



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

ORDER PO-2295

Appeal PA-030189-1

Ministry of Agriculture and Food



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BACKGROUND AND NATURE OF THE APPEAL:

The Ministry of Agriculture and Food (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the Nutrient Management Plan (NMP) for an identified 3000-hog finishing barn.

After identifying the one responsive record, the Ministry notified the owners of the identified property (the property owners), pursuant to section 28 of the *Act*, to obtain their position before responding to the request. The property owners objected to disclosing the NMP. The Ministry then responded to the requester, denying access to the NMP on the basis that it qualified for exemption under two mandatory exemptions in the *Act*:

- section 17(1)(a) and (c) (third party information); and
- section 21 (invasion of privacy).

The Ministry relied on the presumption in section 21(3)(f) and the factor listed in section 21(2)(h) in support of the section 21 claim.

The requester (now the appellant) appealed the Ministry's decision. In her appeal letter, the appellant raised the potential application of the public interest override in section 23 of the *Act*.

The Ministry explained why it had a copy of the NMP:

In 2002 there was no provincial legislation in force that required a Nutrient Management Plan be prepared and submitted to [the Ministry]. Local municipal councils may have enacted by-laws that required a Nutrient Management Plan be provided for a building permit application on agricultural lands. In Ontario 85 municipalities have Nutrient Management By-laws in place ... The content, policy and regulation of these by-laws vary across the province.

The Township of Huron-Kinloss enacted By-law 2001-37 to regulate the storage and disposal of manure on agricultural lands. As part of the building permit application process, the following requirement is contained in paragraph 4 of the By-law:

A Nutrient Management Plan shall be completed prior to the issuance of a building permit, and a copy of such plan shall be provided to the Township prior to submission to [the Ministry]. [The Ministry] shall review and approve all Nutrient Management Plans and forward their approval to the Municipality when completed.

[The Ministry] provided advice, training and software ... for the development of nutrient management plans. As well, the Ministry recommended a third party review to assure that plans were being properly developed. A Ministry Position Statement dated November 5, 1998 stated:

Nutrient Management Plans

Larger livestock farms exceeding 150 Livestock Units or with greater than 50 Livestock Units and a landbase with more than 5 Livestock Units per tillable hectare should have a nutrient management plan. Third party reviews will assure that Nutrient Management Plans are being properly developed.

Some municipalities asked that [the Ministry] provide the third party review. The Ministry would provide third party review, but only for operations of the size indicated in the position statement and according to the Ministry's guidelines and checklist. Although the review was often viewed as [Ministry] approval of a plan, it was actually a review to verify that the plan met the Ministry's recommended criteria.

For those municipalities requesting a third party review by the Ministry, the review was usually done by an engineer in the Resources Management Branch. Plans were submitted to the Ministry from one of three sources: 1) a municipality; 2) a farmer applying for a building permit; or 3) a consultant developing a plan for a farmer.

The NMP at issue in this appeal was submitted to the Ministry in support of an application by the property owners for a building permit.

Mediation was not successful and the file was moved to the adjudication stage of the appeal process.

I began my inquiry by sending a Notice of Inquiry to the Ministry, the property owners and the consulting company that prepared the NMP. The Ministry and the property owners submitted representations in response to the Notice, but the consulting company did not. The property owners take the position that the record contains their personal information and should not be disclosed for that reason.

I then sent the Notice to the appellant, together with the non-confidential portion of the Ministry's representations. The appellant in turn provided representations.

RECORDS:

The record is a 130-page document titled "Nutrient Management Plan prepared for [the property owners' farm] " dated June 26, 2003.

The record consists of information describing the farm operation, manure production and storage reports, nutrient analysis of the manure and cropping practices. It also includes a series of appendices outlining the professional qualifications of the consultant who prepared the report (not included in the Ministry's copy of the NMP), a series of surface draining and water reports, well reports, monitoring schedules and contingency plans, zoning reports, a site plan, soil sample

tests from the subject property, a farm management review (also not included in the Ministry's copy of the NMP), and various reports generated from the Ministry's analysis software.

DISCUSSION:

PERSONAL INFORMATION

General

The section 21 invasion of privacy exemption only applies to information that qualifies as "personal information", as defined in section 2(1) of the *Act*. The definition of "personal information" reads, in part:

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

...

(b) ... information relating to financial transactions in which the individual has been involved,

...

(d) the address, telephone number, ... of the individual,

...

