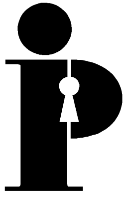

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1209

Appeal MA-980310-1

Township of South Glengarry

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NATURE OF THE APPEAL:

The Township of South Glengarry (the Township) received a request under the Municipal Freedom of Information and Protection of Privacy Act for access to:

> . . . [the] petition dated March 16, 1998, directed to the Township of Charlottenburgh, relating to [a described cottage property] and specifically referred to in the letter dated March 30, 1998 addressed to me from [the Township] and signed by [a named individual], Building Inspector. Would you also provide me with access to the complaints of roof tiles, also referred to in the letter aforesaid.
>
> In the event that there have been subsequent or additional petitions or complaints relating to the above property, would you kindly provide me with access thereto as well. Would you further kindly consider this letter as a request for continuing access pursuant to Section 24(3) of the [Act].

The Township responded to the request by providing the requester with a copy of portions of the identified petition, including the text of the petition and the signatures of the 10 individuals who signed the petition. The Township withheld the addresses and telephone numbers of the individuals, citing "the provisions of the [Act]" as its authority to withhold this information. The Township did not notify the individuals of the request or its decision to disclose portions of the record.

The requester (now the appellant) appealed the decision of the Township to this office. In his letter of appeal, the appellant stated:

> [] Since many of the names on the enclosed copy of the petition are illegible and since it is impossible to determine the identity of such alleged signers and their proximity to the property complained of, I telephoned the Administrator and Co-Ordinator of the [Township] today to inquire as to whether I could receive the names and/or addresses of those signors whose names were not legible, or alternatively, if I could be given access to the original petition pursuant to Section 23 of the Act, and I was informed that the [Township's decision letter] and the enclosed copy of the petition were all I was going to get and that if I was not satisfied I could appeal to the Commissioner.
>
> It is apparent from a review of the response received that the [Township] has not complied with Sections 19, 21, 22 and 23 of the Act, among others.

During the mediation stage of the appeal, the Township sent a subsequent letter to the appellant explaining that the individuals' addresses and telephone numbers were being withheld in accordance with section 14(1)(f) of the Act ("unjustified invasion of personal privacy"). This letter also stated the name and position of the person responsible for making the decision and explained that the appellant may appeal to this office for a review of the decision.

Also during the mediation stage of the appeal, the appellant indicated that he considered both the Township's original and subsequent decision letters not to be in compliance with section 22 of the Act, and that it should have referred to specific provisions under sections 14(2) or (3) to support its decision.

Finally, the appellant explained that he is no longer seeking access to the telephone numbers of the individuals, nor information regarding complaints about roof tiles.

I provided a Notice of Inquiry setting out the issues in this appeal to the appellant and the Township. I received representations from both parties.

DISCUSSION:

RECORD AT ISSUE

The petition contains text describing the substance of the complaint, and the signatures, addresses and telephone numbers of 10 individuals. As stated above, the Township has already disclosed the text and the signatures, but not the addresses and telephone numbers. Also, the appellant has indicated that he now does not seek the individuals' telephone numbers.

In the usual case, I would consider only the individuals' addresses to be at issue, since the remainder of the information has either already been disclosed or is no longer being sought by the appellant. However, the appellant has indicated that he seeks access to the original record in order to determine the identities of the individuals whose signatures he considers to be illegible. In response, in its second decision, the Township denied access to the original version of the entire record. Thus, the parties have in effect placed the full record into issue.

In addition, I have identified as an issue in this appeal whether or not the Township should have notified the individuals of the request and of its decision to disclose information. In order to make a finding on the notice issue, it is necessary for me to consider the application of the personal privacy provisions of the Act to all of the information in the petition.

In the circumstances, I will consider the entire record to be at issue in this appeal, regardless of the fact that some of it has already been disclosed.

PERSONAL INFORMATION

The first issue which must be decided is whether or not the record contains personal information and, if so, to whom the personal information relates. Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the address, telephone number, fingerprints or blood type of the individual [paragraph (d)] and 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 [paragraph (h)].

The Township submits that the individuals' addresses constitute personal information since they fall within the scope of paragraph (d) of the definition set out above.

The appellant submits:

> Firstly . . . an illegible signature, which cannot by itself identify a particular individual, is not a name. Secondly . . . an individual's name alone is not "personal information" unless it appears with other personal information (e..g., an address) or unless the disclosure of the name would by itself reveal other personal information. Therefore, in the case of the illegible signatures, the disclosure of the name of the signer would not constitute personal information, nor would disclosure of the address, since the address does not necessarily define a particular individual.
>
> However . . . by the operation of subsections (d) and (h) under the definition of "personal information", the disclosure of the individual's name, together with the address or telephone number of the individual, would constitute "personal information".

