



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

ORDER MO-2483

Appeal MA09-180

Township of Severn



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NATURE OF THE APPEAL:

The Township of Severn (the Township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of a confidential planning report.

The Township found the responsive record and issued a decision denying access in full, citing sections 8(1)(a), (b) and (c) (law enforcement) of the *Act*.

The requester, now the appellant, appealed the Township's decision.

During mediation, the Township issued a revised decision in which it applied the discretionary exemptions at section 6(1)(b) (closed meeting) and 7(1) (advice or recommendation to the record). As the appellant is the subject of the record, the mediator added section 38(a) as an issue in the appeal.

Further mediation was not possible and the file was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. I initially sent a Notice of Inquiry to the Township. The Township provided representations in response. I then provided the appellant with an opportunity to make representations and to comment on the non-confidential portions of the Township's representations. The appellant also provided representations.

RECORDS:

The only record at issue is a confidential planning report.

DISCUSSION:

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 if 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 where 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].

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].

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 Township submits that the record contains the personal information of the appellant and the individual who wrote the report. The Township notes that the appellant is not identified by name or any other identifiers in the record.

The appellant did not make representations on this issue.

Based on my review of the record, I find that it contains the personal information about the appellant only as defined in paragraphs (a) and (b) of the definition of that term in section 2(1).

The record does not contain the personal information of the individual who wrote the report. I have no evidence to suggest that this individual wrote this report in his personal capacity and not his professional capacity. In fact, this individual is identified by his job title underneath his name. As stated above, information associated with an individual in a professional or official capacity will not be considered to be "about" that individual.

I further find that the appellant would be identifiable if the information in the record were disclosed even if the record does not contain his name, address or telephone number. The appellant's actions appear to be well documented in the township as evidenced by the newspaper clippings which the appellant provided. These same actions are the subject of the record and would identify the appellant should the information be disclosed.

Accordingly, I find that the record contains the personal information of the appellant only.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/CLOSED MEETING

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.

Section 38(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information [Order M-352].

Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

The Township submits that it exercised its discretion to withhold the record under section 38(a) because section 6 of the *Act* applies to the personal information in the record.

Section 6(1)(b): closed meeting

Section 6(1)(b) 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 institution 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]

Under part 3 of the test

- “substance” generally means more than just the subject of the meeting [Orders M-703, MO-1344 and MO-2337]
- “deliberations” refer to discussions conducted with a view towards making a decision [Orders M-184, MO-2337, MO-2368, and MO-2389]

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].

Analysis and findings

In determining whether section 6(1)(b) of the *Act* applies to the record, I will consider the three-part test set out above. The appellant’s representations suggest that I consider whether all the record should be withheld under the exemption.

Part 1 – Council, board, commission or other body, or a committee of one of them, held a meeting

The Township submits that the record was on a Corporate Services Committee agenda under the confidential section for a meeting held on October 25, 2006. The Township provided a copy of the minutes for the meeting that took place where the record is listed as discussed.

Based on my review of the record and the meeting minutes, I find that the Corporate Services Committee held a meeting on October 25, 2006 and I am satisfied that the Township has met the first requirement for the three-part test for the section 6(1)(b) exemption.

Part 2 – Statute authorizes the holding of the meeting in the absence of the public

The Township submits that for the part of the meeting where the record was discussed, the meeting was closed to the public. It states:

As authorized under Section 239(2) of the *Municipal Act*, the meeting was closed to the public during discussions on the information contained in the report by the following resolution of the Committee:

MOTION CSC102506-14: Moved by Member Bench and seconded by [named] Member that this meeting be and it is hereby now closed to the public pursuant to the Municipal Act, S.O. 2001, Chapter 25, Section 239(2), for the purpose of considering personal matters about an identifiable individual, including municipal or local board employees.

CARRIED

Following the completion of the Committee's discussions, the meeting was reopened to the public and the following resolution enacted:

MOTION CSC012506-16: Moved by Member Bench and seconded by [named] Member that Confidential Planning Report No. [specified number], with respect to the [named] Trail be received; AND FURTHER THAT formal notice be sent to the proponent prohibiting any further use of the [named] Trail while [specified action].

Therefore, the Committee held a meeting, closed a portion of the meeting to the public to discuss the subject record as authorized by statute, and then reopened the meeting to make a decision in the public.

Section 239(2)(b) of the *Municipal Act* 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 term “personal matters” is not defined in the *Municipal Act*, but has been found in prior orders of this office to be analogous to the term “personal information” used in the *Act* (Orders MO-2473, MO-2368). Adjudicator Colin Bhattacharjee stated the following in regard to section 239(2)(b):

In my view, the purpose of section 239(2)(b) is to provide a municipal council, board or committee with the discretion to close a meeting or part of a meeting to the public to protect the privacy of an identifiable individual, but only if “personal matters” relating to that individual is the subject matter actually being considered.