(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

To qualify as personal information, the information must be about an individual in a personal capacity. As a general rule, information associated with an individual in his/her professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Representations

The Ministry takes the position that the information contained in the NMP is "about two identifiable individuals", the property owners. The Ministry submits:

The record reveals the names of the property owners together with other personal information. It describes their property, which is a major asset owned by the individuals. The description includes sketches, amount of tillable acres vs. total acreage, location and soil condition. The record contains laboratory reports on the analysis of soil samples taken from their property. This information is unique to

an asset owned by the individuals. It describes the condition of the soil, which relates to the value of the asset and the viability of the property for crop production or other uses. This is personal information as defined by section 2(1)(h).

...

The [NMP] reveals information related to the individuals' income and expenditures. It provides a direct link to income by revealing a three-year plan for crop production, ... The record also provides detailed plans for the purchase and sale of livestock. ... There is a direct link between details in this plan and income. This is personal information under sections 2(1)(b) and (h). [Orders P-778, P-1502].

This [NMP] reveals activities and financial transactions to be undertaken by the [property owners] to earn income. Some aspects of the plan are now complete. The barn and manure storage facility have been constructed. The record reveals that the owners made expenditures required for this construction. It also provides details that, if disclosed, would permit calculation of the gross earnings of two individuals from the purchase and sale of livestock and from the production of crops. This is the personal information of the [property owners].

The Ministry identifies a number of past orders in support of its position.

The Ministry characterises the information contained in the record as "personal" and compares it to past orders dealing with building and land use permits. The Ministry refers to Order PO-1699, where Senior Adjudicator David Goodis says:

Previous orders of this office have held that an individual's name as contained in a building permit application constitutes the individual's personal information [Orders M-138, M-197, M-911]. In my view, the name of an individual contained in a land use permit should be treated in a similar fashion.

The Ministry states:

Where property is owned by an individual or individuals, the identity of the individual owners together with other information about property matter, such as an application for a building permit, property description or financial activities related to the property, the information is personal information as defined by section 2(1) of the *Act*.

The property owners submit that the NMP relates to their "family farm" and contains personal information that should not be disclosed. The property owners' representations do not address any specific components of the definition of "personal information" or any past orders issued by this office.

The appellant takes the position that the NMP does not contain the property owners' "personal information". The appellant points out that the property owners' personal address is not the same as the property listed on the building permit application, and also that the property owners do not live on or beside the property in question.

The appellant submits that a great deal of information in the NMP, including the property owners' names, address, telephone and fax numbers, as well as the basic content of the document are matters of public record through the municipal by-law process required in order to obtain a building permit, and discussions concerning the NMP that took place at a public meeting of the municipal Council in March of 2001. In addition, the appellant submits that much of the information in the current NMP was also contained in a previous version of the NMP that was made public by the municipality and also entered the public domain in the context of successful litigation quashing a previous building permit provided by the municipality to the property owners for the construction of a barn on the same property that is the subject of the NMP at issue in this appeal.

The appellant also relies on the *Municipal Act* in its argument, suggesting that the information that the Ministry has identified as "personal information" is in fact already or about to be made public:

The contents of the Nutrient Management Plan could not properly form the subject of a closed meeting of Council pursuant to section 239(2) of the *Municipal Act*. This is particularly the case if a motion to accept the Nutrient Management Plan submitted as being in conformity with the by-law so as to enable the Chief Building Official to then process an application for a building permit, were to be made. Such motions **must** be made in an open session. [appellant's emphasis]

Analysis and findings

Having carefully considered the Ministry's representations and the various orders identified in support of its position, I have reached the conclusion that the NMP does not contain the property owners' "personal information". In my view, this record is more accurately described as containing information about the property owners in a business or professional capacity.

I recently considered a similar issue in Order PO-2225, which involved a request for information about landlords contained in records held by the Ontario Rental Housing Tribunal. In that case, the Tribunal claimed that information about individual landlords qualified as their "personal information", while the requester had taken the position that the information related to individuals in their business capacity and should not be considered "personal information".

