



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

ORDER M-705

Appeal M_9500454

Township of Ratter and Dunnet



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The appellant is a former employee of the Township of Ratter and Dunnet (the Township). Under the Municipal Freedom of Information and Protection of Privacy Act (the Act) he submitted a request to the Township for copies of statements in his personnel file marked "A" to "G". These statements pertain to the election of the Reeve and the Township Council held on November 14, 1994.

The appellant later amended his request to include "a copy of all information and documentation signed or unsigned mentioning my name or describing my character in any file of this present Council that deals with any subject pertaining to my performance, integrity, honesty and duties as a past employee and after my resignation".

The Township responded to the request, including the amendment, by indicating that the only responsive records in its possession are the statements marked "A" to "G" in the appellant's personnel file. The Township denied access to these records in their entirety, pursuant to the following exemption in the Act:

- evaluative or opinion material - section 38(c).

The decision to deny access was made by the Township Council (including the Reeve), acting as "head" of the institution.

The appellant filed an appeal of the Township's decision to deny access.

A Notice of Inquiry was sent to the appellant, the Township, and five individuals mentioned in the records (the affected persons). In response to this Notice, the Reeve submitted representations on behalf of the Township. One of the affected persons also made representations.

Subsequently, it came to the attention of the Appeals Officer that the Reeve might have a personal interest in some of the records at issue, and that she had participated in the decision to deny access. This raised the issue of a possible conflict of interest in connection with that decision. As a result, a supplementary Notice of Inquiry was sent to all parties who received the original Notice, and to the Reeve personally. In response to this Notice, the appellant, the Reeve and the Township provided representations.

During the inquiry, the appellant agreed that he does not require access to information in the records about other municipal employees and several voters in the election. Therefore, this information is not at issue.

PRELIMINARY ISSUE:

CONFLICT OF INTEREST

An individual with a personal or special interest in whether records are disclosed should not be the person who decides the issue of disclosure. In Order M-640, Inquiry Officer Holly Big Canoe posed the following questions to assist her in determining whether there was a conflict of interest:

- (a) did the decision-maker have a personal or special interest in the records?
- (b) could a well-informed person, considering all of the circumstances, reasonably perceive a conflict of interest on the part of the decision-maker?

These questions are not intended to provide a precise standard for measuring whether or not a conflict of interest exists in a given situation. Rather, they reflect the kinds of issues which need to be considered in making such a determination.

I will begin with question (a). As previously noted, the access decision under appeal was made by the Township Council, which includes the Reeve. The records which were withheld pertain to observations by the Reeve and others about the municipal election held in November, 1994. Although the records were all created after the election, the comments of the Reeve arise from her experiences **as a candidate** in the election, and in my view, this indicates that the Reeve has a **personal** interest in the subject matter.

The representations of the Township and the Reeve relate primarily to question (b). The Township states that it passed the following resolution at its meeting of January 3, 1996:

Be it resolved that the Clerk-Treasurer advise the Information and Privacy Commissioner's Office that, in Council's opinion, no personal bias existed when the decision was made to deny personal information to [the appellant].

Unlike the representation just quoted, however, question (b) does not address the issue of whether bias actually existed. Instead, consistent with prevailing standards for determining whether a reasonable apprehension of bias exists in connection with a person exercising a power of decision, it asks whether a well-informed person, considering all of the circumstances, could reasonably perceive a conflict of interest. The Township's representation is not helpful in making this assessment.

The Reeve's representations also relate to whether there was an **actual**, as opposed to perceived, conflict of interest. Again, this does not assist me in deciding whether there could reasonably be a **perception** that a conflict of interest exists.

The Reeve is only one member of Council, and the access issue was decided by Council as a whole. For this reason, and despite the leadership role usually played by the head of a municipal council, I find, on balance, that a well-informed individual could not reasonably perceive a conflict of interest in this situation.

On this basis, I find that no conflict of interest has been established.