I agree with Adjudicator Bhattacharjee’s reasoning and apply it here. Upon my review of the record and the meeting minutes, I am satisfied that the Corporate Services Committee were considering “personal matters” relating to an identifiable individual (the appellant) and that the Committee was authorized to hold this part of its meeting closed to the public under section 239(2)(b) of the *Municipal Act*.

Accordingly, I find that the Township has met the second requirement of the three-part test for section 6(1)(b).

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.

Based on my review of the record, I find that disclosure of the record would reveal the substance of the deliberations at the meeting. It is clear from the meeting minutes that the record was considered at the closed meeting. The record contains a recommended course of action about an identifiable individual and that recommended course of action would have been the substance of the deliberations at the closed meeting. Disclosure of the record would reveal the recommendation and in effect reveal the substance of the deliberations. Accordingly, I find that the third requirement for the three-part test for section 6(1)(b) has been met.

Exception in section 6(2)(b)

Section 6(2)(b) exception

I must now consider the exception in section 6(2)(b). Section 6(2)(b) of the *Act* sets out exceptions to sections 6(1)(b). It reads:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,

- (b) in the case of a record under clause (1)(b), the subject matter of the deliberations has been considered in a meeting open to the public; or

The Township submits that subject matter of the deliberations in question was never considered in a meeting open to the public. The only matter considered in part of the meeting that was open to the public was the decision by the Committee to enact Resolution No. CSC102506-16 without discussion or debate.

The appellant did not provide representations on this issue.

Based on my review of the Township's representations and the newspaper articles provided by the appellant, I find that the exception to the exemption in section 6(2)(b) does not apply. The subject matter of the deliberations in the closed meeting has not been considered in a meeting open to the public.

In summary, I find that section 38(a) in conjunction with section 6(1)(b) applies to exempt the record, subject to my consideration of the Township's exercise of discretion.

EXERCISE OF DISCRETION

The section 38(a) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. 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)].

Relevant considerations

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations

In support of its exercise of discretion, the Township submitted the following:

The Township of Severn is supportive of the purposes of the Act in that information should be available to the public and that exemptions from the right of access should be limited and specific.

The Township considering the following factors:

- Information should be available to the public.
- A comprehensive review of the record requested in order to release as much of the document as was possible.
- Whether the requester was seeking his own personal information.
- The appellant's need to receive the information – The final decision of Council was forwarded to the appellant which outlined the course of action to be taken. The advice and recommendations were withheld due to the potential of future law enforcement or litigation to resolve this matter.
- The nature of the information could be sensitive to the institution with the potential of future law enforcement or litigation.
- The historic practice of the institution is to withhold information considered during "closed sessions" of Council in order to protect any future litigation or action required.

The appellant submits that the Township improperly exercised its discretion by not considering whether a portion of the record could be disclosed to him.

Analysis and finding

Based on my review of the Township's representations, I find that the Township properly exercised its discretion to withhold the record from disclosure under section 38(a) of the *Act*. The Township considered that the appellant was seeking his own personal information, the section 6(1)(b) exemption and the interests it seeks to protect, and the historic practice of the institution with respect to similar records. The Township also considered the nature of the information and the sensitivity of the information in light of possible future law enforcement or litigation.

While I am sympathetic to the appellant's frustration at not receiving a copy of the record, which contains his personal information, I agree with the Township's assessment that the record contains a discussion of the manner in which the Township chose to deal with the appellant's actions. The record is not solely about the appellant.

In the circumstances, I find that the Township properly exercised its discretion to withhold the information I have found exempt under section 38(a), and I will not interfere with it on appeal.

SEVERANCE

Section 4(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt from disclosure. The appellant raises the issue of whether the record could be severed in any way to disclose some of the information to him.

The key question raised by section 4(2) is one of reasonableness. Where a record contains exempt information, section 4(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information. A head will not be required to sever the record and disclose portions where to do so would reveal only “disconnected snippets,” or “worthless,” “meaningless” or “misleading” information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed [Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.)].

The Township submits that it considered severing the record but due to the specific contents of the request record it would not be feasible as the portion that could potentially be disclosed would not be beneficial to the appellant. The appellant argues that the Township applied the exemptions claimed too broadly to deny him access to the entire record.

I agree with the Township’s assessment on the issue of severing the record. The record is only a page in length and all of the information contained in the record deals with the subject matter of what was being deliberated at the closed meeting. I find that severance of the record is not possible in the circumstances.

ORDER:

I uphold the Township’s decision to deny access to the record and dismiss the appeal.

Original Signed By: _____ December 9, 2009
Stephanie Haly
Adjudicator