

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER PO-3353-I

Appeal PA13-242

Ministry of Natural Resources

June 20, 2014

Summary: The Ministry of Natural Resources received a request under *Freedom of Information and Protection of Privacy Act* for records relating to the sale of Crown land. The ministry denied access to the records in part, citing the personal privacy exemption in sections 49(b) or 21(1), as well as the advice or recommendations exemption in section 13(1) and the solicitor-client privilege exemption in section 19. In addition, the appellant raised the application of the public interest override in section 23. This order upholds the ministry's decision that the information in the records is exempt, except for four records, and orders it to re-exercise its discretion regarding them.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of personal information), 21(1), 21(2)(a), 21(2)(f), 49(b), 19(a), and 23.

Orders and Investigation Reports Considered: Order PO-3241.

OVERVIEW:

[1] The Ministry of Natural Resources (MNR or the ministry) received a request under *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for the following information:

...a copy of documents, specifically correspondence, emails, memoranda and minutes of meetings, pertaining to the ROW (right of way) [at named address] that contain:

- information provided by the adjacent landowners to the MNR to justify the purchase of the ROW and any application/request to buy the ROW, and
- the MNR's position prepared in response to information communicated to the MNR by the adjacent landowners.

[2] The ministry issued a decision granting partial access to the records. Access was denied to the withheld portions of the records in accordance with sections 13(1) (advice or recommendations), 19 (solicitor-client privilege) and 21(1) (personal privacy) of the *Act*.

[3] The requester (now the appellant) appealed the ministry's decision to deny access to the withheld portions of the records. The appellant also raised his concern that a reasonable search was not conducted by the ministry for responsive records.

[4] During mediation, the appellant advised that he was not pursuing access to the personal information consisting of the names and contact information of individuals referred to in the records. The appellant again indicated that he was concerned that the ministry had not conducted a reasonable search for records.

[5] With respect to its claim of section 19, the ministry clarified that it was relying on sections 19(a). With respect to those records withheld under section 21 and which also refer to the appellant, the ministry clarified that it was relying on section 21(1) in conjunction with section 49(b) (right of access to one's own personal information) of the *Act*. Accordingly, the application of section 49(b) was added as an issue to this appeal.

[6] At the appellant's request, the mediator contacted an affected person (an adjacent landowner) in order to obtain consent to disclose the information about them contained in the records. The affected person did not consent to the disclosure of their information to the appellant.

[7] As mediation did not resolve the issues in this appeal, the file was transferred to adjudication where an adjudicator conducts an inquiry. Representations were sought and exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*. The affected person's representations were not shared with the other parties to this appeal due to confidentiality concerns.

[8] In his representations, the appellant raised the application of the public interest override in section 23 of the *Act* to the records. Accordingly, this issue was added to the appeal and representations were sought from the ministry and the affected person with respect to it.

[9] The ministry then issued a supplementary decision letter to the appellant disclosing all of the information at issue in pages 340, 341, 458 and 498 and part of the information in page 559 of the records. As all of the information in Records 9 and 11 has been disclosed to the appellant, these two records are no longer at issue.

[10] In this order, I uphold the ministry's decision that the records are exempt except for four records. I order the ministry to re-exercise its discretion regarding these four records.

RECORDS:

[11] The records remaining at issue consist of all of the records withheld in part or in whole as outlined in the index of records, except for the personal information that contains the names and contact information and any identifying comments made by individuals in the records, as follows:

#	Pages at Issue	From	To	Description of Record	Access Decision and Exemptions Claimed
1	309			Regional Director Briefing Note	Partial - s. 21
2	320 - 327	Mountain River Area Supervisor, Pembroke District	Planning & Information Management Supervisor, Pembroke District; FOIC	Email chain re: FIPPA request	Withheld - s. 49(b)
3	360 - 362	Counsel, Legal Services Branch	Mountain River Area Supervisor, Pembroke District	Email chain re: accretion	Withheld - s. 13 and 19(a)
4	410			Briefing Note: Potential sale of Crown Right of Way north of Deep River	Partial - s. 13 and 19(a)
5	429	Mountain River Area Supervisor,	Senior Lands & Waters Technician	Email chain re: presentation	Withheld - s. 21

