of the opening words of the definition.

In Order P-1180, former Adjudicator Anita Fineberg stated:

> …Information about an employee does not constitute personal information where the information relates to the individual's employment responsibilities or position. Where, however, the information involves an examination of the employee's performance or an investigation into his or her conduct, these references are considered to be the individual's personal information.

Representations

The appellant takes the position that the information about the affected persons was provided in their professional capacities and thus does not qualify as personal information:

> The EBR investigation had no interest in the private affairs of these people. Of course not. [The investigator's] purpose was to collect information about the

> operation of the pit, and not about the personal lives of pit employees. (Forgive me, but since I do not have access to this interview, it is difficult for me to discuss its content!) I would be very surprised if anything of a personal nature was recorded by [the investigator].

The affected persons submit representations in which they both indicate that they do not take a position on whether the requested information qualifies as personal information and rely on the Ministry to make submissions on this issue.

The Ministry makes the following argument:

> The information, which the Ministry has severed, was gathered as part of an investigation into a possible violation of the law. Each of the participants who were interviewed were cautioned and read their rights under the *Canadian Charter of Rights and Freedoms* before the interview. If the evidence had warranted, the Ministry would have laid charges against the individuals. In answering the questions, the individuals were not only acting in their professional capacity, but also in their personal capacity. Their answers to questions could have lead to charges against them as individuals.

Findings

Having had regard to the context in which the information at issue was gathered and the very nature of the information provided, I find that the report contains the personal information of the affected persons, specifically their names together with information they provided about their conduct to the Ministry investigator assigned to the subject investigation.

In my view, the information at issue in the report is "about" the affected persons in their personal rather than strictly professional capacity and, specifically, about their personal knowledge of matters, and their personal conduct and performance. As discussed by former Adjudicator Fineberg in Order P-1180, this information is personal information because it is information involving an examination of the employee's performance or an investigation into the employee's conduct rather than information solely related to the individual's employment responsibilities or position.

Therefore, I find that the information in the report relating to the affected persons falls within the scope of the definition of "personal information" in section 2(1) of the *Act*.

In addition, since the report also contains the personal opinions or views of the appellant, I find that the report also contains the appellant's personal information.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/INVASION OF ANOTHER INDIVIDUAL'S PRIVACY

Introduction

Because the report contains the personal information of both the appellant and the affected persons, the analysis appropriate to the circumstances of this appeal is that commenced by a consideration of the discretionary exemption provided by section 49 of the *Act*, which states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

Section 49(b) of the *Act* introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 49(b) gives the institution the discretion to deny access to the personal information of the requester.

In determining whether the exemption in section 49(b) applies, sections 21(2), (3) and (4) 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 whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

Section 21(3)(b) presumption

The Ministry relies on the presumption of an unjustified invasion of personal privacy at section 21(3)(b). That section reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

Representations

The Ministry submits that the records at issue contain the personal information of individuals who provided information to the Ministry investigator during the course of an investigation under the *EBR* into possible violations of the *Aggregate Resources Act* and the federal *Fisheries Act*. The Ministry submits that the interviews with the affected persons were conducted for the purpose of gathering evidence with the ultimate possibility that charges could be laid against them under those statutes, if warranted, as individuals.

Both affected persons take the position that the discretionary exemption in section 14 of the *Act* ought to apply to the information at issue. In this regard, one affected person submits that the report (as a complete record) "fits squarely within the exemption provided in section 14(2)(a)" (law enforcement report).

The appellant submits:

> Surely, the interview was about the operators of the pit in their role as officers or employees of the company that runs the pit. In the IPC Notice of Inquiry (A2001 000118, July 18, 2001), in Reconsideration of Order P-1583.rec, IPC Adjudicator Donald Hale concluded - see quote above. It appears to me that [the investigator's] interview with pit operators collected background information. As such, it appears that 21(3)(b) should not be used to suppress this information.

Findings

The information at issue clearly was compiled and is identifiable as part of an investigation under the *EBR* into possible violations of the *Aggregate Resources Act* and/or the *Fisheries Act*. Accordingly, the section 21(3)(b) presumption of an unjustified invasion of privacy applies, despite the fact that charges were not ultimately laid (see Order P-242).

As indicated above, the 21(3)(b) presumption cannot be overcome by any factors, listed or unlisted, under section 21(2). In addition, I find that no exceptions under section 21(4) apply.

As a result, I find that the Ministry may refuse to disclose the information at issue under the exemption at section 49(b) of the *Act*, subject to any finding I may make under section 23.

I note that the affected persons submit that the report is exempt under section 14. As I indicated above, section 14 is a discretionary exemption that an institution may choose to rely on if warranted in the circumstances. Here, the Ministry initially relied on this exemption, but later chose to waive its earlier reliance on this exemption. In these circumstances, the section 14 exemption is not available to be claimed by the affected persons, and accordingly it cannot apply (see Order P-257).

PUBLIC INTEREST OVERRIDE

Introduction

Section 23 of the *Act* states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

In order for section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure; and second, this interest must clearly outweigh the purpose of the exemption [see 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 [1999] S.C.C.A. No. 134 (note)].

