[2001] O.J. No. 749
Court File No: 666/99
Date: 2001/03/05

Ontario Superior Court of Justice
Divisional Court

(Southey, J. Macdonald and Crane JJ.)

BETWEEN: PETER GRANT Applicant	)	Ms. B. Fisher and Ms. C.B. Flood for the Applicant;
and - LAUREL CROPLEY, Inquiry Officer, HER MAJESTY THE QUEEN in right of Ontario as represented by the MINISTER of the ENVIRONMENT, and an UNIDENTIFIED PERSON	)	Mr. W. Challis and Mr. J. Higgins for the Respondent Cropley and the Commissioner; Ms. L. Kowal for the Respondent Minister of the Environment
Repondents	)	Heard: February 21-22, 2001 Judgement: March 5, 2001

The following judgment was delivered by:

[1] **THE COURT** (endorsement):— The Information and Privacy Commissioner ("the Commissioner") upheld the refusal of the Minister of the Environment ("the Minister") to disclose to the applicant the name of a person ("the informant") who had complained to the Ministry about large quantities of water being drawn from a lake.The applicant seeks judicial review of the Commissioner's decision.

BACKGROUND:

[2] Upon receipt of the complaint, the Ministry prepared an "occurrence report".It contained the name of the informant and particulars of the information s/he had provided.The Ministry then notified Grant Forest Products Corporation ("the company") of the complaint, by registered mail.The letter was addressed to the company and was to the attention of the applicant, who was conceded to be the president and sole shareholder of the company.

[3] The applicant then requested disclosure of information about the occurrence pursuant to the Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31 ("FIPPA").The Minister, acting through his appointed official, provided to the applicant a copy of the occurrence report with the name of the informant deleted.The applicant appealed to the Commissioner from the Minister's refusal to provide the informant's name.

[4] The Ministry did not commence a prosecution respecting the subject matter of the complaint.The applicant concedes that he is now immune to such a prosecution.There is no suggestion of civil litigation.Consequently, the applicant's desire to know the name of the informant is not for the purpose of protecting himself from any legal consequences of the informant's complaint.

ANALYSIS:

[5] The Commissioner may have been wrong in finding that the occurrence report does not contain "personal information" of the applicant within the meaning of FIPPA because the report notes "private resident Peter Grant taking water without permit".However, this apparent error would not affect the Commissioner's decision that the applicant is not entitled to disclosure of the informant's name.

[6] The applicant submits that the Commissioner should have found that the occurrence report contained personal information of the applicant and, therefore, the Commissioner shouldhave considered the applicant's request for disclosure of the full, unedited occurrence report under Part III of FIPPA.The applicant submits that s. 47 in Part III gives the applicant a right of access to his own personal information. That would have led the Commissioner to the question of whether the informant's name is solely the applicant's personal information.The informant's written submission to the Commissioner consisted of a firm objection to disclosure of her/his name.The informant's objection would have been relevant to this question.The Commissioner would have been required to consider s. 49, which states in part:

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

[7] We are satisfied that the informant's name, taken in conjunction with the fact of her/his complaint, constituted personal information of the informant.Since the refusal to

disclose the informant's name was the issue under appeal, the Commissioner's determination of the issue in s. 49(b) would no doubt have been to refuse disclosure under Part III.

[8] The Commissioner in fact determined that disclosure of the informant's name would constitute an unjustified invasion of the informant's personal privacy.The Commissioner did so pursuant to s. 21(2) FIPPA, which states in part:

> 21.(2).A head, in determining whether disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all relevant circumstances, including whether,
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> ...
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> (f) The personal information is highly sensitive;
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> ...
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> (h) The personal information had been supplied by the individual to whom the information relates in confidence;
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> ...

The Commissioner found that the facts came within clauses (f) and (h).That finding, in our view, was entirely reasonable.

[9] In our opinion, the Commissioner's conclusion that disclosure of the informant's name would constitute an unjustified invasion of the informant's personal privacy would have been no different if it had been made under s. 49(b). The burden of proof, and the differing presumptions under Part II and Part III of FIPPA make little, if any difference when the facts respecting the potential invasion of the informant's personal privacy were as few and as clear as they were before the Commissioner.

[10] In any event, the Commissioner's conclusion that the occurrence report did not contain the applicant's personal information was not unreasonable in the circumstances, even though the Commissioner may have been wrong.It was open to the Commissioner to conclude that the complaint was in fact about the company and not about the applicant personally, based on the Minister's submissions.The Commissioner considered the distinction between the company and the applicant and accepted that it was the company which was referred to in the occurrence report, and which was the subject of investigation.The Commissioner engaged in a rational analysis of the information before her and applied prior relevant decisions.