		Pembroke District			
6	430 - 445			Presentation - Crown Right of Way (Crown) and Public Consultation Process	Withheld - s. 49(b)
7	446 - 452		Minister of Natural Resources	Letter Re: Crown land Part of Lot [#], Range ..., [name] Township - enclosing chronology of events	Withheld - s. 49(b)
8	454 - 457	Counsel, Legal Services Branch	Senior Lands & Waters Technician	Email re: accretion	Withheld - s. 13 and 19(a)
10	483 - 486	Counsel, Legal Services Branch	Senior Lands & Waters Technician	Email chain re: accretion	Withheld - s. 13 and 19(a) and (b)
12	517			Email re: review of file	Withheld - s. 21
13	543			Briefing Note: This issue involves a Crown Right of Way just north of Deep River	Partial - s. 13 and 19(a)
14	557			Letter - Subject: request to purchase Crown Right of Way Lot [#] Range ..., [name] Township	Withheld - s. 21
15	559 - 560	Senior Lands & Waters Technician		Email	Partial - s. 49(b)

ISSUES:

A. Does the discretionary solicitor-client privilege exemption at section 19(a) apply to the information at issue in Records 3, 4, 8, 10 and 13?

B. Do Records 1, 2, 5, 6, 7, 12, 14 and 15 contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

C. Does the mandatory personal privacy exemption at section 21(1) apply to Records 1, 2, 12 and 14 or does the discretionary exemption at section 49(b) apply to Records 5, 6, 7 and 15?

D. Did the institution exercise its discretion under sections 19 and 49(b)? If so, should this office uphold the exercise of discretion?

E. Is there a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the section 21(1) exemption?

DISCUSSION:

Background Information

[12] The ministry provided the following background information to the appeal. It states that:

...the request relates to the sale of a small piece of residual Crown land [the land] in the municipality of [name] to a property owner who owns land adjacent to the Crown land. In the [date], the adjacent property owner approached the ministry's Pembroke District office with a request to purchase the Crown land.

In [date], the District Manager decided to sell the subject Crown land to two adjacent landowners. As part of the process, interested parties were notified of this decision. More comments were received and there was significant coverage of the decision in the local media. As a result, the District conducted an additional review of the proposed disposition to ensure that all views and alternatives had been considered. This review included meeting with two of the principal opponents of the disposition and correspondence with several others including the local municipality and the local MPP. It appears that there has been a good deal of acrimony between the purchasers and those opposed to the sale.

A. Does the discretionary solicitor-client privilege exemption at section 19(a) apply to the information at issue in Records 3, 4, 8, 10 and 13?

[13] Section 19(a) of the *Act* reads:

A head may refuse to disclose a record,

(a) that is subject to solicitor-client privilege;

[14] Section 19 contains two branches. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b). The institution must establish that at least one branch applies.

[15] The ministry states that section 19(a) was applied to all communications between its staff and its internal and external legal counsel as the information at issue falls within the ambit of the branch 1 common law definition of solicitor-client communication privilege.

[16] In particular, the ministry states that the records at issue contain communications in which the client ministry staff request advice or provide information and/or instructions, such as requests for review and comments, as well as communications in which legal counsel provide advice or legal services.

[17] The ministry submits that the information at issue in:

- Record 3 and Record 8 contain the same email chain that involves a request to counsel at the ministry's Legal Services Branch for legal advice, as well as a follow up e-mail to legal counsel.
- Records 4 and 13 are briefing notes. Severed under s. 19(a) is the legal advice given by a solicitor with the ministry's Legal Services Branch.
- Record 10 is an e-mail chain that includes duplicates of the information at issue in Records 3 and 8, but includes a further e-mail from legal counsel communicating the legal advice between MNR staff.

Analysis/Findings

[18] Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue.¹

[19] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.²

[20] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.³

¹ Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

² *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

³ Orders PO-2441, MO-2166 and MO-1925.

[21] The privilege applies to “a continuum of communications” between a solicitor and client:

. . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.⁴

[22] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.⁵

[23] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.⁶

[24] Based on my review of the information at issue in Records 3, 4, 8, 10 and 13, I agree with the ministry that these records all contain direct solicitor-client communications or form part of a continuum of communication of legal advice between a solicitor and their clients. Accordingly, I find that Records 3, 4, 8, 10 and 13 are all subject to branch 1 solicitor-client communication privilege. As such, section 19(a) applies to these records and it is not necessary for me to determine whether they are also subject to litigation privilege.

