



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1905

Appeal MA-040211-1

Township of North Glengarry



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NATURE OF THE APPEAL:

The requester, a journalist, submitted a request to the Township of North Glengarry (the Township) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to the Township's recovery of the cleanup costs in connection with a fuel oil spill. Specifically, the requester sought access to the following information about the settlement negotiated by the Township and the parties involved in the case (the affected parties):

1. the names of the affected parties;
2. the date of the settlement, and when the case went to Court;
3. legal costs absorbed by the Township; and
4. the amount of the settlement.

After notifying the affected parties and considering their oral representations, the Township issued a decision letter in which it disclosed the date of the settlement (part of item 2) and the legal costs paid by the Township (item 4). The letter also advised the requester that access to the remaining information was denied because the affected parties "have advised that they do not want any details of the settlement released." The decision did not indicate which sections of the *Act* the Township relied on to deny access. The requester (now the appellant) appealed the Township's decision.

During the course of mediation of the appeal, the Township issued a supplementary decision letter indicating that access was refused pursuant to sections 10 (third party information) and 12 (solicitor-client privilege) of the *Act*. Upon discussions with the parties, the mediator raised the personal privacy exemption found in section 14 of the *Act*. Also during mediation, the appellant agreed that the date upon which the case went to Court was not at issue.

At the end of mediation, access to the information described in items 1 and 4 above remained at issue, for which the Township claims the exemptions at sections 10, 12 and 14 of the *Act*. This information is contained in a one-page "Full and Final Release" that names the affected parties and identifies the amount paid to the Township. The "Full and Final Release" (the record) is the only record at issue in this appeal.

I began my inquiry by sending a Notice Of Inquiry to the Township and the affected parties. The Township advised that it has "no further material to produce". The affected parties also did not provide representations, despite the fact that this office left follow-up telephone messages reminding them of their right to do so.

I then sent the Notice to the appellant. The appellant also indicated that he would not be providing representations.

DISCUSSION:

BURDEN OF PROOF:

Section 42 of the *Act* states:

If a head refuses access to a record or a part of a record, the burden of proof that the record or the part falls within one of the specified exemptions in this *Act* lies upon the head.

In addition, the law generally requires that any party asserting a proposition bears the onus of proving it, and this applies to the affected parties in the circumstances of this appeal.

PERSONAL INFORMATION

Before information can be exempt under the personal privacy exemption at section 14(1) of the *Act*, it must first qualify as “personal information” relating to an individual or individuals other than the requester. Section 2(1) defines this term 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. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 4987 (Div. Ct.), affirmed in *Ontario (Attorney General) v. Pascoe* [2002] O.J. No. 4300 (C.A.)].

As noted previously, the record contains the names of the affected parties and the amount paid to the Township to secure a full and final release in relation to the oil spill. It also identifies the date of the oil spill and the address at which it occurred, and generally sets out the terms of the settlement between the affected parties and the Township.

Neither the Township nor the affected parties have provided representations on any of the issues in this appeal, including whether the record contains the affected parties' personal information.

On the evidence before me, which consists solely of the record itself, the statements in the appellant's letter of appeal, and the fact that the affected parties advised the Township they did not wish the record disclosed, I find that the record in unsevered form constitutes the personal information of the affected parties, with particular reference to paragraph (h) of the definition. The record does not contain the appellant's personal information.

Severance and "Identifiability" of the Affected Parties

As stated above, in order to qualify as personal information, and to be potentially subject to the personal privacy exemption in section 14(1) of the *Act*, the information must relate to "identifiable" individuals. As noted by the Divisional Court in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)* (cited above), the test is whether "there is a reasonable expectation that, when the information in it is combined with information from sources otherwise available, the individual can be identified."

In the appellant's letter of appeal, he states:

We are still looking, specifically, for the amount of money the Township received from the residents ... and the names of the residents involved in the case.

If the names of the affected parties and the address at which the oil spill occurred are severed from the record, I am not satisfied on the evidence before me that there is a reasonable expectation that the affected parties could be identified. In this regard, I note that the appellant is specifically seeking the names of the affected parties. I therefore find that, with that information

severed, the record does not contain personal information and cannot be exempt under section 14(1).

Despite this finding, the names of the affected parties and the address where the oil spill occurred remain responsive to the appellant's request, and as I find them to be personal information, I must consider whether they are exempt under section 14(1). In the circumstances of this case, however, given the paucity of evidence before me, I have decided to also consider whether the entire record is exempt under section 14(1), rather than restricting my consideration of that issue to the affected parties' names and the address where the oil spill occurred.

PERSONAL PRIVACY

General principles

Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies. If the information fits within any of paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure under section 14. In the circumstances, it appears that the only exception that could apply is paragraph (f).

