



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

# **ORDER MO-1848**

**Appeal MA-040128-1**

**Township of Georgian Bay**



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## **NATURE OF THE APPEAL:**

The Township of Georgian Bay (the Township) received a twelve-part request made pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the construction of a dock on a specified property. The Township originally advised the requester that records responsive to nine parts of the request do not exist, that records relating to two parts of the request are exempt under section 15 of the *Act* because they are already publicly available and that records relating to part five of the request are exempt from disclosure under section 6(1)(b) of the *Act*.

The requester, now the appellant, appealed the Township's decision to deny access to the records responsive to part five of the request.

During the mediation stage of the appeal, the Township located additional records responsive to parts two, four and five of the request. Access to these records was denied pursuant to the discretionary exemptions in section 38(a) (discretion to refuse requester's own information), taken in conjunction with section 6(1)(b) (closed meeting), and section 38(b) (invasion of privacy). The appellant indicated his wish to proceed with his appeal on the Township's decision to deny access to all of the identified records.

Further mediation was not possible and the appeal was moved to the adjudication stage of the process. I sought and received representations from the Township and another individual whose interests may be affected by the disclosure of the information contained in the records (the affected person). I then provided the appellant with a Notice of Inquiry along with those portions of the Township's representations that were not confidential in nature. The appellant also provided me with submissions in response to the Notice.

## **RECORDS:**

The records at issue consist of the following:

- Correspondence from the affected person to the Township with an attached survey plan or map (responsive to part five of the request);
- Correspondence from the Township to the affected person (responsive to part four of the request); and
- Copies of photographs submitted by the affected person (responsive to part two of the request).

## **DISCUSSION:**

### **PERSONAL INFORMATION**

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) 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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The appellant maintains that the information contained in the records is not “personal information” for the purposes of the *Act* as it relates to a property dispute rather than a personal

matter. The affected person and the Township submit that the records contain personal information about the affected person and his family.

Attached to the record responsive to part five of the request is a map. The records responsive to part two of the request consist of four pages of photographs of the area in dispute. I find that neither the map nor the photographs contain information that qualifies as “personal information” for the purposes of section 2(1). As only personal information can be exempt from disclosure under sections 38(a) or (b), I find that the map and the photographs are not exempt under those sections.

I have carefully reviewed the contents of the correspondence records and find that they contain the personal information of the affected person and other members of his family. The correspondence contains the personal opinions or views of the affected person on the property dispute that is the subject matter of the records [section 2(1)(e)]. These records also qualify as “correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence” within the meaning of section 2(1)(f). Further, I find that the correspondence records passing between the Township and the affected person contain information that qualifies as the personal information of the affected person and members of his family under section 2(1)(h).

In addition, I find that these correspondence records also contain information that relates to the appellant and members of his family. This information consists of “the views or opinions of another individual (the affected person) about the individual (the appellant)” for the purposes of section 2(1)(g) and the appellant’s name appearing with other personal information relating to him under section 2(1)(h).

## **INVASION OF PRIVACY**

Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the requester.

Sections 14(1) to (4) provide guidance in determining whether the “unjustified invasion of personal privacy” threshold under section 38(b) is met. If any of paragraphs (a) to (h) of section 14(3) apply, disclosure is presumed to constitute an unjustified invasion of privacy under section 38(b) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

If no section 14(3) presumption applies, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239]. The list of factors under section 14(2) is not exhaustive. The

institution must also consider any other factors that are relevant in the circumstances of the case, even if they are not listed under section 14(2) [Order P-99].

The appellant's representations do not specifically refer to any of the presumptions in section 14(3) or considerations listed in section 14(2). I find, however, that his submissions raise the possible application of the "fair determination of rights" factor that favours the disclosure of personal information in section 14(2)(d). The appellant submits that the information contained in the records:

. . . has influenced the decision of the Township in this matter. In order to provide a defence of our property and to prepare further more conclusive proof the material required lies within the information they [the affected persons] have submitted. The withholding of information by the Township of Georgian Bay denies us the right to prepare further more conclusive information.

I agree with the position taken by the appellant that the disclosure of the information contained in the records is relevant to a fair determination of his rights in the conduct of this property dispute with the affected person. I find that this is a significant factor favouring the disclosure of the information in the records.

Neither the Township nor the affected person refer specifically to any of the considerations listed in section 14(2) in their representations. The Township states that the information falls within the presumptions in sections 14(3)(f) and (g), which read:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

- (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
- (g) consists of personal recommendations or evaluations, character references or personnel evaluations;

In my view, neither of these presumptions has any application to the information contained in the correspondence records. I find that while they refer to various improvements made to the property owned by the affected person, they do not describe in sufficient detail his financial history or activities or his assets to bring the information within the ambit of section 14(3)(f). In addition, I find that while the information may include the affected person's views about the appellant, they do not consist of personal evaluations for the purposes of section 14(3)(g).

I note that all of the records are stamped as "Confidential" and it is evident from their content and the context surrounding those which were provided to the Township that these records are of a confidential nature. In my view, this raises the application of the consideration listed at section 14(2)(h) and is a significant factor favouring the non-disclosure of the records.

The Township also submits that the records which it received from the affected person contain information that qualifies as “highly sensitive” for the purposes of section 14(2)(f). To be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause excessive personal distress to the subject individual [Orders M 1053, P 1681, PO-1736]. Following my review of the information in the records, I am of the view that the text materials, as opposed to the map and photographs contained therein, include personal information which is “highly sensitive” within the meaning of section 14(2)(f). Again, I find this to be a significant consideration with respect to the correspondence passing from the affected person to the Township.

