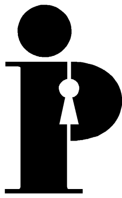

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

INTERIM ORDER MO-1360-I

Appeal MA-000129-1

Township of Southgate

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NATURE OF THE APPEAL:

The appellant, on behalf of a group known as the Southgate Resident and Ratepayers' Association (the Association), wrote to the Township of Southgate (the Township) seeking access under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to information relating to employees of Egremont Township. (The former Township of Egremont now forms part of the new Township of Southgate, as of January 1, 2000).

The Township denied access to the information on the basis of the personal privacy exemption at section 14 of the *Act*.

The Association then appealed the Township's decision to this office, and I sent a Notice of Inquiry setting out the issues in the appeal initially to the Township and six affected persons (individuals whose names appear in the responsive records). In response, I received representations from the Township, counsel for a group of five affected persons, and counsel for the remaining affected person. I then sent a Notice of Inquiry, together with the non-confidential portions of both sets of representations from the affected persons to the Association, and the Association made representations in response.

Prior to receiving the Association's representations, counsel for the single affected person wrote to me stating:

> Our firm was instructed on behalf of [the single affected person] to make a search to ascertain whether or not there was any record of registration for "Southgate Resident and Ratepayer Association". Enclosed is a report produced by the Province of Ontario on August 30, being a Statement of No Match Found. We have made a further search of the Ministry of Consumer and Commercial Relations, Companies Branch, to ascertain if there is a Corporation under the Corporations Act created as "Southgate Resident and Ratepayer Association". We received back a response indicating that there was no such Corporation. It would therefore appear that the Commissioner has been asked to make an enquiry by an organization which is neither registered with the Province of Ontario nor incorporated.
>
> We would ask that you please make appropriate enquiry of the stated applicant to ascertain the status of the Southgate Resident and Ratepayer Association and its Officers and Directors, Constitution, when it was created and by whom and where it was registered and with whom. We ask that this response be generated and that no decision issue by your Office until such time as this information is presented to this Office on behalf of the [single affected person].

In response, I sent a letter to all of the parties to this appeal seeking representations on the issue raised by the single affected person. In this letter, I asked specific questions on the preliminary issue relating to the capacity of the Association to make a request and file an appeal under the *Act*, and made reference to various authorities and provisions of statutes. I also indicated that I intend to dispose of this issue before making my decision on the merits of the appeal.

I received representations in response from the Township and the Association only.

DISCUSSION:

Issue

Sections 4(1) and 39(1) of the *Act* read, in part:

> 4. (1) Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .
>
> 39. (1) A person may appeal any decision of a head under this *Act* to the Commissioner if . . .

The issue for me to decide is whether or not the appellant has the capacity to make a request, and to appeal a decision arising from a request, under the *Act*. This determination turns on whether or not the word "person" in sections 4(1) and 39(1) can be interpreted as including the Association.

Representations

The Township submits:

> . . . "The Association" has no standing to seek access to a record pursuant to Section 4(1) of the *Act*, and consequently . . . the appeal launched by the Association ought to be dismissed outright.
>
> The *Act* clearly gives the right to make an inquiry to "every person". While the term *person* is defined by the Interpretation *Act* to include corporations, that provision does not go on to include unincorporated Associations. Given the fact that the [*Act*] does not define the term *person*, . . . the definition contained in the Interpretation *Act* applies, by virtue of section 1(1) of that legislation.
>
> . . . The fact that other pieces of legislation, such as the Business Names Act, might specifically define person to include unincorporated associations is simply irrelevant. Those definitions apply to specific pieces of legislation. The drafters of the [*Act*] chose not to expand the definition of person, and chose therefore to rely on the definitions of the Interpretation Act. It was certainly open for the drafters to expand the definition should they have felt it was desirable. One can therefore deduce that the legislative intent was that for the purposes of the [*Act*] the definition of *person* from the Interpretation Act is appropriate.

. . . The decision in *Swales v. Glendinning*, upholds the proposition that in order to . . . sue or be sued, one must be either an individual, a corporation or an association granted special status by the legislators.

. . .Because the [Association] in this instance, being an unincorporated association, cannot bring themselves within the provisions of section 4(1), there is simply no authority under which to claim a right of access.