I made the following observations and findings that are relevant to the "personal information" issue in this appeal:

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 a 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). While many of these orders deal with individuals acting as employees or representatives of organizations (Orders 80, P-257, P427, P-1412), other orders have described the distinction more generally as one between individuals acting in a personal or business capacity:

- In Order M-118, former Commissioner Tom Wright ordered the partial disclosure of mailing lists compiled by the City of Toronto that included the names and addresses of individuals who had expressed an interest in certain municipal properties. Commissioner Wright distinguished between the personal or business capacity of the named individual. The distinction did not turn on whether or not the name as it appeared on the list was that of an individual, but rather on whether there was evidence indicating that the individual was acting in a personal or business capacity.
- In Order M-454, former Adjudicator John Higgins found that the name of the owner of a dog kennel, and an address that was both the business and residential address of that owner was not personal information but "information [that] relates to the ordinary operation of the business".
- Order P-710 dealt with records that contained the names of individuals and corporations who were vendors of goods and services to the Liquor Control Board of Ontario. Adjudicator Donald Hale found that the names of individuals should be disclosed as the identifying information related to "the business activities of these individuals" and as such did not qualify as their personal information.
- In Order P-729, former Adjudicator Anita Fineberg found that the amount of financial assistance received from the Ontario Film Development Corporation by a named individual applicant (as opposed to a corporation, sole proprietorship or partnership) related to the business activities of that individual and could not be characterized as personal information.

Based on the principles expressed in these orders, the first question to ask in a case such as this is: "*in what context do the names of the individuals appear*"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere? In my view, when someone rents premises to a tenant in return for payment of rent, that person is operating in a business arena. The landlord has made a business

arrangement for the purpose of realizing income and/or capital appreciation in real estate that he/she owns. Income and expenses incurred by a landlord are accounted for under specific provisions of the *Income Tax Act* and, in my view, the time, effort and resources invested by an individual in this context fall outside the personal sphere and within the scope of profit-motivated business activity.

I recognize that in some cases a landlord's business is no more sophisticated than, for example, an individual homeowner renting out a basement apartment, and I accept that there are differences between the individual homeowner and a large corporation that owns a number of apartment buildings. However, fundamentally, both the large corporation and the individual homeowner can be said to be operating in the same "business arena", albeit on a different scale. In this regard, I concur with the appellant's interpretation of Order MO-1562 that the distinction between a personal and a business capacity does not depend on the size of a particular undertaking. It is also significant to note that the [*Tenant Protection Act*] requires all landlords, large and small, to follow essentially the same set of rules. In my view, it is reasonable to characterize even small-scale, individual landlords as people who have made a conscious decision to enter into a business realm. As such, it necessarily follows that a landlord renting premises to a tenant is operating in a context that is inherently of a business nature and not personal.

The analysis does not end here. I must go on to ask: "*is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual?*" Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

I concluded:

In my view, there is nothing present here that would allow the information to "cross over" into the "personal information" realm. The fact that an individual is a landlord speaks to a business not a personal arrangement. As far as the second point is concerned, the information at issue does not reveal precisely why the individual owes money to the Tribunal, and the mere fact that the individual may be personally liable for the debt is not, in my view, personal, since the debt arises in a business, non-personal context. The fact that monies owed have not been fully paid is also, in my view, not sufficient to bring what is essentially a business debt into the personal realm, nor is the fact that a landlord may be prohibited by statute from commencing an application under the *TPA*.

I will now apply this same approach to an assessment of whether the NMP contains "personal information" of the property owners.

In what context do the names of the property owners appear?

The property owners are clearly engaged in business activity. The building they are seeking approval to construct is a 3000-hog finishing barn, which would appear to me to represent a significant commercial undertaking. There is nothing inherently personal about the context in which the NMP was prepared or used. Similar to the landlords in Order PO-2225, the property owners here are seeking approval to enter into a business arrangement for the purpose of realizing income in their farming operation and perhaps capital appreciation in the barn they intend to construct. Income and expenses incurred by the property owners are accounted for as business income for the purposes of the *Income Tax Act* and, in my view, the time, effort and resources invested by the property owners in this context falls outside the personal sphere and within the scope of profit-motivated business activity.

I acknowledge that the property owners may be engaged in what they characterize as a “family farm” operation, but this does not alter my finding. Fundamentally, both large and small farming operations can be said to be operating in the same “business arena”, albeit on a different scale. As Adjudicator Laurel Cropley pointed out in Order MO-1562, the distinction between a personal and a business capacity does not depend on the size of a particular undertaking. Even if I were to accept that the property owners were engaged in a small-scale operation, which is not necessarily the case, in my view, they have made a conscious decision to enter into the business realm, and it necessarily follows that activities associated with the operation of their farming business are inherently of a business nature and not personal.

Is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the property owners?

As indicated in Order PO-2225, the analysis does not end with an assessment of the context in which the names of the property owners appear. I must do on to answer this second question.

