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

ORDER MO-2519

Appeal MA09-152

Township of Madawaska Valley

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NATURE OF THE APPEAL:

The Township of Madawaska Valley (the Township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to the closed session of a meeting of the Township's Economic Development Committee (the Committee) which was held on November 27, 2008. The request was for the names of all persons present at the closed session, the minutes of the closed session (including any drafts and electronic copies), and other information relating to the closed session of the meeting. The requester has been a member of the Committee, and was in attendance at the closed session.

In response to the request, the Township issued a decision in which it denied access to records responsive to the request on the basis of the exemption in section 6(1)(b) of the *Act* (closed meeting).

The requester (now the appellant) appealed the Township's decision.

During mediation, the parties confirmed that the record responsive to the request is a copy of the approved minutes of a closed meeting of the Committee that took place on November 27, 2008. The appellant confirmed that he was not seeking access to the minutes for the open meeting that took place on the same date.

In addition, the appellant took the position that draft versions of the minutes for the closed meeting ought to exist. The Township stated that no draft versions of these minutes existed and, as a result, the issue of whether the Township had conducted a reasonable search for responsive records was raised as an issue in this appeal.

Also during mediation, it was identified that the minutes of the closed meeting may contain the appellant's personal information. As a result, the discretionary exemption in section 38(a) of the *Act* was identified as a possible issue in this appeal.

Mediation did not resolve the issues, and the file was transferred to the inquiry stage of the process. A Notice of Inquiry identifying the facts and issues in this appeal was sent to the Township, and the Township provided representations in response. The Notice of Inquiry was then sent to the appellant, along with a severed copy of the Township's representations, and the appellant also provided representations to this office.

With respect to the issue of whether the Township had conducted a reasonable search for responsive records, the appellant stated that, based on the material provided by the Township in its representations and shared with him, the appellant was satisfied that a reasonable search for responsive records had been conducted by the Township. Accordingly, the sole remaining issue in this appeal is whether the minutes of the closed meeting qualify for exemption under the *Act*.

RECORDS:

The record at issue is a one-page copy of the minutes of the closed meeting of the Township's Economic Development Committee that took place on November 27, 2008.

DISCUSSION:

PERSONAL INFORMATION

General principles

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "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, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225].

Sections 2(2.1) and 2(2.2) also relate to the definition of personal information. Section 2(2.1) modifies the definition of the term "personal information" by excluding an individual's name, title, contact information or designation which identifies that individual in a "business, professional or official capacity." Section 2(2.2) further clarifies that contact information about an individual who carries out business, professional or official responsibilities from their dwelling does not qualify as "personal information" for the purposes of the definition in section 2(1).

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225 and MO-2344].

Analysis and findings

I must determine whether the records at issue contain "personal information," as that term is defined in section 2(1) of the *Act* and, if so, to whom it relates.

In this appeal the Township states that the record contains the personal information of the appellant, and also suggests that the information relates to another identifiable individual.

With respect to the individual other than the appellant, the Township identifies that the minutes include the name of this individual, and identify the capacity in which this individual is named. However, on my review of the record and the other material provided to me, it appears clear to me that this other named individual is referred to in the record in the context of a business, professional or official capacity, and not in his personal capacity. In addition, in my view the disclosure of this individual's name in the record would not reveal something of a personal nature about him. As a result, I find that the record does not contain the personal information of this individual.

However, a more complex issue is whether the information in the record relating to the appellant constitutes his "personal information" or information associated with him in a professional, official or business capacity. As identified above, the appellant has been a member of the Committee and was in attendance at the closed meeting.

Previous orders have examined the distinction between personal information and business/professional information, and Order PO-2225 sets out this office's current approach to the distinction. In that order, former Assistant Commissioner Tom Mitchinson addressed the issue of whether the name of an individual who operates a business is that individual's personal information or business information. The information at issue in that order was the names of non-corporate landlords who owed money to the Ontario Rental Housing Tribunal.