The decision of the Assistant Commissioner in Order M-96, . . . does [sic] assist the [Association] in the case at hand. In that case the requester union had requested from the employer, the names and addresses of all employees who were by virtue of their employment members of the bargaining unit. The union maintained that the fact that it had legal status as bargaining agent on behalf of these employees should be a relevant consideration in determining whether or not the information requested constituted an unjustified invasion of personal privacy of the employees. In other words, the union argued that who it was should give it special consideration as a requester. The Assistant Commissioner quite appropriately said that the identity of the requester was not relevant in determining whether or not the request if granted would constitute an unjustified invasion of personal privacy. The Commissioner in that case was not asked to consider whether or not the requester had the status to bring the request in the first place, and indeed the Commissioner, and it seems all parties, acted with the belief that the union was entitled to request the information. That issue was apparently not raised, and consequently not decided upon.

The issue in the case at hand is simply not the same. Here the question is whether the requester was even entitled to make a request pursuant to section 4(1) of the *Act*.

The decision of the Court in *Re Rees and United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of the United States and Canada, Local 527*, . . . simply does not apply. First, the issues before the Court were significantly different than those in the case at hand. The Court's decision effectively ensured that members of the trade union had a remedy to challenge the decisions of the trade union. The union argued that the member could not challenge its actions. Not surprisingly the Court decided in favour of the member and allowed the member the right to subject the union's actions to judicial scrutiny. Furthermore, the court referred to section 1(e) of the Judicial Review Procedure Act, and stated that "this section has the effect of altering the common law situation and gives status to a trade union even though it is an unincorporated voluntary association which has no existence apart from its members and that it may be added as a party in judicial review proceedings under the Act in its own name . . ." Hence

> the Court allowed the union to be named because the applicable legislation effectively expanded upon the common law.
>
> Unincorporated associations are simply not recognized at law, unless special legislation is enacted. The [Association] does not exist for legal purposes. It cannot sue or be sued, it cannot own land, and . . . it cannot maintain a request pursuant to the provisions of section 4(1) of the [*Act*]. On that basis, the appeal should be dismissed in its entirety.

The Association argues that the right of access to information under the *Act* is not comparable to the right to sue or be sued, and thus the common law restrictions on capacity are not applicable here. The appellant states:

> . . . This request for information is not an attempt to initiate a civil suit seeking damages in a court of law. This is simply a request for release of information by a person on behalf of or carrying 'agency' for a collective of similar individual persons with a common interest who have formed a voluntary association . . . The activities of such a group are limited perhaps in some areas of legal interpretation, but not specifically prohibited within any of the definitions [the Commissioner's office] sent me to peruse.

The Association also enclosed with its representations various documents which it says establish that the Association is an existing and legitimate organization, including newspaper clippings discussing Association meetings, and Association newsletters dealing with membership issues. Finally, the Association submits that the Township "recognizes our legitimacy as a ratepayers' association and accepts our participation and input at council meetings on those bases."

Analysis

The fact that the Association is an unincorporated association is not in dispute, and I find that this is the case. However, I do not accept the position of the Township and the single affected person that the word "person" in sections 4(1) and 39 (1) of the *Act* excludes an unincorporated association.

Section 29(1) of the *Interpretation Act* reads:

> In every Act, unless the context otherwise requires,
>
> > "person" includes a corporation and the heirs, executors, administrators or other legal representatives of a person to whom the context can apply according to law;

The Township's submissions suggest that this definition excludes an unincorporated association. In my view, this is an incorrect reading of the definition. First, the definition, by use of the word "includes", is open

ended, and thus the words that follow do not restrict the meaning of "person". In addition, this provision indicates that the definition applies "unless the context otherwise requires". This is in direct conflict with the Township's argument that to include unincorporated associations, the Legislature would have had to include express language to this effect in the *Act*. As a result, the *Interpretation Act* does not preclude unincorporated associations from being considered "persons" in the *Act* and, further, the *Interpretation Act* indicates that the meaning of the term should take into account the context of the *Act*.

In my letter to the parties, I included two Ontario court decisions which address the issue of capacity in the context of a civil action and a judicial review proceeding. *Swales v. Glendinning*, [2000] O.J. No. 2695 (S.C.J.) stands for the common law proposition that unincorporated associations lack the capacity to "sue or be sued" in court [see p. 8]. In *Rees v. United Assn. of Journeyment and Apprentices of Plumbing and Pipefitting Industry of the United States and Canada, Local 527* (1983), 43 O.R. (2d) 97 (Div. Ct.), the court found that this common law rule was altered, based on a reading of sections 1(e) and 2(1) of the *Judicial Review Procedure Act*. In my view, this common law rule of capacity, applicable to court processes, is not determinative in the context of a statutory right to commence a proceeding before a government agency, and to appeal to a tribunal. In such a case, the enabling statute is the source of these rights. Issues such as standing must be determined within that statutory context. With respect to processes under the *Act*, that context is provided by the right to make a request conferred on "every person" by section 4(1), and the appeal rights conferred on "a person" in certain situations by section 39(1).

