



Information and Privacy  
Commissioner/Ontario

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

# **ORDER M-211**

**Appeal M-9200001**

**Regional Municipality of Niagara**

# ORDER

## BACKGROUND:

The Regional Municipality of Niagara (the Municipality) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for all information regarding the requester.

The Municipality identified 130 records as responsive to the request. Access was granted to 122 records. Access was denied to the remaining 8 records pursuant to sections 10 and 12 of the Act. The requester appealed the Municipality's decision.

In the course of mediation, the Municipality withdrew its reliance on section 10 but raised the application of section 14 of the Act. The appellant indicated that he felt more records existed than those identified by the Municipality.

Further, the appellant stated that he wanted corrections made to some of the records to which he had received access. The appellant has made a separate request to the Municipality and this matter is not at issue in this appeal.

Mediation was not successful and notice that an inquiry was being conducted to review the decision of the Municipality was sent to the appellant, the Municipality and an individual who had an interest in some of the information contained in the records (the affected person). Also, the application of sections 38(a) and (b) of the Act was raised by this agency. Written representations were received from the appellant and the affected person.

While the representations were being considered, Commissioner Tom Wright issued Order M-170, adopting the Ontario Court (General Division) (Divisional Court) decision in the case of John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767. This decision interpreted several provisions of the Act in a way which differed from the interpretation developed in orders of the Commissioner. Since similar statutory provisions were also at issue in the present appeal, it was determined that copies of Order M-170 should be provided to the parties, and the appellant and the Ministry were provided with the opportunity to change or to supplement the representations previously submitted. No additional representations were received.

The eight records remaining at issue all relate to concerns expressed about the appellant's management style.

## PRELIMINARY ISSUE:

The Municipality did not make any representations in response to the Notice of Inquiry. Accordingly, as I have no substantive comments from the Municipality with respect to the discretionary exemptions provided by sections 12 and 38(a) of the Act, I will not be considering their application in the circumstances of this appeal.

**ISSUES:**

The issues arising in this appeal are:

- A. Whether the information contained in the requested records qualifies as "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, and the personal information is solely that of an individual other than the appellant, whether the mandatory exemption provided by section 14 of the Act applies.
- C. If the answer to Issue A is yes, and the personal information is that of the appellant and another individual, whether the discretionary exemption provided by section 38(b) of the Act applies.
- D. Whether the Municipality's search for responsive records was reasonable in the circumstances.

**SUBMISSIONS/CONCLUSIONS:**

**ISSUE A: Whether the information contained in the requested records qualifies as "personal information" as defined in section 2(1) of the Act.**

Section 2(1) reads, in part, 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,
- (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,
- ...
- (h) the individual's name if 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;

In my view, Records 2, 3, 4, 6, 7 and 8 contain personal information of the appellant only. Records 1 and 5 contain personal information of both the appellant and the affected person.

Because I have found that the all records contain the personal information of the appellant, it is not necessary for me to consider Issue B.

**ISSUE C: If the answer to Issue A is yes and the personal information is that of the appellant and another individual, whether the discretionary exemption provided by section 38(b) of the Act applies.**

In Issue A, I have found that Records 2, 3, 4, 6, 7 and 8 contain personal information of the appellant only. Accordingly, section 38(b) of the Act is not available to exempt these records from disclosure to the appellant. As no other discretionary exemptions have been claimed and no mandatory exemptions apply, these records should be disclosed to the appellant.

Also in Issue A, I found that Records 1 and 5 contain the personal information of the appellant and the affected person. However, in her representations, the affected person indicated she objects only to the release of Record 1. Accordingly, I shall only be addressing the application of section 38(b) to Record 1, and Record 5 should be disclosed to the appellant.

Section 36(1) of the Act gives individuals a general right of access to personal information about themselves which is in the custody or under the control of the Municipality. However, this right of access is not absolute. Section 38 provides a number of exceptions to this general right of access, including section 38(b), which states:

A head may refuse to disclose to the individual to whom the information relates personal information,

if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Section 38(b) introduces a balancing principle. The Municipality must look at the information and weigh the requester's right of access to his/her own personal information against other individuals' right to the protection of their personal privacy. If the Municipality determines that the release of the information would constitute an unjustified invasion of the other individuals' personal privacy, then section 38(b) gives the Municipality the discretion to deny the requester access to the personal information (Order 37).

In my view, where the personal information relates to the requester, the onus should not be on the requester to prove that disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the requester has a right of access to his/her own personal information, the only situation under section 38(b) in which he/she can be denied access to the information is

[IPC Order M-211/November 4, 1993]

if it can be demonstrated that disclosure of the information **would** constitute an unjustified invasion of another individual's privacy.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

I have considered sections 14(3) and (4) of the Act and find that none of the personal information at issue in this appeal falls within the ambit of these provisions.

The affected person indicates that the disclosure of Record 1 would constitute an unjustified invasion of her personal privacy, and submits that Record 1 contains references to her physician and family situation. The appellant states that he is defending a legal action brought forward by the Municipality, and in order to properly defend himself, he requires and believes he has a right to all information used in the consideration of his dismissal.

I have considered the provisions of section 14(2) of the Act, and the circumstances of this particular appeal.

In balancing the interests of the appellant in disclosure of the personal information and the interests of the affected person in the protection of her privacy, I find that disclosure of Record 1 would constitute an unjustified invasion of the personal privacy of another individual, and section 38(b) applies.

Section 38(b) is a discretionary exemption which allows the Municipality to deny a requester access to his or her own personal information if disclosure of the information would constitute an unjustified invasion of another individual's personal privacy. Having reviewed the representations of the affected party, I find that the Municipality's decision not to disclose Record 1 is appropriate in the circumstances of this appeal.

**ISSUE D: Whether the Municipality's search for responsive records was reasonable in the circumstances.**

In his representations, the appellant outlines his reasons for believing that further records exist. The appellant also submitted copies of records which he felt should have been identified as being responsive to his request. However, I note that the copies relate to day-to-day operations within the Municipality and not specifically to the appellant.

The Municipality has submitted an affidavit sworn by the employee of the Municipality who conducted the search, outlining the steps taken to locate any additional responsive records. The affidavit states that a review of all files and records was made and no further records were found.

Having carefully reviewed the representations of the appellant and the affidavit evidence submitted to me, I am satisfied that the Municipality has taken all reasonable steps to locate additional records that would respond to the appellant's request, and I find that the search was reasonable in the circumstances of this

appeal.

**ORDER:**

1. I order the Municipality to disclose to the appellant Records 2, 3, 4, 5, 6, 7 and 8 within 35 days of the date of this order and not earlier than the thirtieth (30th) day following the date of this order.
2. I uphold the Municipality's decision not to disclose Record 1.
3. In order to verify compliance with the provisions of this order, I order the Municipality to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1, **only** upon request.

Original signed by:  
Holly Big Canoe  
Inquiry Officer

November 4, 1993