In order to find that there is 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 deciding whether any public interest in disclosure is compelling, the following comments of former Adjudicator Higgins in Order P-1398 are an appropriate starting point:

> 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.

Only if a compelling public interest is established, must it then be balanced against the purpose of any exemptions that have been found to apply, in this case, section 49(b) in conjunction with section 21(3)(b). Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information that has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption (Order P-1398).

Representations

With respect to the existence of a compelling public interest, the Ministry argues as follows:

> In this instance, it is arguable that there is a public interest in the administration of the *Aggregate Resources Act* and the *Fisheries Act* and in the compliance efforts of the Ministry. However, the activities of Ministry (sic) in this area as it relates to [a named complex] have been subject to public scrutiny through the Environmental Bill of Rights process and the comment of the [Environmental] Commissioner in his 1999-2000 report. He found that the investigation was thorough and in many respects commendable. He had some criticism of the Ministry but these did not relate to the investigation, the finding that charges were

> not warranted or the records in issue. The Commissioner is like the courts in that he is an officer of the legislature and has publicly defined and respected review function. It is the position of the Ministry that considerations set out in MO-1180 apply in that there has been an independent review of the Ministry's actions. Therefore, the weight of any public interest is lessened.
>
> Since his report, there has been no significant public or media interest in the investigation or the Ministry's finding that charges were not warranted. In short, the Ministry is aware of no evidence to support a finding of public interest, compelling or otherwise, in this situation.

In response, the appellant makes several arguments to support his opinion that there is a compelling public interest in disclosure of the records at issue. He indicates that stories on the issue appear regularly in the local press. He highlights the issue as being "can or will the Ministry enforce the regulations intended to control the aggregate (gravel) industry?"

The appellant also contends that the Environmental Commissioner's commentary upon the *EBR* investigation itself in his annual report of 1999/2000 reveal a compelling public interest in that the Commissioner "[urged] the MNR to 'determine how well inspections are being conducted by the different district offices, to see whether there are systemic problems with the program, and to develop and put them in place'." In addition, the appellant noted that the Ontario Ombudsman has shown interest in the issue in that the Ombudsman is currently investigating the allegation of administrative failure in this same *EBR* investigation.

Is there a compelling public interest in disclosure?

Having considered the representations and having reviewed both the report of the Environmental Commissioner and the Ombudsman's letter to the Ministry informing it of the appellant's complaint, I am not persuaded that there is a compelling public interest evident in these circumstances.

I find that there has already been substantial public scrutiny of this matter given the conduct of the *EBR* investigation itself and a review of that investigation by the Environmental Commissioner. Contrary to that submitted by the appellant, while he clearly exposes and criticizes some of its shortcomings, the Environmental Commissioner did commend the appointment of an independent investigator and also found the Ministry's investigation of the alleged *Fisheries Act* contravention commendable. He found the Ministry's investigation a thorough one. As evidenced by his recommendations in that same annual report, the lingering issues for the Commissioner appear to be with the general practices of the Ministry rather than with the particulars of the subject investigation:

> The ECO recommends that MNR review the effectiveness of its Aggregate Resources Compliance Reporting Program, to determine how well inspections are being conducted by the different district offices, to see whether there are systemic problems with the program, and to develop remedies and put them in place.

Furthermore, the correspondence from the Ombudsman indicates that the Ombudsman intends to investigate a complaint made by the appellant. That correspondence also clearly states that the Ombudsman "can assure [the Minister of Natural Resources] that [the Ombudsman has] not yet formed an opinion on this matter". At this point, it is fair to say that any interest on the part of the Ombudsman is to process the appellant's complaint and that the Ombudsman has not yet made any final conclusions about that complaint. The fact that there is an ongoing independent investigatory process goes some way towards addressing the public interest.

These circumstances taken together with the fact that there has been disclosure of the entirety of the *EBR* investigation report save for these two interviews leads me to find that the public interest in knowing about this matter will not be significantly enhanced by the release of the personal information of the two affected persons.

To conclude, I find that there is no compelling public interest in the disclosure of this record, and that, therefore, section 23 of the *Act* cannot apply.

EXERCISE OF DISCRETION

As indicated above, the Ministry applied the section 21 *mandatory* exemption to withhold the information at issue. However, I have found that the appropriate exemption to apply in these circumstances is the *discretionary* exemption at section 49(b). Accordingly, the Ministry has not had the opportunity to exercise its discretion, and I will send this matter back to the Ministry for this purpose. I refer the Ministry to Assistant Commissioner Tom Mitchinson's Order MO-1498 for guidance in exercising its discretion under this section.

ORDER:

1. I uphold the decision of the Ministry that section 49(b) of the *Act* applies to the withheld portions of the report, subject to the exercise of discretion referred to below.

2. I order the Ministry to exercise its discretion under section 49(b) of the *Act*, taking into account all relevant factors and circumstances of this case, and with reference to the principles in Order MO-1498.

3. I order the Ministry to provide me and the appellant with representations on its exercise of discretion no later than **November 14, 2002**.

4. The appellant may submit responding representations on the exercise of discretion issue no later than **November 28, 2002**.

5. I remain seized of this appeal in order to deal with the exercise of discretion issue, and any other issues that may be outstanding.

Original signed by: October 31, 2002
Rosemary Muzzi
Adjudicator