



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

ORDER M-912

Appeal M_9600324

Township of Egremont



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NATURE OF THE APPEAL:

The Township of Egremont (the Township) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to all information relating to a tire dump on a specified property. The requester, the owner of a neighbouring property, also sought access to the advice and opinion given by the Township counsel at a special in-camera council meeting on April 22, 1991.

The owners of the specified property (the affected persons) buried some 33,000 tires on their property. The requester is concerned about the risk of groundwater and surface water pollution.

The Township granted partial access to the records. The requester appealed the decision to deny access to the remaining records. The requester (now the appellant) also claimed that a public interest exists in the disclosure of the records (section 16 of the Act).

During mediation, the appellant reduced the scope of the request and the appeal to 13 records. The Township denies access to these records on the basis of the exemptions found in the following sections of the Act:

- relations with other governments - section 9(1)
- solicitor-client privilege - section 12
- invasion of privacy - section 14(1)
- public interest - section 16

The records which remain at issue in this appeal are described in Appendix B to the Notice of Inquiry provided by this office to the appellant, the Township and the affected persons. The Ministry of Environment and Energy (the Ministry) was also notified as its interests may be affected by the disclosure of some of the records. Subsequent to the issuance of the Notice of Inquiry, the Township disclosed Record 8 to the appellant. Therefore, Record 8 is no longer at issue. Representations were received from the appellant, the Township and the Ministry.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The Township claims that the exemption in section 12 applies to Records 2 and 4.

Section 12 of the Act consists of two branches, which provide a head with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1) and

2. a record which was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the Township must provide evidence that the record satisfies either of the following:

1. (a) there is a written or oral communication, **and**
(b) the communication must be of a confidential nature, **and**
(c) the communication must be between a client (or his agent) and a legal advisor, **and**
(d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

It is the position of the Township that Branch 1 applies to both the records and that Branch 2 also applies to Record 4. Record 2 consists of one page of handwritten notes. The Township states that the notes were taken by its Clerk during a telephone discussion with the Township's legal counsel. The Township states that the Clerk had telephoned its counsel, requesting legal advice on a specific situation that was going to be before the council. Record 4 is a letter dated April 11, 1991 to the Township from its legal counsel.

With its representations, the Township has provided an affidavit sworn by its legal counsel (the counsel). In his affidavit, counsel confirms that he has been legal counsel for the Township since 1970. The affidavit confirms the Township's position that Records 2 and 4 constitute written or oral confidential communication, between the Township and its legal advisor, which communication was directly related to seeking, formulating or giving legal advice.

I have carefully reviewed the two records and I accept the position of the Township. I find that Records 2 and 4 meet all the requirements under Branch 1 and as such, are exempt from disclosure under section 12 of the Act.

RELATIONS WITH OTHER GOVERNMENTS

The Township submits that Record 5 contains information received from an employee of the Ministry and therefore, the Township is obligated to withhold the record under section 9(1) of the Act. Record 5 consists of four pages of handwritten notes of a meeting attended by the Ministry employee, the Reeve, the Deputy Reeve and the Township Clerk. The record also includes notes taken of another meeting attended by the same individuals together with an affected person, his lawyer and another individual.

In its representations, the Ministry submits that “it is not in a position to comment on the disclosure of this information” and that “it does not accurately reflect the substance of the meeting discussions”.

Section 9(1)(b) reads:

A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,

the Government of Ontario or the government of a province or territory in Canada.

Section 9(2) reads:

A head shall disclose a record to which subsection (1) applies if the government, agency or organization from which the information was received consents to the disclosure.