[11] In concluding that disclosure of the informant's name would constitute an unjustified invasion of the informant's personal privacy, the Commissioner also relied on s. 21(3)(b) FIPPA which states:

> 21.(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
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> ...
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> (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that the
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> ...

[12] If the Commissioner's analysis should have taken place pursuant to Part III, it would have been neither incorrect nor unreasonable for the Commissioner to consider the criteria mentioned in s. 21(3)(b) in determining, under s. 49(b), whether disclosure of the informant's name would constitute an unjustified invasion of the informant's personal privacy.

[13] The applicant submits that the Commissioner's application of s. 21(3)(b) in the case of an informant is inconsistent with the intention of the legislature because it renders s. 14 FIPPA nugatory.We do not agree.While s. 14(1)(d) gives a discretion to refuse to disclose a record where it may "disclose the identity of a confidential source of information in respect of a law enforcement matter ...", that does not prevent the more general provision of s. 21(3)(b) from also applying to the information in issue.In our opinion, the legislature enacted separate schemes which overlap in this case, and which thus ensure that the identity of informants may be kept confidential, in appropriate circumstances.The Commissioner's appraisal of the facts which led to the application of s. 21(3)(b) was reasonable. The Commissioner was correct in determining that s. 21(3)(b) applies to the identity of informants.

[14] We say no more respecting s. 14 because the Minister did not rely on it in refusing disclosure, and the Commissioner considered it only in disposing of this submission of the applicant.

[15] The applicant submits that the Commissioner denied him procedural fairness by refusing to disclose the Minister's submissions to the Commissioner.The Commissioner relied on s. 52(13) FIPPA which states:

> institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

[16] In our opinion, the language of s. 52(13) is explicit and clear in stating that the applicant did not have the right either to receive the Minister's submissions or to comment upon them for the purposes of the appeal.The language of s. 52(13) thus demonstrates the intention of the legislature to abrogate the rules of natural justice to the extent specified:Kane v. Board of Governors of the University of British Columbia [1980] 1 S.C.R. 1105, per Dickson J. (as he then was) at p. 1113.

[17] Where it appears that the provisions of a statute conflict with the rules of natural justice, the statute must govern:Brosseau v. the Alberta Securities Commission, [1989] 1 S.C.R. 301; W.D. Latimer Co. v. Bray, (1974), 6 O.R. (2nd) 129 (C.A.); Canadian Union of Public Employees v. Ontario (Minister of Labour), [2000] O.J. No. 4361 (C.A.).

[18] By order of Carnwath J, certain of the Commissioner's documentation was provided to the Court in a "private record", to which other counsel could gain access only after executing a written undertaking respecting confidentiality.Some peripheral information in the private record is mentioned in various factums.In our opinion, the information in the factums cannot identify the informant.The factums in issue need not be sealed and may be treated as public documents.All other information in the private record remains confidential and subject to the undertaking.

DISPOSITION:

[19] While part of the Commissioner's reasoning may have been wrong, the result was not affected by this apparent error.The Commissioner's reasoning is reasonable, in our opinion, as is the result reached by the Commissioner that the informant's name should not be disclosed.The application is dismissed.

[20] The respondents' written submissions respecting costs shall be served and delivered to the Registrar within ten days of the release of this endorsement.The applicant's written submissions shall be served and delivered to the Registrar within seven days thereafter.

SOUTHEY J.
J. MACDONALD J.
CRANE J.

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: PETER GRANT (Applicant) v. LAUREL CROPLEY, Adjudicator, HER MAJESTY THE QUEEN in right of Ontario as represented by the MINISTER OF THE ENVIRONMENT, and an UNIDENTIFIED PERSON (Respondents)

BEFORE: SOUTHEY, J. MACDONALD and CRANE JJ.

COUNSEL: *B. Fisher and C. B. Flood* for the Applicant

L. Kowal for the Respondent Minister of the Environment

W. Challis and]. Higgins for the Respondent Cropley and the Commissioner

DECISION AS TO COSTS

[1] We have considered the voluminous written submissions on Costs submitted by the parties.

[2] The respondents were successful and are entitled to their costs. We propose to fix them under rule 57.01(3).

[3] The argument was complicated and the hearing consumed the better part of 2 days. The amount of $7,500 requested by the Commissioner, and the amount of $2,500 requested by the Ministerof the Environment are both modest claims on a party and party basis. We fix the costs of the respondents in those amounts and direct that they be paid by the applicant forthwith.

RELEASED: April 6, 2001

SOUTHE
J. MACDONALD J.
CRANE J.