

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2668

Appeal MA10-419

Township of Minden Hills

November 3, 2011

Summary: The appellant made a request to the Township of Minden Hills for access to the township's tax assessment roll. The appellant wished to examine the roll and scan it using a hand held device. The township denied access under the *Municipal Freedom of Information and Protection of Privacy Act*, but stated that members of the public may view the roll, subject to certain restrictions. Public access to assessment rolls is mandated by section 39(2) of the *Assessment Act*. The township denied the request to duplicate the roll by means of scanning or photography. This order upholds the township's decision to deny access under the *Act* because section 15(a) of the *Act* applies to the tax assessment roll.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 15(a), 23; *Assessment Act*, R.S.O. 1990, c. A.31, ss. 39(1) and (2).

Orders and Investigation Reports Considered: Order MO-2049-F.

Cases Considered: *Municipal Property Assessment Corporation v. Mitchinson*, 2004 CanLii 17632 (Div. Ct.); *Enterprises Sibeca Inc. v. Frelighsburg (Municipality)*, [2004] 3 S.C.R. 304

OVERVIEW:

[1] The appellant made a request to the Township of Minden Hills (the township) to scan its tax assessment roll using handheld portable scanning or photographic equipment owned by the appellant. The appellant submitted the request to the

township on a request form that refers to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*), and paid the \$5.00 request fee associated with making a request under the *Act*.

[2] The township responded by advising the appellant that it had adopted a policy that prohibits the reproduction of the tax assessment roll by means of photocopying, camera or scanner. The township provided the appellant with a copy of the policy. The policy also indicates that the members of the public may view the assessment roll.

[3] The appellant subsequently filed an appeal with this office. During the intake stage of the process, the township issued a revised decision letter, advising the appellant that he could have access to the tax assessment roll pursuant to section 39(2) of the *Assessment Act*,¹ but reiterated that the roll could not be reproduced by way of photocopying, photographing or scanning, as the assessment roll belongs to the municipality and the municipality has the jurisdiction to determine how to apply section 39(2) of the *Assessment Act*.

[4] The matter then moved directly to the adjudication stage of the appeals process, which takes the form of an inquiry under the *Act*. During the inquiry, I invited and received representations from the township, the Municipal Property Assessment Corporation (MPAC) and the appellant. I shared the representations in accordance with the IPC's *Practice Direction 7*.

[5] I specifically invited the parties to provide representations on the possible application of sections 14(1) (personal privacy), 15(a) (information published or available) and 23 of the *Act*.

[6] As indicated in *Municipal Property Assessment Corporation v. Mitchinson*² ("MPAC"), public availability of the assessment roll under section 39(2) of the *Assessment Act* means that assessment roll information is exempt under section 15(a) of the *Act*. That decision is determinative of the issues in this case, and the appeal is dismissed.

[7] For that reason, it was not necessary to consider the personal privacy exemption in section 14(1) and, because access is not being granted under the *Act*, the provisions of section 23 of the *Act*, which deal with the manner of giving access under the *Act*, do not come into play.

[8] In its representations, MPAC argued that, in addition to being exempt under sections 14(1) and 15(a), the information is also exempt under section 11 (economic and other interests), and cited a number of orders denying access to electronic assessment information under that section. Because section 15(a) applies, it is not

¹ R.S.O. 1990, c. A.31.

² 2004 CanLii 17632 (Div. Ct.).

necessary to consider whether MPAC should be permitted to raise and rely on section 11 in this appeal, or whether that section applies. I will therefore not refer to section 11 further in this order.

ISSUES:

Issue A: Does the discretionary exemption at section 15(a) of the *Act* apply to the record?

Issue B: Did the township properly exercise its discretion in relying on section 15(a)?

DISCUSSION:

Issue A: Does the discretionary exemption at section 15(a) of the *Act* apply to the record?

[9] Section 15(a) states:

A head may refuse to disclose a record if,

the record or the information contained in the record has been published or is currently available to the public;

[10] Section 15(a) is intended to provide an institution with the option of referring a requester to a publicly available source of information where the balance of convenience favours this method of alternative access. It is not intended to be used in order to avoid an institution's obligations under the *Act*.³

[11] For this section to apply, the institution must establish that the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre.⁴

[12] The township provided representations during the inquiry stage. In addition, the revised decision letter sent to the appellant during intake contains relevant arguments on this issue, and I will refer to the content of both the township's decision letter and its representations.

[13] The township states that the purpose of creating an assessment roll for municipalities is to:

³ Orders P-327, P-1114 and MO-2280.