In my view, disclosure of the record would reveal the individuals' names and addresses, their personal opinions or views about the appellant's cottage property, and the fact that they have complained to the Township about the property. Thus, the record contains these individuals' personal information. Although the appellant is of the view that some of the signatures are illegible and therefore are "not names", I am satisfied in the circumstances that each of the individuals could reasonably be identified, if not on the face of the signature alone, through extrinsic means such as using the corresponding address. The record also contains, in the text, the name of the appellant, and the fact that he is the owner of the property. Therefore, the record contains the personal information of the appellant, as well as the other individuals.

INVASION OF PRIVACY

Introduction

Since the record contains the appellant's personal information, the provisions in Part II of the Act regarding the right of access to one's own personal information apply. Section 36(1) provides individuals with a general right of access to their own personal information in the custody or under the control of an institution. However, this right of access under section 36(1) is not absolute; section 38 provides a number of exceptions to this right. In particular, under section 38(b), a head may refuse to disclose to the individual to whom the information relates personal information where the disclosure "would constitute an unjustified invasion of another individual's personal privacy". This exemption is discretionary. Thus, even where

disclosure "would constitute an unjustified invasion of another individual's personal privacy", the institution may exercise its discretion to disclose the information to the requester.

Section 14 provides guidance in determining whether or not disclosure would constitute an unjustified invasion of another individual's personal privacy.

Disclosing the types of personal information listed in section 14(3) is presumed to be an unjustified invasion of personal privacy. The Divisional Court has stated that if one of the presumptions applies, it cannot be overridden, unless section 14(4) or if the section 16 "public interest override" applies [John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767].

If none of the presumptions in section 14(3) applies, section 14(2) requires me to consider all relevant circumstances, including the factors specifically listed therein and any unlisted factors, in order to determine whether disclosure would constitute an unjustified invasion of personal privacy.

Sections 38(b) and 14 - unjustified invasion of the individuals' privacy

In addition to the appellant's own personal information, the record contains personal information of the 10 individuals. Therefore, I must determine whether or not disclosure of the record would constitute an "unjustified invasion" of the individuals' personal privacy under sections 38(b) and 14.

In Order M-580, Inquiry Officer Holly Big Canoe considered the application of section 14 to a case involving a request for access to signatures contained in a petition. (The request did not include the text of the petition). The petition recorded a complaint about the condition of the appellant's property. In support of her decision that the signatures were exempt by virtue of the presumption against disclosure in section 14(3)(b) ("law enforcement"), Inquiry Officer Big Canoe stated:

> The Township claims that the presumption contained in section 14(3)(b) (information compiled and identifiable as part of an investigation into a possible violation of law) applies to the personal information at issue in this appeal. The Township submits that the petition was submitted by concerned taxpayers to initiate action under the Township's Property Standards By-law.
>
> The appellant submits that the petition may have initiated an investigation into a possible violation of law, but was not compiled as part of an investigation.
>
> The ordinary grammatical meaning of "compiled" is to gather or collect. Having reviewed the circumstances under which the record was supplied to and used by the Township, I find that it was compiled and is identifiable as part of an investigation into a possible violation of

> law. Accordingly, the requirements for a presumed unjustified invasion of personal privacy under section 14(3)(b) have been satisfied.
>
> Although petitions by their very nature are not documents which have an aura of confidentiality, there may be cases where, because of the sensitivity of their content, the requirements of a presumed unjustified invasion of privacy will be met . . .

The Township submits that the reasoning in Order M-580 is applicable in the circumstances of this appeal, and therefore the presumption in section 14(3)(b) should be found to apply. The Township also submits that it received and used the petition in respect of an investigation of the appellant's property under a Township Property Standard By-Law 45-90 and the Building Code Act, 1992.

Respecting section 14(3)(b), the appellant submits:

> . . . [S]ince the head has failed to indicate his reliance upon this subsection in reaching his decision, even though invited during the mediation stage to submit his reasons, it must be assumed that, because of circumstances known to him which he did consider, this subsection has no application in this case. This being so, Order M-580 would have no application to this case since section 14(3)(b) was an integral part of that decision.
>
> Undoubtedly, the Township head having now had his attention specifically directed to [Order M-580], he will seek to espouse section 14(3)(b) as the reason for his decision. . . . [T]o permit him to do so at this late stage without hearing his reasons, if any, and giving the appellant the opportunity to respond thereto would be inequitable to the appellant.
>
> To do so would require the appellant to anticipate every possible position which the Township could or would adopt, whether valid or otherwise, and to respond thereto in advance. This procedure would in effect shift the burden of proof from the shoulders of the Township, where it now lies, onto the shoulders of the appellant.