Section 14(1)(f) states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

In order to establish that section 14(1)(f) applies, it must be shown that disclosure of the personal information would *not* constitute an unjustified invasion of personal privacy (see, for example, Order MO-1212).

Sections 14(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates.

Section 14(3) lists the types of information the disclosure of which is *presumed* to constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767] though it can be overcome if the personal information at issue falls under section 14(4) of the *Act* or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 14 exemption. [See Order PO-1764]

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

Section 14(3)(f)

Section 14(3)(f) of the *Act* states:

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;

The record at issue in this case reveals the aggregate amount paid by the four affected parties to the Township in connection with the oil spill. The presumption will apply if the information describes, among other things, “*an individual's ... financial history or activities*” [emphasis added]. In Order PO-1986, Adjudicator Dawn Maruno found that this presumption could apply to fines owed by an individual even though “the information in the record will reveal only a single liability and not an individual's entire financial situation”. In so doing, she relied on a number of previous orders that did not accept “that the section 21(3)(f) presumption requires that the information describe the individual's “finances or income as a whole” [Orders P-1502, PO-1705, M-1154, PO-1834].

It is possible that the presumption would apply to the dollar amount paid to the Township if it had been paid by an identifiable individual. However, in this case, the figure represents an aggregate amount and it is impossible to determine how much was paid by any one of the affected parties. In *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* [2004] O.J. No. 1494 (Div. Ct.), leave to appeal granted [2004] O.J. No. 4215 (C.A.), the Divisional Court upheld a finding by former Assistant Commissioner Tom Mitchinson in Order PO-1922, that a global figure for legal services provided to two individuals was not about an identifiable individual. Although that finding was premised, in part, on the fact that the individuals were not named in the record, the fact that the figure was a global one and two individuals were involved was also a significant factor. In that case, the result was a finding that the information did not even qualify as “personal information”.

On the evidence before me in this appeal, I have found that the names of the affected parties, together with the other information in the record, does constitute information about identifiable individuals, and that the record in unsevered form therefore qualifies as their personal information. In my view, however, where it is not possible to determine how much any individual actually paid to the Township, and indeed, whether all or only some of the affected parties actually contributed, it would not be appropriate to conclude that the dollar figure paid to the Township describes “an individual's ... financial history or activities”. I therefore find that

the presumed unjustified invasion of privacy in section 14(3)(f) does not apply. Nor, based on the evidence before me, do any of the other presumptions in section 14(3) apply.

Section 14(2)

Other than the contents of the record itself, the only information before me that sheds any direct light on which of the factors in section 14(2) could apply is the following statement in the appellant's letter of appeal:

A fuel oil spill occurred in May 2000 ... within the municipality, and was traced to a property owned by some residents. The [T]ownship was stuck with the spill clean-up costs, over \$48,000, we understand. The township then tried to recover the costs from the residents.

The [appellant's news organization] learned at a local council meeting this May that the [T]ownship had reached a settlement with the residents. We wanted to learn some details of the case, as it affects our local tax-payers.

This suggests the possible application of the factor favouring disclosure at section 14(2)(a), which states:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

In order for section 14(2)(a) to apply in the circumstances of an appeal, it must be established through evidence provided by the appellant, and following a review of the relevant record(s), that disclosure of the personal information found in the record(s) is desirable for the purpose of subjecting the activities of the institution to public scrutiny. [See Order P-828]

In the circumstances of this case, I am satisfied that the disclosure of whether a small municipality such as the Township was able to recover all or part of a significant outlay (and if so, how much was actually recovered), where that outlay would otherwise be a burden on local ratepayers, is desirable for the purpose of subjecting the activities of the institution to public scrutiny. In my view, moreover, this basis for applying section 14(2)(a) is implicit in the statements in the appellant's letter of appeal that I have quoted above. However, in order to accomplish this objective, it is not necessary to disclose the affected parties' names or other information that might assist in identifying them, and I therefore find that section 14(2)(a) does not apply to the affected parties' names, nor to the address where the oil spill occurred. As regards the remaining information in the record, I find that this factor merits substantial weight.

As I have previously noted, neither the Township nor the affected parties have provided representations, despite being given an opportunity to do so, and they would be in the best position to indicate which factors favouring non-disclosure in section 14(2) might apply. I am, however, aware that the affected parties advised the Township that they oppose disclosure. I have therefore considered the factors that might favour privacy protection in the circumstances of this case, particularly sections 14(2)(f) (highly sensitive), 14(2)(h) (information provided in confidence), and 14(2)(i) (unfair damage to reputation).

There is no evidence before me to establish that disclosure could reasonably be expected to cause excessive personal distress to the affected parties, as required for me to find the information highly sensitive [Orders M 1053, P 1681, PO-1736]. The record does not indicate that its contents are confidential, and I have no basis to apply section 14(2)(h). Nor do I have any evidence to support a conclusion that disclosure may unfairly damage the affected parties' reputations. I find that no factors favouring privacy protection apply. Moreover, this conclusion applies with particular force to the portions of the record that I will not be finding exempt under section 14(1), as I will now outline.