[25] Accordingly, subject to my review of the ministry’s exercise of discretion, I find that the information in Records 3, 4, 8, 10 and 13 is exempt under section 19(a) of the *Act*. The ministry claimed the application of section 13(1) for the same information in Records 3, 4, 8, 10 and 13. Therefore, it is not necessary for me to consider whether section 13(1) also applies to this information because it is subject to section 19.

B. Do Records 1, 2, 5, 6, 7, 12, 14 and 15 contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?

[26] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

⁴ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

⁵ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

⁶ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[27] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.⁷

[28] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

(3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

⁷ Order 11.

(4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[29] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual.⁸

[30] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.⁹

[31] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.¹⁰

[32] The ministry states that the records for which it has claimed the personal privacy exemptions in section 21(1) or 49(b) contain details of a request made under the *Act* by an individual other than the appellant.

[33] The ministry states that the portion of the note severed in Record 1 refers to a request made under the *Act* with sufficient information that it would be possible to adduce the identity of the requester.

[34] The ministry states that Record 2 is an email string discussing a request under the *Act* and that although the requester in that request is not directly identified in the emails, a surname is mentioned and there are numerous references to the personal pronoun in the emails. The ministry states that given the familiarity of this requester to the parties involved in the land transaction, a person knowledgeable about the land transaction, such as the appellant, would be able to determine who made the request.

[35] The ministry states that Records 5 and 6 comprise:

...an email chain with an attached presentation sent by an individual to the ministry. In the email, the individual details recent attendance at a local council meeting and offers a number of the personal observations. The presentation itself details the history of the subject land and contains the personal information of a number of individuals, including the presentation’s author. Attempting to sever out the personal information

⁸ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁹ Orders P-1409, R-980015, PO-2225 and MO-2344.

¹⁰ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

would still allow a knowledgeable person to deduce not only who prepared it but also the identity of a number of individuals referred to in it.

[36] The ministry states that the first page of Record 7 is an unsigned letter from an individual affected by the sale to the Minister at the time and contains a number of references to the appellant and other opponents to the sale of the land. The ministry states that this letter sets out the views of the author about those named in the letter.

[37] The ministry states that the remainder of Record 7 contains a chronology prepared by an individual to the ongoing dealings with this particular property. It includes not only the author's and the appellant's personal information but that of a number of other individuals. It sets out the author's views of the history around the parcel of land in issue and an on-going land dispute. It also sets out the author's view of the actions of other individuals.

[38] The ministry states that Record 15 is an email from a ministry staff member to an individual listing the names and addresses of other individuals who were notified by the purchaser of the proposed purchase. The ministry states that this record includes the name and address of the appellant and some handwritten notes indicating individuals' positions with respect to the proposed purchase.

[39] The affected person relies on paragraph (b) of the definition of personal information in section 2(1) as the records contain information relating to financial transactions. In addition, the affected person states that the records contain home addresses and telephone numbers.

[40] The appellant did not provide representations on whether the records at issue contain personal information.

Analysis/Findings

[41] In this order, I must determine whether Records 1, 2, 5, 6, 7, 12, 14 and 15 contain personal information and if so, to whom it relates.

[42] Records 1 and 2 contain information about a request made by an individual other than the appellant. In objecting to the release of the information in these records, the ministry relies on *Practices Number 16: Maintaining the Confidentiality of Requesters and Privacy Complainant*, which reads:

Anyone, including employees of an institution, is entitled to exercise his or her right to access information under the *Acts*¹¹ or make a privacy

¹¹ The *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act*.

complaint, without being unnecessarily identified and without fear of negative repercussions.

[43] In Order PO-3241, Adjudicator Donald Hale noted that previous orders and Privacy Complaint Reports issued by this office have found that an individual's identity as a requester under the *Act* can qualify as that individual's personal information under section 2(1) of the *Act*.¹²

[44] I find that Records 1 and 2 contain details of a request made under the Act. The requester in these records made the request in their personal capacity and the request contains this individual's views that are not about another individual. These records contain the personal information of an individual other than the appellant as contemplated by paragraph (e) of the definition of personal information in section 2(1) of the Act. Records 1 and 2 do not contain the personal information of the appellant. Disclosure of the information in these records, even if names are severed, will allow the appellant to identify the person who made the request.

