



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1460-F

Appeal MA-000004-1

Nottawasaga Valley Conservation Authority



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BACKGROUND AND NATURE OF THE APPEAL:

This order represents my final order in respect of the outstanding issue from Interim Order MO-1435-I.

The Nottawasaga Valley Conservation Authority (the NVCA) received a request from counsel for a named ski resort as represented by a named individual (the representative) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for:

copies of all correspondence and documents regarding [five named individuals] for [a named] Secondary Plan and [the named ski resort] for the period January, 1997 to the present date of November 1, 1999.

The NVCA identified a number of responsive records and, after contacting the five named individuals (the affected persons) to determine their views regarding disclosure, granted access to them, in part. The NVCA denied access to the remaining records, which it had identified as being responsive, under the discretionary exemption in sections 8(1)(a) and (b) (law enforcement) and the mandatory provisions under section 14(1) (invasion of privacy) of the *Act*.

The NVCA also cited the mandatory personal information exemption under section 14(5) of the *Act* to refuse to confirm or deny whether other responsive records exist.

The ski resort and its representative (collectively, the appellant) appealed the NVCA's decision.

After considering the representations that were submitted by the NVCA, the primary affected person and the appellant, I issued Interim Order MO-1435-I. In that order, I upheld the NVCA's decision to refuse to confirm or deny the existence of records relating to two of the affected persons identified by the appellant. I also determined that the NVCA did not properly invoke section 14(5) in refusing to confirm or deny the existence of records relating to the primary affected person (which represents two of the individuals named by the appellant) and identified that certain additional records exist. I further found that the presumption in section 14(3)(b) (information compiled as part of an investigation into a possible violation of law) and the factor in section 14(2)(h) (information supplied in confidence) applied to a number of the records at issue and would apply to others that might exist.

As part of the analysis in arriving at the above conclusions, I found that the records that were identified both by the NVCA and in the order, as well as those that might exist contained/would contain the personal information of the appellant's representative. In so finding, I noted that it was not readily apparent from the records or the circumstances that the records contained/might contain this individual's personal information. Rather, my decision in this regard was based on information provided by the appellant in its representations.

As a result of this finding, my analysis of the issues was conducted pursuant to the discretionary exemption in section 38(b) of the *Act*. This section provides the NVCA with discretion to balance two competing interests, the appellant's right of access to his personal information and the other identifiable individuals' rights to privacy. If the NVCA were to conclude that the balance weighs in favour of disclosure, the records could be released to the appellant, even if the

NVCA has determined that this disclosure would represent an unjustified invasion of the other individuals' privacy.

I consequently found that, because the NVCA had not considered the possible application of section 38(b), it had not turned its mind to the relevant circumstances of this particular case in balancing the appellant's right of access to his own personal information and the affected persons' rights to privacy. I included a provision in Interim Order MO-1435-I requiring the NVCA to exercise discretion under section 38(b) with respect to the records at issue in the appeal as well as to its decision to refuse to confirm or deny the existence of other records and to provide me with representations as to the factors considered in doing so.

I received representations from the NVCA in compliance with this provision and subsequently sought representations in response from the appellant. I did not provide the appellant with the NVCA's representations but rather, summarized them in the Supplementary Notice of Inquiry that I sent to it. The appellant submitted representations in response.

DISCUSSION:

Exercise of Discretion

An institution's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion (Order 58).

Commenting on what constitutes a proper exercise of discretion in Order MO-1277-I, Assistant Commissioner Tom Mitchinson stated:

In Order P-344, I considered the question of the proper exercise of discretion as follows:

... In order to preserve the discretionary aspect of a decision ... the head must take into consideration factors personal to the requester, and must ensure that the decision conforms to the policies, objects and provisions of the *Act*.

In considering whether or not to apply [certain discretionary exemptions], a head must be governed by the principles that information should be available to the public; that individuals should have access to their own personal information; and that exemptions to access should be limited and specific. Further, the head must consider the individual circumstances of the request.

My reasoning in Order P-344 is equally applicable to the exercise of discretion under section 38(b) of the *Act* in the present appeal.

NVCA's Position

The NVCA states that in order to continue to foster a good, trusting relationship with parties who are or may be involved with it, it is important that the NVCA upholds parties' wishes pertaining to the release of information on the one hand, and on the other, to ensure that they understand that the NVCA understands and adheres to the *Act*.

The NVCA states further that the affected persons all indicated that they did not, in some cases, wish any information to be released, or, in other cases, wish the existence of any information to be confirmed or denied.

The NVCA notes that many of the records that were identified (in its decision or in the interim order) were supplied in confidence. The NVCA points out that some of these records were considered at *in camera* meetings of its Executive Committee, which further supports an expectation of confidentiality.

The NVCA concludes that it is important that it continue to work in partnership with its stakeholders. This appears to underlie its exercise of discretion under section 38(b) and its decision to refuse to confirm or deny the existence of records relating to two of the affected persons.