As noted above, in order to find that disclosure is not an unjustified invasion of personal privacy and invoke the section 14(1)(f) exception to the personal privacy exemption, it must be shown that disclosure of the personal information would *not* constitute an unjustified invasion of personal privacy. I have found that the factor favouring disclosure at section 14(2)(a) applies to the entire record, with the exception of the affected parties' names and the address where the oil spill occurred. Where the factor applies, I have accorded it substantial weight. No factors favouring privacy protection have been established. I therefore find that disclosure of the portions of the record other than the affected parties' names and the address where the oil spill occurred would not be an unjustified invasion of personal privacy, and that information is not exempt under section 14(1).

However, since I did not apply the factor in section 14(2)(a) to the affected parties' names and the address where the oil spill occurred, the section 14(1)(f) exception to the exemption does not apply, and I find this information exempt under section 14(1).

THIRD PARTY INFORMATION

In its decision letter, the Township states that it relies on section 10(2). This is in fact an exception to the mandatory exemption at section 10(1). Given that section 10(1) is mandatory, and it appears that the Township intended to rely on it, I will consider whether it applies.

Section 10(1) states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

For section 10(1) to apply, the institution and/or the affected party must satisfy *each part* of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

There is nothing in the evidence before me that even begins to suggest that the information in the record is a trade secret or scientific, technical, commercial, financial or labour relations information. I therefore find that part 1 is not met. All three parts of the section 10(1) test must be met, and this finding is therefore sufficient to dispose of this exemption claim. I would also note, however, that I have no evidence of any kind to indicate that parts 2 or 3 of the test are met in the circumstances of this appeal. I find that section 10(1) does not apply.

SOLICITOR-CLIENT PRIVILEGE

Section 12 of the *Act* reads:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that 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.

Section 12 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privileges

This branch applies to a record that is subject to “solicitor-client privilege” at common law. The term “solicitor-client privilege” encompasses two types of privilege:

- solicitor-client communication privilege
- litigation privilege

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co.*].

Branch 2: statutory privileges

Branch 2 is a statutory solicitor-client privilege that is available in the context of institution counsel giving legal advice or conducting litigation. Similar to Branch 1, this branch encompasses two types of privilege as derived from the common law:

- solicitor-client communication privilege
- litigation privilege

The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies.

Findings

Solicitor-Client Communication Privilege

I have been provided with no evidence to indicate that the record reveals direct communications between a solicitor and client of a confidential nature. Given that the record is signed by parties adverse in interest to one another, the evidence I do have speaks against it revealing any such communication, and I find that it is not subject to this type of privilege.

Litigation Privilege

Again, in the absence of representations from the Township or the affected parties, I have no basis for concluding that this record was prepared for the dominant purpose of litigation. The record itself suggests, in fact, that it was prepared in order to avoid litigation. I find that this type of privilege does not apply.

Statutory Privilege

As noted, this type of privilege arises in the context of institution counsel giving legal advice or conducting litigation. Nothing of this nature is established on the evidence before me. I find that this type of privilege does not apply.

Settlement Privilege

The record reflects the terms of a settlement and could, arguably, qualify for settlement privilege. Without deciding that issue, I note that this office has previously determined that settlement privilege does not fall within the scope of the section 12 exemption. As an enclosure with the Notice of Inquiry, I sent the Township and the affected parties a copy of Order PO-2112, in which Adjudicator Donald Hale found that settlement privilege is not encompassed within the equivalent exemption in the provincial *Freedom of Information and Protection of Privacy Act*, and I invited their representations on its impact. As noted, they did not provide representations on any of the issues in this appeal.

In Order MO-1736, Senior Adjudicator David Goodis expressly adopted the analysis of Adjudicator Hale in Order PO-2112, in the context of an appeal under the *Act*. He found that settlement privilege is not within the scope of section 12 of the *Act*. I concur with the conclusions on this point in these two orders, and I therefore find that even if the record were to qualify for settlement privilege, this would not lead to it being exempt under section 12 of the *Act*.

Since the record does not qualify for any of the privileges recognized in section 12, I find that it is not exempt under that section.

ORDER:

1. I order the Township to disclose the record to the appellant, subject to the severance of the affected parties' names and the address where the oil spill occurred, by sending a copy to the appellant not later than **April 6, 2005** and not earlier than **April 1, 2005**. For greater certainty, I enclose a copy of the record showing the exempt portions with highlighting. The highlighted passages are not to be disclosed.

2. I reserve the right to require the Township to provide me with a copy of the record it discloses to the appellant pursuant to this order.

Original signed by: _____
John Higgins
Senior Adjudicator

February 28, 2005 _____