In my view, the reasoning in Inquiry Officer Big Canoe's Order M-580 applies with equal force to this case. The record at issue was compiled and is identifiable as part of an investigation into a possible violation of law under the Township's Property Standard by-Law 45-90 and the Building Code Act, 1992. Therefore, section 14(3)(b) applies to the record at issue.

The appellant argues that Order M-580 is distinguishable and that section 14(3)(b) should not apply, relying on the fact that the Township did not indicate its reliance on that section 14(3)(b) in its decision, or subsequently during mediation. However, in determining whether or not disclosure would constitute an unjustified invasion of the individuals' personal privacy under sections 38(b) and 14, I have a duty to determine the applicability of these sections in their entirety, regardless of whether or not, or the extent to

which, the institution at first instance applied those provisions. This view is consistent with one of the fundamental purposes of the Act, which is to "protect the privacy of individuals with respect to personal information about themselves held by institutions . . ." [section 1(b)].

Neither party made submissions on the applicability of section 14(4). Only the Township made submissions on the application of section 16. The Township argued against its application. Based on a review of the records and the other material before me, I find that neither section 14(4) nor 16 applies.

To conclude, I find that disclosure of the record would constitute an unjustified invasion of the individuals' personal privacy under section 38(b) and 14 of the Act.

Severance

Section 4(2) of the Act requires disclosure of as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

In my view, once the personal identifiers of the 10 individuals contained in the record are removed (signatures, addresses, telephone numbers) these individuals cannot be identified on the basis of the remaining information (the text) alone. Thus, at the time the Township disclosed information to the appellant, the text alone could have been considered to be the personal information of the appellant only. Therefore, had the Township disclosed only the text to the appellant, I would have upheld this decision on the basis that the text alone would not be exempt under section 38(b).

The appellant is now in possession of a severed copy of the record, containing the signatures and the text. The appellant knows the identities of at least some of the 10 individuals, but seeks access to the original record in order to ascertain the identities of the individuals whose signatures he believes are not legible. Thus, a second disclosure of the signatures at this time could result in the appellant learning the identity of more individuals, beyond those he has already identified. This would result in an "unjustified invasion of personal privacy" of additional individuals under section 38(b). Therefore, I find that the signatures qualify for exemption under section 38(b).

Since the text has already been disclosed to the appellant, and since I would have found (in the absence of prior disclosure of the signatures) that the text alone would not be exempt under section 38(b), it is questionable whether or not disclosure of the text alone at this time would result in an unjustified invasion of personal privacy. However, the appellant clearly is not interested in gaining access to the text alone, since he already has this information. Therefore, it is not necessary for me to make a finding on the severability of the text alone.

As a result, I find that the record is not reasonably severable under section 4(2) of the Act.

To conclude, I find in the circumstances that the exemption at section 38(b) applies to the entire record, and that the severance provision in section 4(2) has no application at this time.

Exercise of discretion

Even though I have found that the record in its entirety is subject to the exemption at section 38(b), as stated above, this exemption is discretionary in nature. Thus, in the usual case, an institution may choose to exercise its discretion in favour of disclosure of some or all of the record, despite the fact that it "may" withhold all of the record.

This is not the usual case. In its first decision, the Township decided to disclose the signatures and the text, and to withhold the balance of the record. At the same time, the Township provided the appellant with a copy of the severed record in accordance with this decision. This decision was made in the absence of notice to the 10 individuals. As I explain in more detail below, by not giving notice, the Township failed to comply with a mandatory provision of the Act and thus breached the individuals' statutory right to be treated fairly. Because of this procedural defect, which resulted in significant prejudice to the individuals, this initial decision should not be upheld [Bezaire (Litigation Guardian of) v. Windsor Roman Catholic Separate/Separé School Board (1992), 9 O.R. (3d) 737 (Div. Ct.); Ontario (Attorney General) v. Fineberg (1996), 88 O.A.C. 318 (Div. Ct.)].

