

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER PO-3460-F

Appeal PA13-242

Ministry of Natural Resources

February 10, 2015

Summary: The Ministry of Natural Resources received a request under the *Freedom of Information and Protection of Privacy Act (FIPPA or the 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 section 49(b). In Interim Order PO-3353-I, the adjudicator upheld the ministry's decision that the information in four records was subject to the discretionary personal privacy exemption in section 49(b) and ordered the ministry to re-exercise its discretion regarding these records. This order upholds the ministry's re-exercise of discretion.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 49(b).

Orders and Investigation Reports Considered: Interim Order PO-3353-I.

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 stage of the appeal process 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.

[10] In Interim Order PO-3353-I, I upheld the ministry's decision that the records were exempt except for four records. I ordered the ministry to re-exercise its discretion under section 49(b) regarding Records 5, 6, 7 and 15.

[11] The ministry re-exercised its discretion and provided an explanation for its decision to continue denying access to the four records. The appellant responded by providing representations in response to the ministry's decision on its re-exercise of discretion. The affected person did not provide representations on this issue. The ministry did not provide representations in reply to the appellant's representations.

[12] In this order, I uphold the ministry's re-exercise of discretion.

RECORDS:

[13] The records remaining at issue consist of Records 5, 6, 7 and 15, 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
5	429	Mountain River Area Supervisor, Pembroke District	Senior Lands & Waters Technician	Email chain re: presentation
6	430 - 445			Presentation - Crown Right of Way (Crown) and Public Consultation Process
7	446 - 452		Minister of Natural Resources	Letter Re: Crown land Part of Lot [#], Range ..., [name] Township - enclosing chronology of events
15	559 - 560	Senior Lands & Waters Technician		Email

[14] Records 5, 6, and 7 have been withheld in full. Record 15 has been withheld in part. All of these records contain the personal information of the appellant and other individuals. I found in Interim Order PO-3353-I that section 49(b) applied to these four records.

DISCUSSION:

Background Information

[15] 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.

Description of Records from Interim Order PO-3353-I

Records 5, 6 and 7

[16] Records 5 and 6 each contain an email with a number of personal observations and an attached presentation that describes the history of the land being transferred. These records contain 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.

[17] With respect to Records 5, 6, and 7, in Interim Order PO-3353-I, I found that the presumption against disclosure in 21(3)(f)¹ and the factor weighing against disclosure in 21(2)(f)² outweigh the factor in section 21(2)(a)³ in favour of disclosure.

Record 15

[18] Record 15 consists of a list of 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 disclosed the appellant's own information in this record to him. In Interim Order PO-3353-I, I agreed with the ministry that the remaining information in this record is highly sensitive given the acrimony surrounding the sale of land and, therefore, I found that the factor in section 21(2)(f) applied to it.

[19] I also found that the factor favouring disclosure is section 21(2)(a) did not appear to apply as the record is only a listing of names with an indication beside each name whether the ministry had information about whether these neighbours objected to the sale of the land

Did the institution re-exercise its discretion in a proper manner under section 49(b)? If so, should this office uphold the exercise of discretion?

[20] The section 49(b) exemption is discretionary and permits 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.

[21] 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

¹ 21(3)(f) 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.

² 21(2)(f) 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.

³ 21(2)(a) 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.

- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[22] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁴ This office may not, however, substitute its own discretion for that of the institution.⁵

[23] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:⁶

- 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
- 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

⁴ Order MO-1573.

⁵ Section 54(2).

⁶ Orders P-344 and MO-1573.

- the historic practice of the institution with respect to similar information.

[24] As the ministry did not provide representations as to how it exercised its discretion under section 49(b), in Interim Order PO-3353-I ordered it to re-exercise its discretion concerning Records 5, 6, 7 and 15.

[25] Following Interim Order PO-3353-I, in its decision to withhold the four records at issue, the ministry stated that:

In considering whether to exercise its discretion to exempt the records to which section 49(b) applied, the ministry balanced the purpose of the exemptions at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of this particular case.

The decision involved two steps. First, the head determined whether the exemption applies. Based on Order PO-3353-I, the ministry's determination was correct.

The ministry, then had regard to all relevant interests, including the public interest in disclosure, and concluded that disclosure should not be made. In this case, the interest in disclosure was of a private nature, i.e. related to the appellant's property interests, rather than a broader public interest of holding the ministry to greater scrutiny on public issues. To the extent possible, the ministry severed records in order to allow for whatever public interest there was in disclosure.

As noted in the order, various factors with respect to the records weighed in favour of non-disclosure in order to protect the privacy interests of the affected party. Given the high regard of the ministry with respect to protection of privacy of individuals, the ministry has exercised its discretion to withhold the records that remain at issue under section 49(b).

[26] In response, the appellant states that he has received disclosure of a large amount of information as a result of two court actions.

[27] The appellant also states that public organizations, such as the ministry, should conduct transactions like the sale of this Crown right of way in a manner consistent with the Ontario Government's policies on openness and transparency and the organization's own policies and procedures. He states that in this case there is evidence to suggest that the ministry did not follow its own policies and procedures, and that ministry is now refusing to release substantive, factual information about the sale to avoid public scrutiny.

Analysis/Findings

[28] Based on my review of the information at issue in the four records, and considering the representations of the ministry and the appellant, I find that the ministry re-exercised its discretion in a proper manner.

[29] I find that the ministry took into account the relevant considerations, as listed above, and did not take into account irrelevant considerations.

[30] Although the records contain the personal information of the appellant, the records mainly contain the personal information of individuals other than the appellant. The records primarily concern the history of the affected person's land and the names of the neighbours who consented or objected to the sale of the right of way to the affected person. I agree with the ministry that in this appeal the privacy of the other individuals in the records should be protected.

[31] Although the appellant has received other documents related to the sale from disclosure during court proceedings, the access process under *FIPPA* is a different process than that of disclosure of documents through court proceedings.

[32] The documents that the appellant has received through the court process are distinct from those at issue in this order. The four records at issue in this appeal do not contain substantive, factual information about the sale of the right of way. The records do not contain the details of the price and terms of the sale of the land. Disclosure will not provide information on the application of the ministry's policies and procedures as claimed by the appellant.

[33] Accordingly, I am upholding the ministry's re-exercise of discretion and dismiss the appeal.

ORDER:

I uphold the ministry's re-exercise of its discretion and find that Records 5, 6, 7, and 15 are exempt.

Original Signed By: _____
Diane Smith
Adjudicator

February 10, 2015 _____