In Order M-844, former Inquiry Officer Holly Big Canoe considered the application of sections 9(1) and (2) in light of the intent of the Legislature. She commented as follows:

In my view, these statements [of the Legislature and submissions to the Legislature] confirm that the purpose of an exemption of this nature is to ensure that governments under the jurisdiction of the Act will continue to obtain access to records which other governments could otherwise be unwilling to supply, without having this protection from disclosure. Clearly, it is the supplier of information's requirement of confidentiality that is the focus here, not a need of the recipient. It is only satisfaction of the former need, which would have a bearing on the ability of the institution to obtain information from other governments. This view is further reinforced by the wording of section 9(2), which invalidates the exemption claim where the supplier of the information consents to its disclosure. The exception also effectively confirms that the exemption is designed to protect the interests of the supplier.

I agree with the Inquiry Officer's reasoning and conclusions and adopt them for the purposes of this appeal. I have carefully reviewed the record together with the representations of the parties and in my view, there is no evidence before me that the Ministry expected the information to be held in confidence. I find, therefore, that section 9(1) of the Act does not apply to exempt the record from disclosure.

Because section 9 is a mandatory exemption, I have considered its application to other records and find that it does not apply. The Township has also claimed that section 14(1) applies to Record 5 and I will consider its application below.

PERSONAL INFORMATION

The Township has claimed that the mandatory exemption in section 14(1) (invasion of privacy) applies to Records 1, 3, 5, 6, 7, 9, 10, 11, 12 and 13.

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 to determine if they contain personal information and, if so, to whom the personal information relates.

The records contain the names and other information relating to the Ministry employee, the Reeve, the Deputy Reeve, the Clerk, lawyers for the affected persons and officials of Grey County Highway Department. I find that this information appears in the records as a function of these individuals performing in their professional capacity and in the course of their employment. I find, therefore, that this information does not qualify as the personal information of these individuals. On that basis, I find that Records 6 and 9 do not contain any personal information. No other mandatory exemption applies and the Township has not claimed that any discretionary exemptions apply. Therefore, Records 6 and 9 should be disclosed to the appellant in their entirety.

I find that the remaining records (Records 1, 3, 5, 7, 10, 11, 12 and 13) contain information that relates to the affected persons and other identifiable individuals. None of the records contain the personal information of the appellant.

Once a record has been identified as containing personal information, section 14(1) of the Act prohibits an institution from disclosing that personal information except in the circumstances listed in sections 14(1)(a) through (f). Of these, only section 14(1)(f) could apply in this appeal. It permits disclosure if it “does not constitute an unjustified invasion of personal privacy”.

Disclosing the types of personal information listed in section 14(3) is presumed to be an unjustified invasion of personal privacy. If one of the presumptions applies, the institution can disclose the personal information only if it falls under section 14(4) or if section 16 applies to it.

If none of the presumptions in section 14(3) apply, the institution must consider the factors listed in section 14(2), as well as all other relevant circumstances.

The Township submits that the personal information in the records was compiled and is identifiable as part of an investigation into a possible violation of law (section 14(3)(b)) and that it describes an individual’s finances, financial history or activities (section 14(3)(f)). In this regard, the Township submits that the storage of tires on the property by the affected persons was not a permitted use under the Township’s Zoning By-law No. 12. The Township states that section 6 of the by-law provides that any person convicted of a breach must pay a penalty not exceeding \$1,000. The Township states that the records were obtained by the Township as part of its investigation into the violation of the by-law for use as evidence in the event that charges were laid. The Township states that it also had an interest in any violation of the Environmental Protection Act (the EPA).

The Township submits that some of the records contain financial information about the affected person and other identifiable individuals. In particular, the Township states that Record 3, which is a letter from the Clerk to the affected person advising him of the Council’s resolution and

returning his zoning amendment application fee, contains information about the affected person's financial activities.

I have carefully reviewed the information in the records together with the representations of the parties. Based on the evidence before me, I find that only Record 1 (letter from the Township to the affected person) contains information that was compiled and is identifiable as part of the Township's investigation into a possible violation of its zoning by-law. I find, therefore, that Record 1 is exempt under section 14(3)(b). I find that section 14(4) does not apply.