I have carefully balanced those considerations weighing against and in favour of disclosure and conclude that the factors favouring the non-disclosure of the correspondence passing between the Township and the affected person [sections 14(2)(f) and (h)] outweigh the single relevant factor favouring the disclosure of this information [section 14(2)(d)]. Accordingly, I find that the disclosure of the correspondence between the affected person and the Township would result in an unjustified invasion of privacy and these records are, accordingly, exempt from disclosure under section 38(b).

Where a finding is made that information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester’s right of access to his or her own personal information against the other individual’s right to protection of their privacy. After reviewing the contents of the undisclosed records and the history of this dispute contained in the representations of the affected person, the Township and the appellant, I am satisfied that the Township properly exercised its discretion not to disclose those records which I have found above to be subject to exemption under section 38(b).

Because of the manner in which I have addressed the application of section 38(b) to the correspondence records, it is unnecessary for me to consider whether they also qualify for exemption under section 6(1)(b). I will now consider whether the map and photographs contained in the records responsive to parts 5 and 2 of the request, respectively, qualify for exemption under section 6(1)(b).

## **CLOSED MEETING**

The Township argues that the map and the photographs are exempt from disclosure under the discretionary exemption in section 6(1)(b), which reads:

A head may refuse to disclose a record,

that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

For this exemption to apply, the Township must establish that

1. a council, board, commission or other body, or a committee of one of them, held a meeting
2. a statute authorizes the holding of the meeting in the absence of the public, and
3. disclosure of the record would reveal the actual substance of the deliberations of the meeting

[Orders M-64, M-102, MO-1248]

The Township states that following a public Council meeting on December 8, 2003 at which the appellant made a presentation, the Township Council met again on January 12, 2004 and discussed, as part of its *in camera* session, the subject matter of the presentation made by the appellant. The Township indicates that it is relying on sections 239(2)(b) and (e) of the *Municipal Act, 2001* authorize a municipal council to meet in the absence of the public because the subject matter of the *in camera* session involved “personal matters about an identifiable individual” and/or “potential litigation”. Further, the Township submits that the “substance of the deliberations was the contents of the documents in question and would therefore reveal the actual substance of the meeting”.

Based upon my review of the minutes of the Council meeting held on January 12, 2004 and the representations of the Township, I am satisfied that a meeting of the Council took place on that date and that portions of that meeting were held *in camera*. I am also satisfied that statutory authority exists in section 239(2)(b) of the *Municipal Act, 2001* for the holding of a meeting in the absence of the public. Accordingly, the first two parts of the test under section 6(1)(b) have been met.

Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings [Order MO-1344].

In Order MO-1344, Assistant Commissioner Tom Mitchinson addressed the application of section 6(1)(b) as follows:

To satisfy the third requirement of the test, the Board must establish that disclosure of the record would reveal the actual substance of the deliberations of this *in camera* meeting. As I found in Order M-98, the third requirement would not be satisfied if the disclosure would merely reveal the **subject** of the deliberations and not their **substance** (see also Order M-703). “Deliberations” in the context of section 6(1)(b) means discussions which have been conducted with a view to making a decision (Orders M-184, M-196 and M-385).

...

It is clear from the wording of the statute and from previous orders that to qualify for exemption under section 6(1)(b) requires more than simply the authority to hold a meeting in the absence of the public. The *Act* specifically requires that the record at issue must reveal the substance of deliberations which took place at the meeting.

In my view, the Township Council met *in camera* on January 12, 2004 to discuss the issues brought forward by the appellant at its public meeting on December 8, 2003. The appellant raised concerns about the manner in which the Township investigated his complaints about a violation of the pertinent zoning bylaw. The appellant's concerns revolved around the sufficiency of the evidence relied upon by the Township in making its decision that the affected person was not in violation of the provisions of the Township's zoning bylaw. The decision of the Council, as reflected in its communication to the appellant of January 16, 2004, was that "there is insufficient conclusive information to determine if a zoning violation has occurred." This would lead me to the conclusion that the Council examined the evidence before it, including the information provided by both the appellant and the affected party, including the map and photographs at issue in this appeal, in reaching its decision.

In my view, the disclosure of the map and the photographs would not serve to reveal the substance of the Township Council's deliberations. Rather, the disclosure of this evidence would reveal only that the map and the photographs formed part of the **subject** of Council's deliberations, as opposed to revealing the actual substance of those *in camera* discussions. Accordingly, applying the reasoning expressed in Order MO-1344 to this fact situation, I find that the Township has not established the third part of the test under section 6(1)(b). As all three parts of the test must be satisfied, the section 6(1)(b) exemption has no application to the map and photographs.

Because no other exemptions have been claimed for the map and the photographs and no mandatory exemptions apply to them, I will order that they be disclosed to the appellant.

**ORDER:**

1. I uphold the Township's decision to deny access to the correspondence records that are responsive to parts 4 and 5 of the request.
2. I order the Township to disclose the map attached to the record responsive to part five of the request and the photographs responsive to part two of the request by providing the appellant with copies by October 29, 2004.



3. In order to verify compliance with Order Provision 2, I reserve the right to require the Township to provide me with copies of the records that are disclosed to the appellant.

Original Signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

\_\_\_\_\_ October 7, 2004