



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

FINAL ORDER MO-2599-F

Appeal MA09-323

The Corporation of the Township of Cavan-Monaghan



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NATURE OF THE APPEAL:

The appellant submitted a request to the Corporation of the Township of Cavan-Monaghan (the Township) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to copies of “all tests and related technical information that pertain to the well on [name of street] and the issue of possible contamination as referred to in Township documents and letters.”

The Township issued a decision letter denying the appellant access to the responsive record. In its decision letter, the Township claimed that the record qualifies for exemption under section 7(1) of the *Act* (advice and recommendations). The Township also claimed that the record was considered at a closed meeting.

The appellant appealed the Township’s decision to this office.

During mediation, the Township issued a supplemental decision letter and raised the possible application of the mandatory exemption at section 10(1) of the *Act* (third party information) to the record. The Township also clarified that it is relying on the discretionary exemption at section 6(1)(b) of the *Act* (closed meeting) to deny access to the record on the basis that it was considered at a meeting of Council or one of its Committees authorized by statute to be held in the absence of the public. Finally, the Township confirmed that it continues to rely on the exemption at section 7(1) to deny access to the record.

Also during mediation, the mediator contacted the author of the report and a company (the affected parties) to inquiry as to whether they would consent to the disclosure of the information relevant to their companies. The affected parties advised the mediator that they object to the disclosure of any information contained in the record which relates to them.

Finally, the appellant raised the possible application of the public interest override provision at section 16 of the *Act* to the record.

No issues were resolved in mediation and the appeal was transferred to the adjudication stage of the appeals process. The adjudicator previously assigned to this appeal decided to commence her inquiry by seeking the representations of the Township and the affected parties initially.

The Township and one of the affected parties provided representations. The other affected party did not provide representations, but advised this office that it objects to the release of any information which relates to it. The previous adjudicator then sought representations from the appellant and provided her with a complete copy of the affected party’s representations and the non-confidential representations that were submitted by the Township. The appellant also submitted representations. After reviewing them, the previous adjudicator decided to seek representations by way of reply from the Township and the affected parties, and provided them with a copy of the appellant’s non-confidential representations. The Township submitted representations in reply.

The file was subsequently transferred to me to complete the adjudication process. I issued Interim Order MO-2572-I, in which I found that the record at issue qualified for exemption under section 6(1)(b) of the *Act*, and that the exception in section 6(2)(b) did not apply.

Section 6(1)(b) is a discretionary exemption. Accordingly, I reviewed the Township's exercise of discretion in withholding the record pursuant to section 6(1)(b). I found that the Township failed to properly exercise its discretion. In order provision 1 of Interim Order MO-2572-I, I ordered the Township to re-exercise its discretion in accordance with the principles that I set out in the order. In order provision 2, I ordered the Township to provide representations on the factors it considered in exercising its discretion to withhold the record.

In accordance with the order provisions in Interim Order MO-2572-I, the Township has provided me with representations on its re-exercise of discretion. I sent the non-confidential portions of its representations to the appellant and she has also submitted representations addressing the Township's exercise of discretion.

DISCUSSION:

EXERCISE OF DISCRETION

General principles

The section 6(1)(b) 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

In Interim Order MO-2572-I, I made the following findings regarding the Township's exercise of discretion and ordered the Township to re-exercise its discretion based on them:

...I am satisfied that the Township took into consideration the following relevant considerations:

- the fact that the report was produced as part of the process for the acquisition of private property, which is typically conducted in confidence at least until such time as the purchase is finalized;
- in the circumstances, the purchase of the property was not finalized and the interests of the owner of the property may well be affected by disclosure of the report;
- there is some additional information that is publicly accessible regarding the property in question with respect to environmental testing.

I find that the following considerations relied upon by the Township in exercising its discretion not to disclose the record are irrelevant to that decision:

- reliance on the fact that the appellant can make an access request under the provincial *Act* to obtain information about the property before such a request has been made and a decision granting access has been given;
- placing significant reliance on the fact that the appellant does not live within the Township's boundaries, particularly given her indicated representation of other individuals, including local residents;
- placing significant reliance on the fact that the appellant has stated concerns about her own property with respect to environmental issues.

I find further that the Township has failed to take into account the following relevant considerations:

- the general concerns regarding water quality raised by the appellant, and the relationship between the record and those concerns generally;
- the concerns of the larger community regarding this issue;
- the impact on public perception of the Township's decision not to pursue the property in question;
- there was no weighing of the competing interests in the Township's decision.

Representations

In its representations, the Township confirms that it re-exercised its discretion concerning the disclosure of the record at issue, taking into account the directions that I set out in Interim Order MO-2572-I. The Township indicates that it decided that the record at issue should still be withheld pursuant to section 6(1)(b) of the *Act*. In arriving at this decision, the Township stated that:

The confidentiality of the Township's property acquisition process is of paramount importance where, in the circumstances of the acquisition process, the vendor has been assured that any investigations by the purchaser (Township) will remain confidential.