I find that the remaining records relate to the Township's refusal to amend the zoning by-law and the Ministry's interactions with various parties regarding the potential impact under the EPA. The prima facie evidence in the records indicates that the Township was a guest and/or an observer at such meetings, rather than an involved proponent. I find that the personal information in the remaining records was not compiled and is not identifiable as part of the Township's investigation into a possible violation of its municipal by-law and section 14(3)(b) does not apply.

I find also that the personal information in the records does not fall within the presumption provided by section 14(3)(f) as it does not describe an individual's finances, income, assets or liabilities as contemplated by the section.

The Township has not raised any factors under section 14(2), which may weigh in favour of protection, for consideration and I find that none are relevant. In the circumstances of this appeal, I am of the view that disclosure of the records, with the names and personal identifiers of the individuals referred to therein removed, would not constitute an unjustified invasion of personal privacy of these individuals. I have highlighted the names and personal identifiers on the copy of the record provided to the Township's Freedom of Information and Privacy Co_ordinator with a copy of this order. The highlighted information is not to be disclosed to the appellant.

Section 14(4) of the Act does not apply to the highlighted information and I will consider the application of section 16 to this information.

PUBLIC INTEREST

The appellant submits that a public interest exists in the disclosure of the personal information in the records (section 16 of the Act).

Section 16 reads as follows:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and **14** does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. (Emphasis added)

Section 16 does not include the solicitor-client privilege in section 12.

In my discussion under “invasion of privacy” above, I found that disclosure of the records, with the names and personal identifiers removed, would not constitute an unjustified invasion of personal privacy. I also found that Record 1 was exempt from disclosure. Therefore, it is only Record 1 and the names and personal identifiers in the remaining records that I will consider for the purposes of “the public interest override”.

The appellant submits that the tires buried on the affected persons’ property constitute an environmental and health hazard. The appellant argues that this method of disposing of the tires could have been prevented by the Township. The appellant states that the buried tires will, over time, leach pollutants into the groundwater and he expresses his concerns for the health and safety of his family. The appellant submits that he obtained evidence, over two years ago, that “an unidentified lethal (to aquatic life) substance is sinking to the bottom of the tire trench and moving into the ground water flow”. The appellant submits that there is both a personal and a public interest in the disclosure of the records.

There are two requirements contained in section 16 which must be satisfied in order to invoke the application of the so-called “public interest override”: there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

One of the principal purposes of the Act is to open a window into government. The Act is intended to enable an informed public to better participate in the decision-making process of government and ensure the accountability of those who govern. Accordingly, in my view, there is a basic public interest in knowing more about the operations of government.

In Order P-984, former Inquiry Officer Holly Big Canoe defined “a compelling public interest” as follows:

“Compelling” is defined as “rousing strong interest or attention” (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the Act’s central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, 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.

I have carefully considered the circumstances of this appeal together with the representations of the parties. I am also cognizant of the concerns raised by the appellant. However, I do not agree that disclosure of the information in Record 1 and the identity of the individuals referred to in the remaining records, can add to the information that I have ordered to be disclosed to the appellant in this order. Accordingly, I find that a compelling public interest does not exist in the disclosure of the information that I have found to be exempt under section 14(1) of the Act.

ORDER:

1. I uphold the Township's decision to deny access to Records 1, 2 and 4 and the portions that I have highlighted on Records 3, 5, 7, 10, 11, 12 and 13.
2. I order the Township to disclose Records 6 and 9, in their entirety, and the non-highlighted portions of Records 3, 5, 7, 10, 11, 12 and 13, to the appellant, by sending a copy of the records to the appellant by **April 24, 1997** but not earlier than **April 21, 1997**.
3. In order to verify compliance with this order, I reserve the right to require the Township to provide me with a copy of the records which are disclosed to the appellant under Provision 2.

Original signed by: _____
Mumtaz Jiwan
Inquiry Officer

_____ March 20, 1997