[45] Records 5 and 6 consist of an email and attached presentation. Record 7 is a letter with an attached chronology. I agree with the ministry that these records contain the views of an individual other than the appellant in their personal capacity within the meaning of paragraph (e) of section 2(1). This information also consists of the views of an individual about other individuals and, therefore, consists of the personal information of these other individuals in accordance with paragraph (g) of the definition of that term in section 2(1) of the *Act*. I find that Records 5, 6 and 7 contain the personal information of the appellant, as well as other individuals.

[46] The ministry did not provide representations on Records 12 and 14. Record 12 is an email and Record 14 is a letter. Record 12 contains the views of individual other than the appellant, in their personal capacity. The information in this record qualifies as personal information under paragraph (e) of the definition of that term in section 2(1) of the *Act*. Record 14 contains information relating to financial transactions in which an individual other than the appellant has been involved, in accordance with paragraph (b) of the definition of personal information in section 2(1) of the *Act*.

[47] Record 15 is a list of individuals, including the appellant, and contains their views as to the proposed purchase of the land. The information in this record qualifies as their personal information under paragraph (e) of the definition of that term in section 2(1) of the *Act*.

[48] In addition, the records refer to financial transactions undertaken by the landowner, as well as home addresses and phone numbers, in accordance with

¹² Orders PO-2488, P-27, M-32, P-370, Privacy Complaints MC-040012-1, MC-05005-1, MC-050034-1.

paragraphs (b) and (d) of the definition of personal information in section 2(1) of the *Act*.

[49] I will now consider whether the mandatory personal privacy exemption in section 21(1) applies to Records 1, 2, 12 and 14, which contain the personal information of identifiable individuals other than the appellant. I will also consider whether the discretionary personal privacy exemption in section 49(b) applies to Records 5, 6, 7 and 15, which contain the personal information of the appellant and other identifiable individuals.

C. Does the mandatory personal privacy exemption at section 21(1) apply to Records 1, 2, 12 and 14 or does the discretionary exemption at section 49(b) apply to Records 5, 6, 7 and 15?

[50] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

[51] Under section 49(b), where a record contains the personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 49(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[52] In contrast, under section 21(1), where a record contains personal information of another individual but *not* the requester, the institution is prohibited from disclosing that information unless one of the exceptions in sections 21(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy under section 21(1)(f).

[53] If any of paragraphs (a) to (e) of section 21(1) apply, the personal privacy exemption is not available. Section 21(4) lists situations that would not be an unjustified invasion of personal privacy. In this appeal, neither section 21(4) nor the exceptions in paragraphs (a) to (e) of section 21(1) apply.

[54] In applying either of the section 49(b) or 21(1) exemptions, sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy.

[55] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy.

[56] For records claimed to be exempt under section 21(1) (i.e., records that do not contain the requester's personal information), a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if a section 21(4) exception or the "public interest override" at section 23 applies.¹³

[57] If the records are not covered by a presumption in section 21(3), section 21(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy and the information will be exempt unless the circumstances favour disclosure.¹⁴

[58] For records claimed to be exempt under section 49(b) (i.e., records that contain the requester's personal information), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.¹⁵

[59] The ministry has applied the factor that favours privacy protection in section 21(2)(f) to the records. This section reads:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

the personal information is highly sensitive.

[60] The ministry states that Records 1 and 2 contain details of a request made under the *Act*, and reveal the identity of a requester. It states that Records 5 and 6 contain an email with a number of the personal observations and an attached presentation sent to the ministry for review and comment. The ministry states that the presentation itself describes the history of the subject land and contains the personal information of a number of individuals, including the presentation's author.

[61] According to the ministry, attempting to sever out the personal information in Records 5 and 6 would still allow a knowledgeable requester to deduce not only who prepared it, but also the identity of a number of individuals referred to in it. Given the acrimony around the land transaction, it is submitted by the ministry that the personal information in this record is highly sensitive.

[62] Record 7 is a letter from an individual affected by the sale to the Minister at the time and contains a number of references to the appellant and other opponents to the sale of the land. Record 7 also contains a chronology and a history of the land and the

¹³ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

¹⁴ Order P-239.

¹⁵ Order MO-2954.

ongoing dispute about the land. Section 49(b) was claimed in connection with this record as it contains the personal information of the individual, the appellant and a number of other individuals. The ministry states that this record demonstrates the acrimony that has arisen from the land sale.

