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

ORDER PO-2166

Appeal PA-020358-1

Ministry of Natural Resources

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

Background

This appeal arises from a request for records concerning cormorants. Cormorants, which are large, lustrous, black sea birds, have nested in western Canada and northwestern Ontario for hundreds of years, and first colonized the Great Lakes in the early 1900s.

The Ministry of Natural Resources (the Ministry) states that the population of cormorants in Ontario has increased from a low of about 120 nesting pairs in the early 1970's to approximately 115,000 nesting pairs in 2001. Cormorant abundance has continued to increase in the Great Lakes region of Ontario, and the Ministry identifies that in certain areas, densities of free-ranging cormorants in 2002 range between 10-15 birds per square kilometer of lake surface per day. It also notes that these density estimates represent some of the highest recorded for free-ranging cormorants, and that the magnitude of fish consumption by cormorants at these densities is substantial.

The Ministry also identifies that this increase in the number of cormorants has led to concern both within government and amongst members of the public. The concern relates to the potential ecological, social and economic effects of cormorants on a variety of natural resource values including fish stocks, other wildlife species, rare habitats, water quality and odour, and disease/parasite transmission. The Ministry also notes that public and media pressure to control cormorants continues to grow.

The number of cormorants has increased to such an extent that in the Spring of the year 2000, the Ministry initiated a 5-year cormorant research and monitoring program.

In year three of the program (2002), the Ministry publicly announced that an experimental egg-oiling program was being undertaken at selected locations on Lake Huron, as identified in a decision notice posted on the Environmental Bill of Rights (EBR) Registry. Egg oiling involves oiling cormorant eggs in nests at selected locations to control cormorant numbers, either for experimental or management purposes.

The Ministry has identified that it intends to continue and expand its experimental oiling program in 2003 as part of its multi-year research and monitoring program.

Appeal

The requester made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "…field records/data from the cormorant control program from 2002", including a list of colonies oiled.

The Ministry responded to the request by denying access to all records or data from the cormorant control program, claiming that the records were exempt from disclosure under section

14(1)(l) (facilitate commission of unlawful act); section 18(1)(a) (valuable government information); and section 18(1)(b) (economic and other interests).

The requester (now the appellant) appealed the Ministry's decision to deny access.

During mediation, the Ministry provided this office with a hard copy of all of the responsive records, with the exception of records containing hydroacoustic data. That data is contained on 72 separate CD ROMs. The Ministry provided this office with one CD ROM containing a representative sample of the hydroacoustic data. During the mediation stage of this appeal, the appellant agreed to limit her appeal to the identified hardcopy records and the one CD ROM containing the hydroacoustic data.

Mediation did not resolve the issues and this appeal was transferred to the adjudication stage. I sent a Notice of Inquiry summarizing the facts and issues to the Ministry initially, and received representations in response. I then sent the Notice of Inquiry, along with a copy of the Ministry's representations, to the appellant, who also provided me with representations. In those representations, the appellant identifies a number of studies which have been done on the impact of an increased cormorant population, and identifies an interest in obtaining the records for a variety of purposes, including the ability to review the methodology used by the Ministry in the study.

In this appeal I must determine whether the exemption claims made by the Ministry apply to the records.

RECORDS:

There are approximately 574 pages of records at issue, as well as one CD ROM. The records consist of:

- Nest count field forms
- Oiling field data forms for all treated sites
- Aerial foraging bird count records
- Electro fishing survey compilation sheets
- Index fishing data (Excel spreadsheet)
- List/map of colonies which are included in the experimental design
    - 2002 Oiling and Nest Count Program Delivery
    - Population Trends and Colony Locations
    - Cormorant Colonies to be surveyed in 2002
    - Cormorant Nest Count Forms
- a CD ROM containing raw hydroacoustic data

DISCUSSION:

LAW ENFORCEMENT

Section 14(1)(l): facilitate the commission of a crime

The Ministry claims that the records qualify for exemption under section 14(1)(l) of the *Act*. This section reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > facilitate the commission of an unlawful act or hamper the control of crime.

The Ministry must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)]. However, as the Ministry points out, the law enforcement exemption in section 14 must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

The Ministry states that in this instance, the criminal activity in question would be vandalizing or destroying the nests located in the cormorant colonies. After referring to the concern among certain groups about the effect of the cormorant population growth on the fisheries, the Ministry states:

> The Ministry is aware of incidents in which some limited vandalism has occurred to colonies.

The Ministry then attaches a news release dated July 1998 issued by the New York State Department of Environmental Conservation that describes the killing of approximately 840 nesting cormorants in a cormorant colony on an island in Lake Ontario. The Ministry states that "feelings arising from concerns about the effect of cormorants on fisheries are equally high in Ontario".

The Ministry also states that it would have no control over the dissemination of the information in the records if the information is released. It correctly identifies this office's long-held view that release of information is release to the world. The Ministry goes on to state:

> In the hands of the unscrupulous, the information in the records would indicate the specific location of a number of cormorant colonies and allow them to go there to vandalize or destroy nests or harm cormorants. Given the events in New

> York State and the high feelings in Ontario, it is the position of the Ministry that release of the information would facilitate the destruction or vandalizing of colonies in Ontario by identifying the locations of colonies.