In my view, my discussion and findings in Interim Order MO-1435-I serve as a backdrop to the submissions made by the parties on this issue. Accordingly, in seeking representations from the appellant I asked it to review the Interim Order in its entirety, and in particular, the discussion at pages 11 – 25 and 31 and 32 (of the copy that was sent to it).

The Appellant's Position

The appellant states:

As I read your order under the heading "Exercise of Discretion under section 38(b)", it is apparent that the NVCA did not claim the application of the discretionary exemption in this section for their records either at issue or which may or may not exist. Rather this was a determination that you made as a result of the evidence presented by the appellant in its representations. Moreover, you found that the NVCA has not turned its mind to the relevant circumstances of this particular case in balancing the appellant's right of access to his own personal information and the affected persons' rights to privacy. Accordingly, that is the basis for appeal if there is no substantive reason why the NVCA should not exercise its discretion in favour of my client.

I would respectfully suggest that my client's economic interests may be grievously affected, which interests I would submit override the public relations aspect of the NVCA fostering a trusting relationship with parties who are or may be involved with it, (whatever that means). I would suggest that the principle of law that an accuser cannot "hide in the bushes" when the accused is being physically or financially hurt by such accusations overrides the public relations aspect. Put another way, my client is entitled to know the case against it and by whom it is being made.

Accordingly, I would suggest that the NVCA has not exercised its discretion according to law but more on public relations.

Findings

In most cases, an institution will exercise its discretion to disclose or withhold records from disclosure during its initial decision-making based only on the information it has at that time. This appeal differs from the usual case in that the institution has been asked to exercise its discretion, not only after the fact, but after an order has been issued which has dealt extensively with both the nature of the records and the reasons for withholding them. As a result, the NVCA has been placed in a position to consider its exercise of discretion based on a full appreciation of the facts and circumstances of this particular case.

In Interim Order MO-1435-I, I discussed the "public interest" role that organizations such as the NVCA play and the importance of ensuring meaningful participation of the public as part of its mandate:

Organizations such as the NVCA are established, in part, to address, and to a certain extent reflect, the public interest with respect to the use of environmentally sensitive lands. In my view, there are sound public policy reasons in ensuring that the public is able to contribute meaningfully in ensuring that the NVCA fulfills its mandate. Often there are public processes established to consider proposed land usage, as was the case here. Parties who participate in these processes do so with the knowledge that their identities and views will be open to at least some public scrutiny. That does not preclude members of the public from making their views known to the NVCA privately and in confidence.

The affected persons are all local residents. Given the interests at stake in the current appeal, including the very personal interest the affected persons may have with respect to the impact of the appellant's business operations, I am satisfied that there would be a reasonable expectation that the contents of any communications (if they exist) in regards to the NVCA's regulatory role would be maintained in confidence. Similarly, they would have a reasonable expectation that their identities would also be protected (whether or not they actually communicated with the NVCA in this regard).

I also noted that the NVCA had contacted all of the affected persons who objected to the disclosure of any information about them in the NVCA's custody or control, whether or not any existed. Interim Order MO-1435-I also dealt extensively with the reasons for the primary affected person's objections to disclosure of their personal information to the appellant. Based on the discussion in the order relating to these issues, I find that the appellant's characterization of the NVCA's exercise of discretion as one based on "public relations" is not supportable. In my view, the NVCA's submissions on this issue indicate that it weighed its role and the relationships that it wishes to foster in fulfilling its mandate as an important circumstance in deciding whether to disclose the appellant's information to him.

The appellant suggests that there is no substantive reason why the NVCA should not exercise its discretion in favour of his client. Again, I refer to my decision in Interim Order MO-1435-I in which I have found that there are significant "substantive" reasons for withholding the records at issue from disclosure. The question is, did the NVCA consider all of the relevant circumstances, including the appellant's need for this information in order to protect its economic interests and in order to know the "case against it"? And then, did it balance this need against the interests of the affected persons in maintaining their privacy? I find, based on the totality of the information before me, including the interim order, that it did both.

The arguments raised by the appellant in its representations on the exercise of discretion were also raised in relation to the substantive issues that were dealt with in the interim order. Although I recognized that it is important that regulatory agencies operate with a certain degree of transparency, and that fairness would require that a party affected by decisions made by such a body be provided with sufficient information to know the case against it, I was not satisfied that the appellant was entirely uninformed in this regard.

All of this was before the NVCA at the time it was asked to exercise its discretion and it has indicated that the importance of respecting the confidentiality expectations of parties who provide information to it outweighs the appellant's interests in this case. Based on the foregoing, I find nothing improper in the manner in which the NVCA has exercised its discretion in favour of continuing non-disclosure under section 38(b) of the *Act*.

ORDER:

1. I uphold the NVCA's decision to withhold the records remaining at issue in this appeal from disclosure under section 38(b) of the *Act*.
2. I uphold the NVCA's decision to refuse to confirm or deny the existence of records relating to two of the affected persons under sections 14(5) and 38(b).

Original signed by: _____
Laurel Cropley
Adjudicator

August 22, 2001