I find that there is nothing present in the circumstances of this case that would allow the information in the NMP to “cross over” into the personal realm.

The address and phone number on the front page of the NMP is listed under the name of the farming operation, not the property owners personally. I have no evidence to suggest that this address and phone number does not belong to the farming business, and in fact, the appellant states in his representations that the property owners personal address is not the same as the farm address. In the circumstances, I am not persuaded that the address and phone number are information about the property owners in a personal capacity. I should also note that it would appear that the address and phone number on the front page have already been disclosed in the context of the previous version of the MNP and the litigation the arose in that context.

The Ministry’s main argument is that disclosing the contents of the NMP would reveal the information about the property owners’ “income and expenditures”, as well as “activities and financial transactions to be undertaken by the property owners to earn income”. In my view, the linkage between the content of the NMP and the type of information described by the Ministry is simply too remote to warrant the characterization the Ministry suggests. As

the Ministry appears to acknowledge in its representations relating to section 17(1), the document does not include any actual “financial information”. Having carefully reviewed the record, I am unable to conclude that the property owners’ actual “income and expenditures” could be ascertained from the contents of the NMP. In my view, it would be necessary for someone to have considerably more information than the various test results and farm operation details contained in the record in order to come up with any accurate estimate of the property owners’ “income and expenditures”.

In addition, the NMP does not include “information relating to financial transactions in which the individual has been involved”, as required in order to meet the requirements of paragraph (h) of the definition of “personal information”. The record itself was not prepared in the context of a financial transaction involving the property owners, nor does it include information concerning past financial transactions relating to the property. The Ministry’s position that the NMP “provides details that, if disclosed, would permit calculation of the gross earnings of two individuals from the purchase and sale of livestock and from the production of crops” is simply not supported by the content of the record itself.

It would also appear on the facts that the barn the property owners intend to build is an expansion of an existing farming operation. This reinforces my finding that the document contains business rather than personal information. Unlike the situation in Order P-364, which involved a small farming operation and records that would reveal the overall income of the farm owners, this appeal involves persons engaged in a more sophisticated and expansive business operation. In my view, it is not accurate to conclude that even if financial information could be derived from the disclosure of the NMP, it would be sufficient to permit the calculation of the overall income level of either property owner.

As far as the past orders identified by the Ministry regarding building and land use permits are concerned, they are distinguishable from the current appeal. These cases presuppose that the applicant is an individual, which is not the case here.

The fact that the property owners operate a large hog finishing farm speaks to a business not a personal arrangement and, in my view, there is nothing in the NMP or the circumstances of this appeal to bring what is essentially a business activity into the personal realm.

Accordingly, I find that the NMP does not contain the “personal information” of the property owners. Because only “personal information” can qualify for exemption under section 21 of the Act, I find that this exemption has no application in the circumstances of this appeal.

THIRD PARTY INFORMATION

General principles

Section 17(1) states, in part:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in

confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the parties resisting disclosure (in this case the Ministry and the property owners) must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the Ministry in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b) and/or (c) of section 17(1) will occur.

[Orders 36, P-373, M-29 and M-37]

Part 3: Harms

I will deal first with the harms component of section 17(1).

General principles

To meet this part of the test, the Ministry and/or the property owners must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm” if the record is disclosed. Evidence amounting to speculation of possible harm is not sufficient; the party resisting disclosure must demonstrate that disclosure “could reasonably be expected to” lead to a specified

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

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

Representations of the parties

The Ministry's representations on the harms component of section 17(1) focus on land value. The Ministry submits:

[The property owners'] farming operation (including land, building, equipment, crops, livestock, and operational methodology) is a major asset. The record at issue provides detailed information related directly to the value of the asset and the viability of the farm, including soil test reports, yields per acre by fields, and crop plans. This information is not otherwise available about [the property owners'] farm or other farms. It is a reasonable expectation that release of the record would interfere with [the property owners'] ability to negotiate the sale or lease of the farming operation, or parts of it. [The property owners] would be at an unfair disadvantage in such contractual negotiations because similar detailed information about other farming operations that are for sale or lease would not be available. Exposing details about one farm that are not available about other farms in the area would create an inequity and could reasonably be expected to result in an undue loss in bargaining power for [the property owners] in this appeal.

The plan reveals the [property owners'] business plans and projected cash income for a three-year period. Release of this information could reasonably be expected to interfere with negotiations with suppliers or financial lenders.