Similarly, I find that any other common law restrictions on unincorporated associations, such as the ability to own land, are inapplicable in the context of the *Act*.

In my view, the word "person" in sections 4(1) and 39(1) of the *Act* should be given a broad and liberal meaning, to include unincorporated associations. First, the access provisions of Part I of the *Act* are intended to permit information to be available to the general public and, in general, the status or identity of any given requester is irrelevant. One of the stated purposes of the *Act*, contained in section 1(a)(i), reads:

> The purposes of this *Act* are,
>
> > to provide a right of access to information under the control of institutions in accordance with the principles that,
> >
> > > information should be available to the public . . .

This point was made by Assistant Commissioner Tom Mitchinson in Order M-96:

> In my view, a requester's status cannot be a relevant factor in determining whether disclosure of personal information will constitute an unjustified invasion of personal privacy. Disclosure of a record under Part I of the *Act* is, in effect, disclosure to the world and not

> just to the requester, and I find that the status of the Federation, or the relationship of a Federation to its members, is not a relevant consideration.

[That order was upheld on judicial review in *O.S.S.T.F., District 39 v. Wellington (County) Board of Education* (February 6, 1995), Toronto Doc. 407/93 (Ont. Div. Ct.), leave to appeal refused (October 16, 1995) Doc. M15357 (C.A.).]

A narrow interpretation of the word "person" in sections 4(1) and 39(1), in my view, is not consistent with this purpose of the *Act*. The Legislature intended that government information which is not exempt should be disseminated to the public at large, and restrictions on the capacity of an individual or organization to make a request based on technical grounds, such as whether an organization is incorporated, would undermine this intention.

I find support for this view in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report), which led to the passage of the *Act* and its provincial counterpart. In discussing who should be given rights of access to information, the Report stated (at pp. 233-234):

> The central and animating principle of freedom of information law should be that the individual is entitled, as of right, to obtain access to government information. Stated this broadly, however, the principle raises a number of important questions.
>
> First, it must be asked whether "any person" should be entitled to exercise this right of access, or whether the right should be restricted to a certain category of persons, such as residents or Canadian citizens, or to persons who have a particular need for the information. Almost all of the freedom of information statutes in place in other jurisdictions confer the right of access on "any person," without adopting limitations of this kind.
>
> We think it unwise to restrict access to persons who can demonstrate a need for the information in questions. We accept as a basic premise that members of the public should be entitled to have access to government information simply for the purpose of scrutinizing the conduct of public affairs. To require individuals to demonstrate a need for information would erect a barrier to access resulting in unproductive disputes over the nature and value of a particular individual's interest in obtaining access to government information. Nor do we believe that it would be useful to attempt to restrict the right of access to a category of persons having particular citizenship status or residency within the province. In part, our reason for rejecting such a requirement stems from the difficulty in determining satisfactorily the categories of individuals who should be entitled to access to government information. It is arguable that many persons other than residents of the province can make a legitimate claim for access . . . *The most compelling reason for rejecting the adoption of criteria*

> *of this kind, however, is simply that they could not be effectively enforced. A person who was not entitled as of right to access could simply seek the intervention of another person who was so entitled. It would be a tedious and fruitless task to attempt to ensure compliance with status rules.* We recommend, therefore, that the right of information be conferred upon "any person" who chooses to exercise rights under the legislation [emphasis added].

Although the Williams Commission Report did not specifically address the issue of whether or not the word "person" should include an unincorporated association, in my view, the rationale for not restricting the right to those who could demonstrate a need or those who fit within a particular category applies to the issue before me. To exclude unincorporated associations from making access requests also could not be effectively enforced. In this case, if I accepted the argument of the Township and the single affected person, the Association could simply seek to have one of its members make a request in his or her personal capacity. In that event, it would equally be a "tedious and fruitless task" to attempt to ensure that this individual requester was in fact making a request on his or her own behalf.

To conclude, it is my view that unincorporated associations fall within the scope of the word "person" in sections 4(1) and 39(1) of the *Act*, and therefore the Association has the capacity to make a request and appeal any decision under the *Act*, to the same extent as a natural person or a corporation. Accordingly, I dismiss the objections of the single affected person and the Township, and the Association's appeal will proceed.

INTERIM ORDER:

I do not uphold the preliminary objection of the single affected person and the Association's appeal will proceed.

Original Signed By: November 3, 2000
David Goodis
Senior Adjudicator