Subsequently, in response to the appellant's second request, the Township verbally exercised its discretion to refuse access to the entire record. The Township later confirmed this decision in a second letter. As I found above, the Township was entitled to withhold the entire record under section 38(b). Therefore, there is no reason to interfere with the Township's exercise of discretion in this regard, and the second decision should be upheld.

It might be argued that the Township's second decision should not be upheld, since the Township in effect reneged on its first decision. In the usual case, an institution would not be permitted to decide to disclose a record, make the disclosure and then issue a subsequent decision denying access [see, for example, Order P-341, upheld on judicial review in General Accident Assurance Co. v. Ontario (Information and Privacy Commissioner) (March 8, 1994), Toronto Doc. 557/92 (Ont. Div. Ct.)]. However, my finding that the Township's first decision was invalid due to the procedural defect takes this case outside the norm.

To conclude, I find that the Township's first decision to grant partial access to the record should not be upheld, while its second decision to deny access to the record in full should be upheld.

PROCESS AT THE REQUEST STAGE

Notice to affected persons

Section 21 of the Act reads, in part:

> (1) A head shall give written notice in accordance with subsection (2) to the person to whom the information relates before granting a request for access to a record,
>
> > (b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 14(1)(f).
>
> (2) The notice shall contain,
>
> > (a) a statement that the head intends to disclose a record or part of a record that may affect the interests of the person;
> >
> > (b) a description of the contents of the record or part that relate to the person; and
> >
> > (c) a statement that the person may, within twenty days after the notice is given, make representations to the head as to why the record or part should not be disclosed.
>
> (4) A head who gives notice to a person under subsection (1) shall also give the person who made the request written notice of delay, setting out,
>
> > (a) that the disclosure of the record or part may affect the interests of another party;
> >
> > (b) that the other party is being given an opportunity to make representations concerning disclosure; and
> >
> > (c) that the head will within thirty days decide whether or not to disclose the record.
>
> (5) Where a notice is given under subsection (1), the person to whom the information relates may, within twenty days after the notice is given, make representations to the head as to why the record or part should not be disclosed.
>
> (6) Representations under subsection (5) shall be made in writing unless the head permits them to be made orally.

(7) The head shall decide whether or not to disclose the record or part and give written notice of the decision to the person to whom the information relates and the person who made the request within thirty days after the notice under subsection (1) is given, but not before the earlier of,

(a) the day the response to the notice from the person to whom the information relates is received; or

(b) twenty-one days after the notice is given.

(8) A head who decides to disclose a record or part under subsection (7) shall state in the notice that,

(a) the person to whom the information relates may appeal the decision to the Commissioner within thirty days after the notice is given; and

(b) the person who made the request will be given access to the record or part unless an appeal of the decision is commenced within thirty days after the notice is given.

(9) A head who decides under subsection (7) to disclose the record or part shall give the person who made the request access to the record or part within thirty days after notice is given under subsection (7), unless the person to whom the information relates asks the Commissioner to review the decision.

In Order PO-1657, with respect to similar provisions under the Act's provincial counterpart, I stated:

In this case, the Board did not notify the affected person of the appellant's request. Further, the Board disclosed portions of the requested records in the absence of notice to the affected person.

. . . . .

In my view, the purpose of these provisions of section 28 is to ensure that procedural fairness is accorded to individuals whose privacy interests may be at stake. Adherence to these provisions permits the subject individual to make representations as to whether or not the information should be disclosed and, if the head decides to disclose information, to appeal the matter to the Commissioner before disclosure actually takes place.

. . . . .

Here, it may be the case that the personal information disclosed by the Board would not constitute an unjustified invasion of the affected person's personal privacy within the

> meaning of sections 21(1)(f) and 49(b). Since the information has already been disclosed, I see no useful purpose in making a determination on this issue. However, the requested records clearly contained the personal information of both the appellant and the affected person and, as acknowledged by the Board, the matter giving rise to the records was highly sensitive. In these circumstances, there was a "reasonable doubt" as to whether disclosure would constitute an unjustified invasion of the affected person's personal privacy, and thus the Board had ample reason to believe that disclosure "might" constitute an unjustified invasion within the meaning of section 28(1)(b). Therefore, the Board ought not to have deprived the affected person of notice under this provision, and should have given her an opportunity to make representations on the issues prior to disclosure.

In my view, these comments apply in the circumstances of this appeal. The record clearly contained the personal information of the 10 individuals and the Township had ample reason to believe that disclosure of their personal information might constitute an unjustified invasion of personal privacy within the meaning of section 21(1)(b). Therefore, the Township ought to have given the 10 individuals notice under section 21(1)(b) before disclosing portions of the record, in order to provide them with an opportunity to make representations on the issues prior to disclosure. Failure to comply with the mandatory notice provision in section 21(1)(b) breached the 10 individuals' right to be treated fairly, and constitutes a significant procedural defect. It is on this basis that I found above that the Township's first decision should not be upheld.