However, in my view, since the Reeve had a personal interest in the records at issue, it might have been prudent for her to abstain from voting on the issue of access to these records when Council was making that decision, in order to completely avoid any appearance of bias.

DISCUSSION:

EVALUATIVE OR OPINION MATERIAL

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

I have reviewed the records. In my view, the fact that they were placed in the appellant's personnel file pursuant to a resolution of the Township Council indicates that, in Council's view, they relate to the appellant's job performance. Moreover, they are located in his personnel file. Therefore, despite the fact that not all of the records refer to the appellant by name, I find that they all contain his personal information. Some of the records also contain personal information of the Reeve.

All the other personal information in the records relates to other municipal employees and several voters in the election. As noted previously, the appellant does not require this information and it is not at issue.

I have found that all of the records contain the appellant's personal information. Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. However, this right of access is not absolute. Section 38 provides a number of exemptions to this general right of access. One such exemption is found in section 38(c), which reads:

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

that is evaluative or opinion material compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of contracts and other benefits by an institution if the disclosure would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence.

An analysis of section 38(c) indicates that it contains several distinct components, each of which must be satisfied in order for this exemption to apply. These are:

- the information in question must be "evaluative" or "opinion" material relating to the requester (in this case, the appellant);

- the information must have been “compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of contracts and other benefits by an institution”; **and**
- it must be established that disclosure would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence.

I will begin with the requirement that the records contain “evaluative” or “opinion” material relating to the appellant. Records A, B, C and D contain no references to the appellant, either by name or by job title. In my view, they do not contain any “evaluative” or “opinion” material relating to the appellant and, on this basis, they cannot be exempt under section 38(c).

Record F mentions the appellant indirectly, by making a reference to one of his job responsibilities. However, this record offers no evaluation or opinion of any kind concerning the appellant or his job performance. Again, this fact alone disqualifies Record F from meeting the exemption criteria under section 38(c).

Records E and G contain direct references to the appellant. Record E contains a statement which could be construed as evaluative or opinion material, but it does not pertain to the appellant. As noted previously, section 38(c) only applies to the personal information of the requester (i.e. the appellant). Therefore, in my view, Record E is not exempt under section 38(c). Record G contains a section entitled “Lack of Performance of Duties”, but the reader is left to infer that, in the opinion of the author of this document, some job responsibilities were not met. There is no direct analysis in this regard. In my view, the contents of this record are too vague to qualify as “evaluative” or “opinion” material within the meaning of section 38(c).

Accordingly, none of the records meets the requirement that the withheld information must be “evaluative” or “opinion” material, and as a result, none of them is exempt under section 38(c).

As noted previously, the appellant is not seeking access to personal information in the records relating to other Township employees or to voters in the election. This information appears in Records C and G. I have highlighted it on the copies of these records which are being sent to the Township’s Freedom of Information and Privacy Co-ordinator with a copy of this order. This information should **not** be disclosed.

I have also found that the records contain personal information pertaining to the Reeve. This raises the possible application of section 38(b), which provides the Township with the discretion to deny access to records containing the appellant’s personal information where the disclosure would constitute an unjustified invasion of another individual’s personal privacy. However, in the circumstances of this case, the Township has not claimed section 38(b), and I see no reason to question the Township’s decision in that regard.

The records are not exempt under section 38(c), and no other discretionary exemptions have been claimed. In addition, no mandatory exemptions apply. Under these circumstances, the records (with the exception of the highlighted passages in Records C and G) should be disclosed.

ORDER:

1. I order the Township to disclose the records to the appellant (except the parts of Records C and G which are highlighted on the copies of those records being sent to the Township's Freedom of Information and Privacy Co-ordinator with a copy of this order) by sending copies to him not later than **March 15, 1996** but not earlier than **March 11, 1996**.
2. To verify compliance with the provisions of this order, I reserve the right to require the Township to provide me with a copy of the records disclosed in accordance with Provision 1.

Original signed by: _____ February 9, 1996
John Higgins
Inquiry Officer