In his analysis, former Assistant Commissioner Mitchinson posed two questions that help to illuminate the distinction between information about an individual acting in a business capacity as opposed to a personal capacity:

> … the first question to ask in a case such as this is: *"in what context do the names of the individuals appear"*? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere? ....
>
> The analysis does not end here. I must go on to ask: *"is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual"*? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

I agree with this reasoning and adopt it for the purposes of this appeal.

The first issue that I must address is whether the appellant, at the time he attended the meeting, was a Committee member, and therefore attending the meeting in his "official capacity." I have carefully reviewed the representations of the parties and the content of the record to determine in what capacity the appellant attended the meeting. The information I have before me contains conflicting evidence. There is evidence in the representations of the Township, supported by the minutes, that the appellant attended the meeting as a member of the public. However, the stronger evidence, contained in the record itself and which I cannot disclose, satisfies me that the appellant was a Committee member at the time he attended the closed session meeting.

Accordingly, with respect to the first question posed in Order PO-2225 ("in what context does the name of the individual appear"?), I find that the name of the appellant appears in a professional or official context, not a personal context.

However, that is not the end of the analysis. I must go on to ask the second question posed in Order PO-2225: "is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual"?

Based on my review of the information relating to the appellant contained in the record, including the statements made about him, by him, and the future actions referred to in the record, I am satisfied that the record contains the appellant's "personal information." Although the appellant attended the meeting in an official capacity, there is some information in the record which indicates that this individual's conduct was scrutinized and questioned. Previous orders of

this office have established that information about persons in their professional or employment capacity may qualify as their personal information if it involves an evaluation of that individual's performance as an employee or an investigation into his or her conduct as an employee [see, for example, Orders P-939, PO-2414, PO-2516, PO-2524, MO-2395]. In the circumstances of this appeal, I find that the information contained in the record reveals something of a personal nature about the appellant. Because the information relating to the appellant relates to his conduct, in the circumstances it takes on a different, more personal quality. Consequently, I find that the information relating to the appellant reveals something of a personal nature about him.

In summary, I find that the record contains the personal information of the appellant, but that it does not contain the personal information of any other identifiable individual.

I will now determine whether the record qualifies for exemption under sections 38(a) and/or 6(1) of the *Act*.

DO THE DISCRETIONARY EXEMPTIONS AT SECTIONS 6(1) AND/OR 38(a) APPLY TO THE RECORDS?

General principles

Section 36(1) 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(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information. Because section 38(a) is a discretionary exemption, even if the information falls within the scope of the listed sections, the Township must nevertheless consider whether to disclose the information to the requester.

Here, the Township relies on section 38(a) in conjunction with section 6(1) of the *Act*. Because I have found that the record contains the personal information of the appellant, I will review whether it qualifies for exemption under section 38(a), in conjunction with section 6(1).

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/CLOSED MEETING

The Township takes the position that the record qualifies for exemption under 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.

Previous orders have held that, 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]

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].

I will now review each part of this three-part test, to determine whether the record qualifies for exemption under this section.

Part 1- a council, board, commission or other body, or a committee of one of them, held a meeting

In support of its position that the record qualifies for exemption under section 6(1)(b) of the *Act*, the Township has provided a copy of the minutes of the open portion of the meeting of the Committee that took place on November 27, 2008, which includes a resolution to go into closed session. The minutes of the open meeting identify the individuals who made the motion and who seconded the motion to go into closed session. The minutes also indicate that the meeting subsequently came out of closed session.

The appellant does not dispute that the meeting was held, but argues that, if he was attending the meeting as a member of the public, the meeting may not actually have been held in the absence of the public. I have found above, however, that the appellant was a Committee member at the time he attended the closed session meeting. As a result, I am satisfied that the meeting did, in fact, take place, and that it was held in the absence of the public. Accordingly, part 1 of the three part test under section 6(1)(b) has been met.