Since the Township's disclosure of some of the individuals' personal information has already taken place, I see no useful purpose in sending the matter back or providing any other remedy, beyond upholding the Township's second decision to deny access to the entire record. I would urge the Township to be mindful of its responsibilities under the Act to notify affected persons in accordance with section 21.

Adequacy of the decision letters

The appellant indicated that he considered both the Township's original and subsequent decision letters not to be in compliance with section 22 of the Act, and that it should have referred to specific provisions under sections 14(2) or (3) to support its decision.

Section 22(1)(b) of the Act reads:

> Notice of refusal to give access to a record or part under section 19 shall set out,
>
> (b) where there is such a record,
>
> (i) the specific provision of this Act under which access is refused,

> (ii) the reason the provision applies to the record,
>
> (iii) the name and position of the person responsible for making the decision, and
>
> (iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

In Order M-913, Inquiry Officer Anita Fineberg stated:

> The appellant submits that the decision letter of the Police was inadequate in that it failed to provide any reasons for denying access to the requested information. He states that the decision merely refers to sections of the Act and that it is insufficient "... to allow our client to make informed decisions and meaningful representations in this appeal".
>
> The decision letter issued by the Police stated that access was being denied to the listing of police officers pursuant to sections 13, 14(1)(f) and 14(3)(d) of the Act. The letter went on to note that "... These sections apply because ..." followed by a paragraph setting out the language of these sections.
>
> In my view, the purpose of the inclusion of the above information in a notice of refusal is to put the requester in a position to make a reasonably informed decision on whether to seek a review of the head's decision (Orders 158, P-235 and P-324). In this case, I agree with the appellant that the decision letter of the Police should have provided him with **reasons** for the denial of access. A restatement of the language of the legislation is not sufficient to satisfy the requirement in section 29(1)(b)(ii) of the Act. It does not provide an explanation of why the exemptions claimed by the Police apply to the record. Section 29(1)(b)(i) already requires that the notice contain the provision of the Act under which access is refused.
>
> Notwithstanding the inadequacy of the decision letter, the appellant has exercised his right of appeal and provided extensive representations which I have referred to in my disposition of all the issues relating to the information in this order. In these circumstances, there would be no useful purpose served in requiring the Police to provide a new decision letter to the appellant.

Inquiry Officer Fineberg's statements are applicable here. The initial decision of the Township makes only general references to information being withheld based on privacy interests; it does not fully comply with any of the requirements in section 22(1)(b) . The Township's subsequent decision does comply with paragraphs

(iii) and (iv) of section 22(1)(b), but not with paragraphs (i) and (ii). This latter decision does state that the Township is relying on section 14(1)(f) to deny access to information, but does not cite any particular provisions under section 14(2) or (3) in support of its decision, nor does it provide reasons for the decision.

I agree with the appellant's submissions that both of the Township's decisions were inadequate, in light of section 22(1)(b) and the principles expressed in Order M-913. However, I also see no useful purpose in requiring the Township to provide a new decision letter to the appellant, or in providing any other remedy [Gravenhurst (Town) v. Ontario (Information and Privacy Commissioner), [1994] O.J. No. 2782 (Div. Ct.); Brown v. Troia Investments Inc. (1995), 22 O.R. (3d) 637 (Div. Ct.)]. The appellant has been given a full and fair opportunity to argue the issues in this appeal, for the reasons set out below. Again, I would urge the Township to be mindful of its responsibilities under the Act, in this case to provide more detailed reasons for withholding information, in accordance with section 22(1)(b).

PROCESS AT THE APPEAL STAGE

The appellant's submissions on the section 14(3) issue appear to be directed in part towards the fairness of the appeal process. In my view, the appellant has been given adequate disclosure of the case he was required to meet. The Notice of Inquiry set out the personal privacy issues to be addressed, including section 14(3)(b), and the parties were invited to comment on the applicability of that section and the reasons for decision in Order M-580. Therefore, I conclude that the appellant was treated fairly during the appeal process.

ORDER:

1. I do not uphold the Township's first decision to disclose the text and the signatures on the record to the appellant.

2. I uphold the Township's second decision to deny the appellant access to the entire record.

Original signed by: April 28, 1999

David Goodis
Senior Adjudicator