I recognize the difficulty of predicting future events in a law enforcement context. However, in this appeal I must decide whether the Ministry has provided me with the type of "detailed and convincing" evidence required to establish a "reasonable expectation of harm". I find that the Ministry has not done so, and that the exemption in section 14(1)(l) does not apply to the records.

The Ministry has not provided me with detailed and convincing evidence that the disclosure of the records could reasonably be expected to result in the vandalism or destruction of the nests whose locations are identified in the records. The Ministry has provided information concerning the abundance of cormorants in Ontario. The Ministry has also referred to a concern about the vandalism or destruction of cormorant nests or harm to cormorants, and I accept that these actions would be "unlawful acts" for the purpose of section 14(1)(l). However, the Ministry has not identified any connection, causal or otherwise, between the disclosure of the records in this appeal and the possible harms referred to in section 14(1)(l).

First, the Ministry has not identified whether or not the nests or colonies are difficult to locate - it has not provided information concerning whether the locations of cormorant nests are particularly confidential or difficult to ascertain. Nor has the Ministry provided information regarding how the nests that are included in the program were located in the first place. Without information about the particular confidentiality of the information in the records, I cannot determine that its disclosure would result in the vandalism or destruction of nests or harm to cormorants.

Furthermore, there is no suggestion in the material provided to me regarding the incident that occurred in New York State that the destruction of cormorants and their nests had any connection with the disclosure of information relating to the location of these nests. The reference in the news release is to the destruction of approximately 840 cormorants on or around a particular island. It strikes me that individuals familiar with that island would already be aware that many cormorants nested there; however, I have no information on this point.

Finally, even if I had been referred to a connection between the disclosure of information and the possible harms set out in section 14(1)(l), there are different factors raised in this appeal. The Ministry in this appeal is specifically engaged in a program of oiling cormorant eggs in the identified locations. The purpose of oiling the eggs is to stop the eggs from hatching, thereby reducing the cormorant population. While I acknowledge the difficulty of predicting future events, in my view it is unlikely that persons intent on destroying cormorant nests or harming cormorants would target nests or cormorants that are already being "monitored" in some way by the Ministry itself.

The purpose of the exemption in section 14(1)(l) is to provide the Ministry with the discretion to preclude access to records in circumstances where disclosure could reasonably be expected to result in the harms set out in that section. In my view, in this appeal, the Ministry has not provided sufficient evidence to establish that disclosure of the records could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. Accordingly, I find that the requirements for exemption under section 14(1)(l) have not been met with respect to the records.

As an additional point, I note that the Ministry's claim that section 14(1)(l) applies to the records was made on the basis that the location of particular nests would result in the anticipated harm. Of the hundreds of pages of records at issue in this appeal, only a portion identify the location of nests. Other records contain other raw data for which no representations were made concerning the possible application of section 14(1)(l). Even if I had found that section 14(1)(l) applied to certain records (which I have not), it would have applied only to those records which contain information relating to nest locations.

VALUABLE GOVERNMENT INFORMATION/ECONOMIC AND OTHER INTERESTS

The Ministry claims that the records qualify for exemption under sections 18(1)(a) and (b). These sections state:

A head may refuse to disclose a record that contains,

> (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
>
> (b) information obtained through research by an employee of an institution where the disclosure could reasonably be expected to deprive the employee of priority of publication;

Section 18(1)(a): Information that belongs to an institution and has monetary value

In order for a record to qualify for exemption under section 18(1)(a) of the *Act*, it must be established that the information contained in the record:

1. is a trade secret, or financial, commercial, scientific or technical information; **and**

2. belongs to the Government of Ontario or an institution; **and**

3. has monetary value or potential monetary value [Orders 87, P-581].

The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) provides the following rationale for including a "valuable government information" exemption in the *Act*, which is helpful in considering the section 18(1)(a) exemption claim in the context of this appeal:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute. . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited. The activities of the Ontario Research Foundation, for example, are a primary illustration of this phenomenon. We are not opposed in principle to the sale of such expertise or the fruits of research in an attempt to recover the value of the public investments which created it. Moreover, there are situations in which government agencies compete with the private sector in providing services to other governmental institutions . . . on a charge back basis. . . . In our view, the effectiveness of this kind of experimentation with service delivery should not be impaired by requiring such governmental organizations to disclose their trade secrets developed in the course of their work to their competitors under the proposed freedom of information law.

Concerning the third part of the test set out above, in Order M-654, former Adjudicator Big Canoe made the following finding under section 11(a) of the *Municipal Freedom of Information and Protection of Privacy Act* (the equivalent to section 18(1)(a) in the provincial *Act*):

> The use of the term **"monetary value"** in section 11(a) requires that the information itself have an intrinsic value. The purpose of section 11(a) is to permit an institution to refuse to disclose a record which contains information where circumstances are such that disclosure would deprive the institution of the monetary value of the information . . . [emphasis in original].