⁴ Orders P-327, P-1387 and MO-1881.

- facilitate the collection of taxes;
- identify entitled voters in municipal and school board elections;
- create a school support list; and
- generate a list of eligible potential jurors.

[14] The township also refers to section 39(2) of *Assessment Act*. Sections 39(1) and (2) of the *Assessment Act* state:

(1) The assessment corporation [MPAC] shall deliver the assessment roll for a municipality and any area attached to the municipality under clause 56(b) or subsection 58.1(2) of the Education Act to the clerk of the municipality, the assessment roll for a locality or a local roads area under the Local Roads Boards Act to the secretary of the applicable board and the assessment roll for non-municipal territory to the Minister, and shall do so on or before the date fixed for the return of the roll.

(2) *Immediately upon receiving the assessment roll for the municipality, the clerk shall make it available for inspection by the public during office hours.* [Emphasis added.]

[15] The township states that the purpose of section 39(2) is to facilitate access by taxpayers to assessment roll information so that they can verify that their assessments are equitable with respect to other taxpayers in the municipality. The township notes, however, that the *Assessment Act* does not expressly limit inspection to that purpose or any other purpose.

[16] The township confirms that, pursuant to section 39(2), it had granted access to the tax assessment roll. However, the township is of the view that section 39(2) also permits a municipality to determine how that access is granted. To that end, it adopted a written policy prohibiting the reproduction of the roll by means of scanner, photocopier, and/or camera.

[17] The township also notes that it consulted with MPAC, who advised that only copying by hand or keying the information into a laptop should be permitted.

[18] MPAC also provided representations in this appeal. By way of background, MPAC is a non-share capital, not-for-profit corporation and is the sole provider of assessment services for the Province. One of its duties is to prepare an assessment roll for each municipality in Ontario, which the municipalities use to calculate property taxes.

[19] Under section 39(1) of the *Assessment Act*, MPAC must deliver the assessment roll to the clerk of the municipality, who then must make it available for inspection by the public during office hours under section 39(2).

[20] MPAC also notes that in the *MPAC* decision⁵, the Divisional Court addressed the issue of electronic access to the assessment roll. The Court quashed the IPC's order to disclose that type of information, upholding MPAC's denial of access. In addition, MPAC notes that the Court upheld the application of section 15(a) to the assessment roll because of its availability under section 39(2) of the *Assessment Act*. The Court stated:

Although the electronic record itself is not available to the public, the information contained in the record is available in paper form for the public to inspect. We are of the view that in these circumstances, s. 15(a) confers authority upon the head to prohibit disclosure under *MFIPPA*.

[21] The appellant submits that although municipal corporations are required to comply with the *Assessment Act*, there is no provision within the *Assessment Act* conferring a municipal corporation jurisdiction over it. It is for the legislature to decide what the purpose of section 39(2) of the *Assessment Act* is.

[22] The appellant also submits that there is no distinction between hand writing, keyboard inputting or scanning the information contained in the assessment roll. The appellant states:

Current OCR (optical character recognition) software allows electronic data bases to be constructed from hand writing, keyboard input as well as scanning. There is no distinction between the three processes as far as the end result in producing an electronic database. . . .

. . .

Scanning using a handheld scanner is a more modern equivalent to keying into a laptop. This is similar to the Township and MPAC's position that keying into a laptop is the more modern equivalent to handwriting.

. . .

The appellant submits that there is a clear distinction between requiring the 'township providing digital files' and a 'requester creating digital files' from information that is currently available.

⁵ cited above at footnote 2.

[23] The appellant also submits that the township has not established that assessment records are available to the public generally, through a regularized system of access such as a public library or a government publications centre, as the record is not available to sight impaired individuals or other those with other physical or intellectual impairments. The appellant does not indicate that he has any such impairment.

[24] As previously discussed, the relationship between section 15(a) of the *Act* and the tax assessment roll has been considered by the Divisional Court in the *MPAC* case. In that case, the Divisional Court held that MPAC's electronic database containing assessment roll information for the province of Ontario was exempt under section 14(1) of the *Act* where the records pertained to individual property owners, and that because the database is available for inspection under section 39(2) of the *Assessment Act*, the entire database was also exempt under section 15(a) of the *Act* (information published or available).