The property owners do not deal specifically with the harms component of section 17(1) in their representations, focusing instead on the costs they have incurred in obtaining approval for the construction of the barn and questioning the motives of the appellant in seeking access to the NMP.

The appellant responds to the Ministry's submissions as follows:

Assuming, without necessarily conceding the point, that the soils information comes from tests which are specific to the lands owned or controlled by [the property owners], how release of that information interferes significantly with [the property owners'] economic interests or results in undue loss remains unclear to [the appellant]. The institution speculates that it might interfere with the proponent's ability to sell or lease his land or part of it, because similar

information with respect to other farms is not readily available. This is not, however, the case. Firstly, that information is, as indicated, generally available through a visit to a public library. Secondly, it has already been provided and exposed publicly for these lands through a previous Court and related proceedings. Thirdly, in this day and age, when liability for environmental damage can be so costly, and the liability is spread to **all** owners of a parcel of land, past, present and future, it is a reality that parcels of land which **may** attract environmental liability of any kind will not likely be sold without a potential purchaser requiring a Part 1 Environmental Assessment to be undertaken, which means soil testing. In fact, [the property owners] here will gain a competitive advantage over others who may wish to see in the area because [they] will have a readily available, chronological history of the soils which others may not have, and be able to assert that [they have] nothing to hide [appellant's emphasis].

...

... [W]e reiterate that there is no reasonable evidence of significant interference with business operations, or undue loss. There is, rather, speculation, in the abstract, of contingencies too remote to be realistic. To the extent that detailed financial, insurance, net worth or other information is found in [the NMP], then we are likely content that it be severed.

I find that the Ministry and/or the property owners have failed to provide the level of detailed and convincing evidence necessary to establish a reasonable expectation that any of the section 17(1) harms would occur if the NMP is disclosed.

As the appellant points out, this is at least the second time that a NMP has been prepared for the proposed barn on the property owners' farm, and the first one was apparently made public by the Township of Huron-Kinloss and also formed part of the public record of proceedings in the context of litigation involving the property owners' previous building permit application. Although the content of the current NMP may have changed from the previous version, given the nature of the record, I accept the appellant's position that both versions would contain highly similar information, thereby raising substantial doubt as to any harms the property owners are likely to suffer here.

Although the Ministry's representations focus on harms associated with the property owners' ability to sell their farm in future, it is significant to note that the property owners themselves offer no arguments to support the Ministry. In my view, the property owners, not the Ministry, are in the best position to provide evidence of harm under sections 17(1)(a) and (c), and the fact that they did not do so here lends support for the appellant's position that the expectation of harm is speculative at best and not adequately supported by evidence.

Having carefully reviewed the record, I do not accept the Ministry's submission that disclosing the records would "reveal[s] the [property owners'] business plans and projected cash income for a three-year period". The Ministry does not argue that the NMP contains "financial information" for the purposes of section 17(1) and, with the exception of the Crop Insurance Renewal Notice

included as Appendix J, I am unable to identify any “financial information” in the record. The record does include an outline of the business venture proposed by the property owners but, in my view, the Ministry’s characterization of the NMP as containing “business plans and projected cash income for a three-year period” is simply not accurate. It is important to state that the NMP is by definition a document dealing with projections and estimates of business activities, and does not contain actual financial or profit/loss statements where different considerations might apply.

In summary, I find that the evidence provided in support of the section 17(1) harms is neither detailed nor convincing, and does not meet the evidentiary standard established by the Court of Appeal for part 3 of the section 17(1) test.

Because all three parts of the test must be established in order for a record to qualify for exemption under section 17(1), I do not need to deal with parts 1 and 2 before concluding that the NMP does not qualify.

The appellant has indicated that insurance-related information can be severed, so I will not require the Ministry to disclose Appendix J.

In summary, I find that the NMP (with the exception of Appendix J) does not qualify for exemption under section 21 or section 17(1) and should be disclosed to the appellant.

In the circumstances, it is not necessary for me to deal with the appellant’s arguments under the section 23 public interest override.

ORDER:

1. I order the Ministry to disclose the Nutrient Management Plan (with the exception of Appendix J) to that appellant by **July 28, 2004** but not before **July 23, 2004**.
2. In order to verify compliance, I reserve the right to require the Ministry to provide me with a copy of the record disclosed to the appellant pursuant to Provision 1, upon request.

Tom Mitchinson
Assistant Commissioner

June 22, 2004