[63] The ministry describes Record 15 as an email from a ministry staff member to an individual listing the names and addresses of other individuals who were notified by the purchaser of the proposed purchase. The email also includes the name and address of the appellant, and some handwritten notes indicating those individual's positions with respect to the proposed purchase. The ministry states that acrimony around the sale of the land has pitted neighbour against neighbour and, as a result, is highly sensitive.

[64] The ministry states that the information at issue in the records is highly sensitive personal information, especially in this situation given the great deal of acrimony around this land transaction. The ministry takes the position that applying the factor set out in section 21(2)(f), the balance favours non-disclosure of the severed portions of the records as it would constitute an unjustifiable invasion of privacy under sections 49(b) or 21(1) of the *Act*.

[65] The affected person relies on the presumption in section 21(3)(f), which reads:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

[66] The appellant relies on the factor favouring disclosure in section 21(2)(a). This factor reads:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;

[67] The appellant states that it is in the 'public interest', in a manner consistent with the Ontario Government's and the MNR's policies with respect to 'openness and transparency', to release any information that was used as 'factual material' by the MNR to justify the proposed sale of the Crown land.

[68] The appellant states that it is appropriate under sections 21(1) and 49(b) to withhold, or redact personal information (e.g., name, address, contact information and financial information), but withholding information used as 'fact' to justify the proposed sale of the Crown land is inappropriate and not consistent with the 'letter' or 'spirit' of the *Act*, or the Ontario government's policies on 'openness and transparency'.

Analysis/Findings

Records 1 and 2

[69] The personal information at issue in Records 1 and 2 consists of the details of a request made under the *Act* and the name of the requester who made the request.

[70] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.¹⁶ Based on my review of the request, I find that its disclosure could not reasonably be expected to cause significant personal distress to the person who made the request. Therefore, I find that the factor in section 21(2)(f) does not apply.

[71] I also find that the factor favouring disclosure in section 21(2)(a) does not apply. This section contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.¹⁷ In order for section 21(2)(a) to apply, it is not appropriate to require that the issues addressed in the records have been the subject of public debate; rather, this is a circumstance which, if present, would favour its application.¹⁸

[72] In my view, the public has a right to expect that expenditures of employees of government institutions during the course of performing their employment-related responsibilities are made in accordance with established policies and procedures, carefully developed in accordance with sound and responsible administrative principles.¹⁹ None of the records at issue provide information about expenditures of employees of government, however.

[73] The personal information at issue in Records 1 and 2 is not the type of information referred to by the appellant in his representations. It is not factual material used by the MNR to justify the proposed sale of the Crown land. I find that the factor in section 21(2)(a) does not apply to these two records.

[74] In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure in

¹⁶ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

¹⁷ Order P-1134.

¹⁸ Order PO-2905.

¹⁹ Orders P-256 and PO-2536.

section 21(2) must be present. In the absence of such a finding, the exception in section 21(1)(f) is not established and the mandatory section 21(1) exemption applies to these records.²⁰ Records 1 and 2 are exempt, subject to my review of the applicability of the public interest override in section 23.

Records 5, 6 and 7

[75] Records 5 and 6 contain an email with a number of personal observations and an attached presentation that describes the history of the land being transferred and contains the personal information of a number of individuals. Record 7 is a letter that contains a number of references to the appellant and other opponents to the sale of the land. Record 7 also contains a chronology and a history of the land and the ongoing dispute about the land.

[76] Records 6 and 7 contain factual information relied upon by the MNR to justify the proposed sale of the Crown land. The factor in section 21(2)(a) favouring disclosure applies. I also find that the factor weighing against disclosure in section 21(2)(f) also applies to certain information in these records as they contain details of the personal family situation of the landowner, as well as other financial transactions that the landowner has been involved in.

[77] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.²¹ Based on my review of the Records 5, 6 and 7, I find that its disclosure could reasonably be expected to cause significant personal distress to individuals other than the appellant. Therefore, I find that the factor in section 21(2)(f) applies to this personal information.

[78] In addition, the presumption in section 21(3)(f) applies to Records 5, 6 and 7 as they contain information about the landowner's financial history or activities.

[79] Records 5, 6 and 7 contain the personal information of the appellant and other individuals. I find that the presumption in 21(3)(f) and the factor weighing against disclosure in 21(2)(f) outweigh the factor in section 21(2)(a) in favour of disclosure. As such, Records 5, 6 and 7 are exempt by reason of section 49(b), subject to my review of the ministry's exercise of discretion and the public interest override in section 23.