[25] The precedent set by the Divisional Court in the *MPAC* case is clear, and applicable in the circumstances of this appeal. The Court unequivocally states that the public availability of paper records for inspection under section 39(2) of the *Assessment Act* is sufficient to support the application of section 15(a) to assessment roll information. It is implicit in this decision that access under section 39(2) is a regularized system of access, and that the balance of convenience does not favour someone who requests assessment roll information. I therefore find that this exemption applies.

[26] As a result, and consistent with the township's decision, the appellant's access to the assessment rolls is under section 39(2) of the *Assessment Act*, and not under the *Act*. In that circumstance, section 23 of the *Act*, which speaks to the manner of providing access where it is granted under the *Act*, does not apply.

[27] As a further result, it is not necessary to consider the exemption in section 14(1).

Issue B: Did the township properly exercise its discretion in relying on section 15(a)?

[28] The section 15(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.

[29] 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; or
- it fails to take into account relevant considerations.

[30] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations. This office may not, however, substitute its own discretion for that of the institution.⁶

[31] The appellant submits that the township has not established that the balance of convenience favours alternative access, and submits further that it did not take into account relevant considerations such as making the record available to those with visual, physical and/or intellectual impairments. The appellant does not indicate that he has any such impairment.

[32] I have already addressed these arguments in the discussion of section 15(a), above, and as stated there, the Divisional Court implicitly determined these issues in its decision in the *MPAC* case.⁷ I appreciate the appellant's position, but in view of the *MPAC* decision, I find that these arguments do not support a finding that the township's exercise of discretion was faulty.

[33] In addition, the appellant refers to the fact that the township passed the policy regarding the use of scanners after the appellant made his request. He argues, on that basis, that the township's decision to deny of the use of hand held scanners was made in bad faith. I disagree with this submission. In this regard, I note the discussion of the concept of bad faith in Order MO-2049-F. That order refers to the Supreme Court of Canada's discussion of bad faith in *Enterprises Sibeca Inc. v. Frelighsburg (Municipality)*⁸, as encompassing not only acts committed deliberately with intent to harm, but also "acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith." In my view, although the township may have created the policy in response to the request, and may only have turned its mind to this issue after it received the appellant's request, this is not evidence of bad faith.

[34] The appellant also submits that the township took into consideration irrelevant factors such as the creation of an electronic database. The appellant states:

. . . the township was not advised the information was being copied to create an electronic database. . . . [T]here is no material difference in copying material by scanner, pen or keyboard . . . copied is copied.

⁶ See Order MO-1573 and section 43(2) of the *Act*.

⁷ cited above at footnote 2.

⁸ [2004] 3 S.C.R. 304; see paras. 25 and 26.

[35] In my view, this submission goes more to the manner of access than to the question of whether the record is exempt from disclosure under the *Act*. The township's consideration of potential electronic access is not an indication that it exercised its discretion improperly in denying access.

[36] In its second decision letter, the township refers to previous jurisprudence of this office as a basis for its view that public access to the tax assessment roll is accomplished by way of section 39(2) of the *Assessment Act*. In my view, this is supported by the Divisional Court's decision in *MPAC*, quoted above in paragraph 20.

[37] The township also refers to MPAC's statement, which also appears in its second decision letter that "inspection" of the roll means "view only" and does not mean photocopying, scanning, or filming by still or video cameras that might be used to create digital files. MPAC also advised the township that only copying by hand or keying the information into a laptop should be permitted.

[38] Simply put, the township's view has always been that the record is accessible under section 39(2) of the *Assessment Act*, and is not available under the *Act*. This position is affirmed by my finding, above, that section 15(a) applies, and by the Divisional Court's decision in *MPAC*.⁹

[39] MPAC submits that the township exercised its discretion appropriately, as it considered, and sought to protect, personal privacy as well as MPAC's economic interests.

[40] Having considered all of the arguments put forward by the parties, I accept that the township properly considered the circumstances of this case in deciding to deny access. I find that it was appropriate for the township to consider MPAC's position. I also find that it was appropriate for the township to base its decision on the public availability of the assessment roll under section 39(2) of the *Assessment Act*. I do not accept that the township's decision was made in bad faith, nor that it took irrelevant factors into consideration. Therefore, I find that the township properly exercised its discretion in denying access to the assessment roll under the *Act*.

[41] I have found that section 15(a) of the *Act* applies and permits the township to deny access to the assessment roll under the *Act*, and that the township properly exercised its discretion in its denial of access. Accordingly, this appeal is dismissed.

⁹ cited above at footnote 2.

ORDER:

The appeal is dismissed.

Original signed by: _____

John Higgins
Senior Adjudicator

November 3, 2011