The Ministry's representations on this part of the test read as follows:

> There is an inherent monetary value in the information as a result of the expenditure of money and staff time in conducting the study. The study is a four-year study. The cost of the field component of the study has been approximately $300,000 annually. Disruption or interference with [the] study by disturbance or destruction of cormorant nests would render the work done on the study useless; thus the money expended to conduct the study to date would be wasted. It is the position of the ministry that the information has an intrinsic value.

The records at issue consist mainly of raw data compiled by the Ministry in the course of carrying out its cormorant research and monitoring program. The fact that there has been a cost

to the Ministry to conduct the study does not mean that the records have monetary or potential monetary value for the purpose of section 18(1)(a). As noted by former Adjudicator Big Canoe, the record itself must have intrinsic value, the disclosure of which would deprive the Ministry of the monetary value of the information.

The Ministry has not identified how these records have value within the marketplace, nor whether the Ministry has any intention of exploiting the fruits of the research in an attempt to recover the monetary value of the program. Moreover, the Ministry has not identified that the information in the records - raw data – has any current or potential commercial value which may be exploited.

Based upon its representations, the Ministry's main concern does not appear to be that the information in the records has monetary or potential monetary value, as required by section 18(1)(a). Rather, the Ministry's main concern seems to be that the disclosure of the information may result in further actions (the possible disruption or interference with the study by disturbance or destruction of cormorant nests) which may in turn affect the program. This does not mean the information itself has "intrinsic value" as required by the section (see Order M-654). In addition, I have not been provided with sufficient evidence to support the argument that these further actions, which may affect the program, could reasonably be expected to occur.

Accordingly, I am not satisfied that the information contained in the records has monetary value or potential monetary value for the purpose of section 18(1)(a).

In order to qualify for exemption under section 18(1)(a), all three parts of the test set out above must be established. As the Ministry has failed to establish that the third part of the test applies, the exemption in section 18(1)(a) does not apply to the records.

Section 18(1)(b): economic and other interests

In order to qualify for exemption under section 18(1)(b), the Ministry must demonstrate that:

(i) the record contains information obtained through research of an employee of the institution, **and**

(ii) its disclosure could reasonably be expected to deprive the employee of priority of publication.

[See P-811]

For this exemption to apply, the Ministry must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified harm. To meet this test, the Ministry must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers'*

Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 (C.A.)].

In support of its position that the records qualify for exemption under section 18(1)(b), the Ministry confirms that the cormorant research and monitoring program is a five-year study, with the year 2003 representing the fourth year of the study. It identifies that the pre-treatment data that was collected at various sites will be compared to other information that will be collected in the future, and confirms that the study is not yet completed.

The Ministry then states:

> Data analysis and write up [is] anticipated occurring in 2003 and 2004 with completion in 2004 or early 2005. Upon completion of the study, the study will undergo peer review and [be] published in primary scientific literature.
>
> If the records were released, the effect would be to release raw data. Releasing the raw data from the study at this point would permit others to write findings/conclusions prior to completion of the study. Given the public profile of the issue of the effect of increasing cormorant populations, it is reasonable to expect both those who support and oppose controlling cormorant population to use the data to support their point of view. As the study is still on going, the effect would be to deny priority of publication to the science staff involved in the project.

Previous orders dealing with this exemption have upheld the exemption in circumstances where cogent evidence was provided to support the position that an employee intended to publish a specific record. For example, in Order P-811, section 18(1)(b) was claimed for a record entitled "A Review of the Biological and Conservation Implications of Game Farming". The decision-maker was provided with an affidavit, sworn by the author of the record, wherein she stated that she intended to publish the record following an internal peer review of it. The decision-maker in that appeal was satisfied that the identified employee intended to publish the record in an appropriate scientific forum, and that the premature release of the record could reasonably be expected to deprive her of priority of publication.

In this appeal, I find that the Ministry has not provided detailed and convincing evidence to support its position that section 18(1)(b) applies to the records. The Ministry's representations do not state that the information in the records will be published. It specifically states that the records contain raw data, and that the study will be published after further data is gathered and the study is completed. The Ministry has not identified the employee who could reasonably be expected to be deprived of the priority of publication, nor has the Ministry provided detailed and convincing evidence that disclosing the record will affect priority of publication.

The Ministry's main concern appears to be that individuals will take the raw data from the partially completed study and publish their own (possibly conflicting) findings or conclusions,

based on that raw data, prior to completion of the study. The information in the records consists of the raw data from one year of a five-year study. Even if I had been provided with detailed and convincing evidence that an identified employee of the Ministry intends to publish a study based on the information, the information contained in the records comprises only a portion of the raw data upon which any such future study will be based. I do not consider this to be detailed and convincing evidence that the disclosure could deprive the employee of priority of publication.

Accordingly, I am not persuaded that the criteria for the exemption have been satisfied, and I find that the records do not qualify for exemption under section 18(1)(b) of the *Act*.

ORDER:

1. I order the Ministry to disclose the records to the appellant by **August 13, 2003.**

2. In order to verify compliance with Provision 1, I reserve the right to require the Ministry to provide me with copies of the records which are disclosed to the appellant, upon request.

Original signed by July 22, 2003
Frank DeVries
Adjudicator