Part 2 - a statute authorizes the holding of the meeting in the absence of the public

The Township states that the meeting was held in the absence of the public under the authority of section 239(2)(b) of the *Municipal Act*. Section 239(1) of the *Municipal Act* requires meetings to be open to the public; however, section 239(2) provides certain exceptions to this. Section 239(2)(b) states:

> (2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

> (b) personal matters about an identifiable individual, including municipal or local board employees;

The Township states that the Committee requested to go into closed session to discuss with the appellant certain actions he had undertaken, and takes the position that the subject matter of the closed session of the meeting dealt with personal matters relating to the appellant. The appellant does not appear to dispute this basis for going into the closed session.

Based on the Township's representations, I am satisfied that the Committee was authorized by section 239(2)(b) of the *Municipal Act* to hold a closed meeting. I found above that the record contains the personal information of the appellant, and this is sufficient to satisfy the requirement in section 239(2)(b), which allows for a meeting to be closed to the public. In the circumstances, I find that the Committee was authorized by statute to hold the meeting in the absence of the public, thereby satisfying Part 2 of the test under section 6(1)(b) of the *Act*.

Part 3 - disclosure of the record would reveal the actual substance of the deliberations of the meeting

Under Part 3 of the test set out above, previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision [Order M-184]

- "substance" generally means more than just the subject of the meeting [Orders M-703, MO-1344]

In addition, previous orders of this office have established that it is not sufficient that the record itself was the subject of deliberations at the meeting in question [see Order M-98, M-208], where the record does not reveal the actual substance of the deliberations or discussions that took place leading up to the decisions that were made.

In support of its position that disclosure of the record would reveal the actual substance of the deliberations of the meeting, the Township refers to the open and frank discussion which took place at the meeting. The appellant disputes that the record contains discussions.

On my review of the record, I note that the minutes record various statements made by the attendees, including positions taken by them. It also identifies the next steps to be taken. In the circumstances, I am satisfied that disclosure would reveal the actual substance of the deliberations of the meeting. Accordingly, I conclude that the third part of the test has also been met.

In conclusion, I find that all three parts of the test under section 6(1)(b) have been satisfied, and the record qualifies for exemption under section 38(a) of the *Act*, subject to my findings below on the absurd result principle, as well as on the exercise of discretion.

Absurd result

This office has applied the "absurd result" principle in situations where the basis for a finding that information qualifies for exemption would be absurd and inconsistent with the purpose of the exemption.

Senior Adjudicator John Higgins first applied the absurd result principle in Order M-444 where, after finding that the disclosure of identified information would, according to the legislation, be a presumed unjustified invasion of privacy, he went on to state:

> However, it is an established principle of statutory interpretation that an absurd result, or one which contradicts the purposes of the statute in which it is found, is not a proper implementation of the legislature's intention. In this case, applying the presumption to deny access to information which the appellant provided to the Police in the first place is, in my view, a manifestly absurd result. Moreover, one of the primary purposes of the *Act* is to allow individuals to have access to records containing their own personal information, unless there is a compelling reason for non- disclosure. In my view, in the circumstances of this appeal, non-disclosure of this information would contradict this primary purpose.

Numerous subsequent orders have supported this position and include similar findings. The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451, M-613];
- the requester was present when the information was provided to the institution [Orders P-1414];
- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO- 1755].

In Order MO-1323, Adjudicator Laurel Cropley elaborated on the rationale for the application of the absurd result principle in the context of the *Act* as follows:

> As noted above, one of the primary purposes of the *Act* is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure (section 1(b)). Section 1(b) also establishes a competing purpose which is to protect the privacy of individuals with respect to personal information about themselves. Section 38(b) was introduced into the *Act* in recognition of these competing interests.
>
> In most cases, the "absurd result" has been applied in circumstances where the institution has claimed the application of the personal privacy exemption in section 38(b) (or section 49(b) of the provincial *Act*). The reasoning in Order M-444 has also been applied, however, in circumstances where other exemptions (for example, section 9(1)(d) of the *Act* and section 14(2)(a) of the provincial *Act*)