Record 12 and 14

[80] Record 12 is an email and Record 14 is a letter about the land which describe certain financial activities the landowner is involved in concerning the land. In my opinion, neither record contains factual material used by the MNR to justify the

²⁰ Orders PO-2267 and PO-2733.

²¹ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

proposed sale of the Crown land. In addition, neither record contains the personal information of the appellant.

[81] I find that the presumption in section 21(3)(f) applies to these records as they contain personal information about the landowner's financial history or activities. As section 21(3)(f) applies, disclosure of the personal information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies. Section 21(4) does not apply. I will consider below whether section 23 applies to Records 12 and 14.

Record 15

[82] Record 15 consists of a list the names and addresses of the landowner's neighbours and states whether each neighbour supported or objected to the sale of the land. The ministry has disclosed the appellant's own information in this record to him. I agree with the ministry that the remaining information is highly sensitive given the acrimony surrounding the sale of land and the factor in section 21(2)(f) applies to it.

[83] The factor favouring disclosure is section 21(2)(a) does not appear to apply as the record is only a listing of names with indication beside each name whether the ministry had information about whether these neighbours objected to the sale of the land

[84] As such, Record 15 is exempt by reason of section 49(b), subject to my review of the ministry's exercise of discretion and the public interest override in section 23.

Conclusion

[85] In conclusion, I find that there are factors and presumptions that do not favour disclosure of the personal information at issue apply to each record. I will consider whether the ministry exercised its discretion in a proper manner concerning the records that I have found subject to section 49(b), namely, Records 5, 6, 7 and 15. I will consider below whether the public interest override in section 23 applies to Records 1, 2, 5, 6, 7, 12, 14 and 15.

D. Did the institution exercise its discretion under sections 19 and 49(b)? If so, should this office uphold the exercise of discretion?

[86] The sections 19 and 49(b) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[87] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[88] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²² This office may not, however, substitute its own discretion for that of the institution.²³

[89] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²⁴

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons

²² Order MO-1573.

²³ Section 54(2).

²⁴ Orders P-344 and MO-1573.

- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[90] The ministry states that with respect to section 19, it considered the purposes of the *Act* but was mindful of the Supreme Court's decisions and concerns around the importance of solicitor-client privilege. Taking into account the totality of the ministry's representations under section 19, I find that the ministry exercised its discretion concerning section 19 in a proper manner. Accordingly, as section 23 does not apply to section 19 records, Records 3, 4, 8, 10 and 13 are exempt under section 19(a).

[91] The ministry did not provide representations as to how it exercised its discretion under section 49(b). Accordingly, I will order the ministry to re-exercise its discretion concerning Records 5, 6, 7 and 15, taking into account the relevant considerations listed above.

E. Is there a compelling public interest in the disclosure of Records 1, 2, 5, 6, 7, 12, 14 and 15 that clearly outweighs the purpose of the section 21 exemption?

[92] Section 23 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.

[93] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[94] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the

records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.²⁵

[95] The appellant states that if there is any acrimony it was caused by the MNR's lack of 'openness and transparency' and 'due process' with respect to dealing with the disposition of the Crown land in question. He submits that the information provided by the landowner is false and that the information provided by those who opposed the sale, the local municipalities and concerned citizens, was ignored and never communicated to the Minister.

[96] The appellant states that none of the information released to date contains any information from the adjacent landowners that would justify the 'extraordinary' emphasis that the MNR placed on personal privacy, or the MNR's environmental assessment reference to 'increase privacy of private property'. No information from the application to buy the Crown land was released. There were no additional legal opinions about the status of the Crown beyond the 1993 opinion.

[97] The appellant states that it is in the public interest to disclose any information provided to the MNR that was used as 'fact' by the MNR to justify its position with respect to the sale of the Crown land, especially the extraordinary emphasis the MNR placed on 'personal privacy'. He states:

For example, I learned through an FOI request filed with the OPP that, between 2008 and 2010, one of the three adjacent landowners filed three complaints. The unredacted contents of these complaints released by court order show that they contain false and unsubstantiated statements about 'trespassing and personal privacy'. This was confirmed in a recent defamation suit settlement that included the attached apology and retraction.

[98] The affected party provided confidential representations disputing the appellant's representations.