The Township indicates that it took into consideration that breaching these confidentiality expectations would taint future property acquisitions or make them more time consuming and expensive. The Township also considered that without assurances of confidentiality in property acquisition negotiations, potential vendors may be reluctant to consent to environmental or other investigations.

The Township acknowledges the validity of the appellant's concerns about water quality, and recognizes that these concerns are shared not only by the larger community, but also the municipality and the province. The Township states, however:

Simply stated, protection of the quality of water is a universal concern and it is a matter that has been directly addressed by the province through significant amendments to the legislation and regulations concerning water supply and safety. That being said, the fact that the appellant and the larger community are concerned about the quality of water in the "area" is not sufficient to, nor does it, warrant, a breach of the confidentiality principle between the Township and the vendor; nor does it warrant the potential tainting of future property acquisition processes.

The Township confirms that the record at issue "does not conclude or indicate that the ground water or aquifer, from which water would be drawn for the proposed well or that supplies other wells in the area, is actually contaminated or at imminent risk of contamination." The Township notes that if such were the case, it "would have clear and undeniable cause or basis to disclose the information to the appropriate agencies." The Township asserts that if it obtained a report that the aquifer or wells in the area were contaminated or at imminent risk of contamination, it would "immediately report such findings to the Ministry of the Environment which has authority under the *Safe Drinking Water Act* to issue directives/orders concerning contaminated water supplies of imminent risks to such water supplies.

In balancing the public perception of the Township's decision not to pursue the purchase of the property in question against the perceived negative effects of disclosing a record obtained through a confidential process, the Township states that in exercising its discretion not to disclose the record, it determined that the need to maintain confidentiality and to adhere to assurances provided to the vendor outweighs the "general concerns over water quality" expressed by the appellant and the larger community.

In her representations, the appellant admits that in most cases it would be appropriate that information regarding private properties not be released. She contends, however, that the circumstances in this appeal are unique in that health and/or safety issues relating to local residents might be at issue.

The appellant points out that the tests conducted on the private property were paid for by the public purse, which, she believes "[makes] the citizenry part of the hydrologic investigative process." She asserts that the Township must be accountable to its citizens.

The appellant also refers to other technical information regarding the well on the subject property that is publicly available and that the Ministry of the Environment had declared the water to be "of excellent quality." She then points out that a different municipal document appears to question the validity of this previous finding. The appellant attached to her representations, an excerpt from a document entitled, "Fraserville Secondary Plan Update Background Report". This report stated that "[t]est results on the preferred site indicated a concern of possible site contamination. The contamination stems from historic uses of the lands."

The appellant has requested that the Township publicly state that the record at issue “does not conclude or indicate that the ground water or aquifer, from which water would be drawn for the proposed well or that supplies other wells in the area, is actually contaminated or at imminent risk of contamination.” She believes that this admission would allay public fears regarding contamination. She has asked that this affirmation be confirmed at a council meeting and published in the media.

Findings

The issues raised by the appellant are significant and pertain to serious concerns regarding the quality of water in the area in question. She is essentially seeking public confirmation that water in that area is not contaminated. By bringing this appeal, she has been provided with some information that answers her questions. She may do what she wishes with any public statements that the Township has made in its submissions which are quoted in this order.

The question before me is whether the Township has undertaken a proper exercise of discretion in withholding a record that qualifies for exemption under the closed meeting provision of the *Act* (section 6(1)(b)). Many of the appellant’s arguments raise public interest issues. I note that she raised section 16 as an issue in this appeal. However, the public interest override in section 16 of the *Act* does not apply to records found to be exempt under section 6(1)(b). Although section 16 is not available to assist the appellant, in Interim Order MO-2572-I, I found that the Township had failed to take into account the “public interest” in the water quality issues. I also found that it had failed to balance the competing interests that existed in the circumstances of this appeal.

In my view, the submissions made by the Township reflect a serious consideration of these competing interests to the extent that it has provided additional information to assist the appellant in understanding why it exercised its discretion in favour of non-disclosure. The Township’s submissions indicate that the decision was based on proper consideration of the perceived harms that would result from a breach of the confidential property acquisition process in addition to the relevant considerations discussed previously in the interim order.

Based on the submissions made by the Township, I am satisfied that it has taken into consideration only relevant factors in deciding to exercise its discretion not to disclose the record at issue. I am also satisfied that the Township has not acted in bad faith or for an improper purpose. Accordingly, I find that the Township’s exercise of discretion was proper, and section 6(1)(b) applies to exempt the record from disclosure.

Because of these findings, it is not necessary for me to consider the other exemptions claimed by the Township.

ORDER:

I uphold the Township's decision.

Original Signed By: _____ February 22, 2011
Laurel Cropley
Adjudicator