> have been claimed for records which contain the appellant's personal information (Orders PO-1708 and MO-1288).
>
> In my view, it is the "higher" right of an individual to obtain his or her own personal information that underlies the reasoning in Order M-444 which related to information actually supplied by the requester. Subsequent orders have expanded on the circumstances in which an absurdity may be found, for example, in a case where a requester was present while a statement was given by another individual to the Police (Order P-1414) or where information on a record would clearly be known to the individual, such as where the requester already had a copy of the record (Order PO- 1679) or where the requester was an intended recipient of the record (PO-1708).

However, previous orders have also established that if disclosure is inconsistent with the purpose of the exemption, the absurd result principal may not apply, even if the information was supplied by the requester or is within the requester's knowledge [Orders M-757, MO-1323, MO-1378].

Adjudicator Cropley applied the above principles in Order MO-1379, in which she had to make a determination in circumstances similar to those in this appeal. In that order, the requester had asked for access to the minutes of a closed meeting in which she was in attendance. Although Adjudicator Cropley found that the section 6(1)(b) exemption did not apply in the circumstances, she went on to state:

> In most cases, the "absurd result" principle has been applied in circumstances where the institution has claimed the application of the personal privacy exemption in section 38(b) of the *Act*. The reasoning in Order M-444 (referred to above) has also been applied in circumstances where other exemptions (for example, section 9(1)(d) of the Act and section 14(2)(a) of the provincial Act) have been claimed for records which contain the appellant's personal information (Orders PO-1708 and MO-1288). In my view, this reasoning could similarly be applied to records for which section 6(1)(b) has been claimed.
>
> In this case, even if the exemption in section 6(1)(b) did apply, based on the involvement of the parents in the meeting, I would find that withholding the minutes of such a meeting from them would result in an absurdity.
>
> As no other exemptions have been claimed or apply to [the record], it should be disclosed to the appellant.

I agree with the approach taken to this issue by Adjudicator Cropley in Order MO-1379 and apply it to the circumstances of this appeal.

The sole reason why the Committee went into closed session was to deal with personal matters about an identifiable individual under section 239(2)(b) of the *Municipal Act*. The identifiable individual to whom the personal matters relate is the appellant, and he was present throughout the closed meeting. The record at issue contains statements made about the appellant, statements

made by the appellant, and identifies future actions to be taken by the parties, including future actions to be taken by the appellant as a result of the discussions in the meeting. In these circumstances, I find that withholding the minutes of the meeting from the appellant would result in an absurdity.

One of the arguments made by the Township in support of its decision to withhold the record from the appellant is its position that, although Council members and staff of the Township are governed by confidentiality clauses for discussions that are held in camera, the appellant, as a member of the public, has no such constraints. The Township argues that one of the purposes of closed meetings is to enable discussions to take place in an open and frank manner. However, in the circumstances of this appeal, I am not satisfied that any other factors exist that would not allow the appellant to have access to the minutes of this meeting, which he attended and which relate to him. I also note that, as identified above, the appellant appears to have been a member of the Committee at the time this meeting took place.

Exercise of Discretion

As noted, sections 6 and 38(a) are discretionary exemptions. When a discretionary exemption has been claimed, an institution must exercise its discretion in deciding whether or not to disclose the records. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

The appellant argues that, because he was in attendance at the meeting and because the record relates to him, he ought to have access to it for a number of reasons, including allowing him to ensure the accuracy of the information, and to take steps to correct the information relating to him if it is inaccurate. In my view these would constitute relevant considerations in support of exercising the discretion to disclose the record to the appellant. However, having found that the record does not qualify for exemption under sections 6(1)(b) and/or 38(a) because of the absurd result principle, it is not necessary for me to review the Township's exercise of discretion.

ORDER:

I order the Township to disclose the record to the appellant by **May 27, 2010**.

Original signed by: April 29, 2010
Frank DeVries
Adjudicator