[99] In reply, the ministry states that in this instance, it is arguable that there is at best a limited public interest in the sale of the land. There is no evidence of significant public or media interest in the sale of the land. The interest seems to involve only a few local property owners who may have used the former Crown land to access the Ottawa River. These interests are essentially private interests, and not the basis for the application of section 23.

²⁵ Order P-244.

Analysis/Findings

Compelling public interest

[100] In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government.²⁶ Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, 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.²⁷ A public interest does not exist where the interests being advanced are essentially private in nature.²⁸ Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.²⁹

[101] The word “compelling” has been defined in previous orders as “rousing strong interest or attention”.³⁰

[102] Any public interest in *non*-disclosure that may exist also must be considered.³¹ A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of “compelling”.³²

[103] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation³³
- the integrity of the criminal justice system has been called into question³⁴
- public safety issues relating to the operation of nuclear facilities have been raised³⁵

²⁶ Orders P-984 and PO-2607.

²⁷ Orders P-984 and PO-2556.

²⁸ Orders P-12, P-347 and P-1439.

²⁹ Order MO-1564.

³⁰ Order P-984.

³¹ *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

³² Orders PO-2072-F, PO-2098-R and PO-3197.

³³ Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).

³⁴ Order PO-1779.

³⁵ Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805.

- disclosure would shed light on the safe operation of petrochemical facilities³⁶ or the province's ability to prepare for a nuclear emergency³⁷
- the records contain information about contributions to municipal election campaigns³⁸

[104] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations³⁹
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations⁴⁰
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding⁴¹
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter⁴²
- the records do not respond to the applicable public interest raised by appellant⁴³

[105] The appellant is seeking disclosure of any information provided to the MNR that was used as 'fact' by the MNR to justify its position with respect to the sale of the land.

[106] Records 1, 2, 5, 6, 7, 12, 14 and 15 are the records that I found are subject to the personal privacy exemption in section 21 or 49(b).

[107] Only Records 6 and 7, which are records prepared by the landowner, could be said to contain factual information about the land. Record 6 is dated 2008 and is a draft PowerPoint presentation about the history of the land. Record 7 is dated 2009 and is a letter to the Minister attaching a chronology of the neighbourhood dispute about the land.

³⁶ Order P-1175.

³⁷ Order P-901.

³⁸ *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.

³⁹ Orders P-123/124, P-391 and M-539.

⁴⁰ Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

⁴¹ Orders M-249 and M-317.

⁴² Order P-613.

⁴³ Orders MO-1994 and PO-2607.

[108] There is no indication in these records that they were actually used by the ministry to justify its position with respect to the sale of the land. I find that the records do not respond to the applicable public interest raised by appellant. I find that the interests being advanced in Records 6 and 7 are essentially private in nature and do not raise issues of more general application.

[109] The appellant has already received a copy of the briefing note containing the factual basis for the ministry's decision to sell the land. The only information withheld from this briefing note were the details of a freedom of information request made by a requester that does not contain the factual information sought by the appellant.

[110] I find that the personal information in Records 6 and 7 do not serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, 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.

[111] Accordingly, I find that there is not a compelling public interest in the disclosure of Records 1, 2, 5, 6, 7, 12, 14 and 15 under section 23. As I have found there is not a compelling public interest in disclosure of these records, there is no need for me to consider whether there is a compelling public interest in the disclosure of the records that clearly outweigh the purpose of the personal privacy exemption in sections 21 or 49(b) in this case.

ORDER:

1. I uphold the ministry's decision that the records are exempt, except for Records 5, 6, 7 and 15.
2. I order the ministry to re-exercise its discretion with respect to Records 5, 6, 7 and 15, taking into consideration the relevant considerations listed in paragraph 89 of this order. I order the ministry to advise the appellant and the affected person and this office of the result of this re-exercise of discretion, in writing. The ministry is required to send the explanation of its re-exercise of discretion, to the appellant and the affected person, with the copy to this office, by no later than **July 12, 2014**.
3. If the appellant or the affected person wishes to respond to the ministry's explanation for re-exercising its discretion, it must do so within 21 days of the date of the ministry's correspondence by providing me with written representations.

4. I remain seized of this matter pending the resolution of the re-exercise of discretion issue addressed in order provisions 2 and 3.

Original Signed By: _____ June 20, 2014 _____
Diane Smith
Adjudicator