

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2654

Appeal MA10-289

Municipality of Meaford

September 26, 2011

Summary: The appellants sought access to a petition and other records relating to them and their property. The Municipality of Meaford (the municipality) denied access to all responsive records pursuant to the mandatory personal privacy exemption in section 14(1) after giving notice to the affected persons. During mediation, the mediator added section 38(b) as an issue as the records appeared to contain the personal information of the appellants. The appellants indicated that they were not interested in receiving the names and addresses of the signatories of the petition. Without the personal information of the affected persons, the petition would only contain the appellants' personal information, and was, accordingly, ordered disclosed to them. The remaining records are exempt under section 38(b).

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 14(1), 14(2)(a), (d), (e), (f), (h) and (i), 14(3)(b), (g), 38(b)

OVERVIEW:

[1] The appellants made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Municipality of Meaford (the municipality) for access to the "petition that was given to Meaford in regards to property we own and all other records pertaining to our property."

[2] The municipality located the responsive records but denied access to them, in full, on the basis that the mandatory personal privacy exemption in section 14(1) of the *Act* applied.

[3] During mediation, the appellants indicated that they are not interested in pursuing access to the petitioners' names, addresses and signatures that are contained in the responsive records. The appellants, however, indicate that they wish to pursue access to the substance of the petition, as they take the position that this information is relevant to a fair determination of their rights (section 14(2)(d) of the *Act*). The appellants also indicate they are seeking access to any other records pertaining to their property.

[4] Also during mediation, the municipality conducted a further search for responsive records. The municipality also sought representations from individuals whose interests may be affected by the outcome of the appeal (the affected persons).

[5] The municipality subsequently issued a revised decision advising the appellants that it had decided to grant access to the petition part of the records and that it will continue to deny access to the names, addresses and signatures contained in the record, pursuant to section 14(1) of the *Act*. The municipality also advised that as a result of its search, additional responsive records had been located, but access to them denied pursuant to section 14(1).

[6] The municipality also gave notice to the affected persons of its decision to disclose the petition portion of the record and sought their representations on the disclosure. As a result, some of the affected persons objected to the disclosure, one consented, and the others did not respond.

[7] After reviewing the representations of the affected persons, the municipality issued a revised decision, advising that access to all of the records had been denied pursuant to sections 14(1) with reference to the factors in section 14(2)(e), (f) and (h) of the *Act*. After receiving the revised decision, the appellants confirmed with the mediator that they wished to pursue the substance of the petition and any recently located records.

[8] Finally, as it appears that the records also contain the appellants' personal information, the mediator added the possible application of the discretionary personal privacy exemption in section 38(b) of the *Act*. As further mediation was not possible, the appeal was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*.

[9] During my inquiry into this appeal, I sought and received representations from the municipality, the affected persons and the appellant. One of the affected persons consented to the disclosure of the petition portion only. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction* number 7.

[9] In this decision, I order the municipality to disclose portions of the petition, but uphold its decision regarding the other records.

RECORDS:

[10] The records at issue consist:

- One page petition (a 2 page attachment which includes names and addresses is not at issue)
- Letter from affected person (1 page, double-sided)
- Memorandum to municipality from affected person (6 pages)
- Letter from affected person (1 page)
- Letter from affected person (5 pages)
- Letter from affected person (3 pages)

ISSUES:

- A. Do the records contain personal information?
- B. Would disclosure of the records constitute an unjustified invasion of another individual's personal privacy?
- C. Was the municipality's exercise of discretion proper?

DISCUSSION:

A. Do the records contain personal information?

[11] 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 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;

[12] 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].

[13] 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.)].

[14] The municipality submits that the record contains recorded information about identifiable individuals and is the personal information of the affected persons within the meaning of paragraphs (c), (d), (f), (g) and (h) of the definition of that term in section 2(1) of the *Act*. The municipality states:

The personal information found throughout these documents relates to the authors of each record... The information also provides comments

about situations in the past dealing with the appellants. Upon reading these comments, the appellants would be able to identify individual property owners ... and as such would identify individuals. This information is highly sensitive and should not be released.

[15] In regard to paragraph (f) of the definition of "personal information" in section 2(1), the municipality submits that the documents submitted by the affected persons were done so with the understanding that they would remain confidential between the municipality and the individuals who submitted them.

[16] The affected persons submit that the records, including their letters and the petition, include recorded information about identifiable individuals, specifically themselves, the appellants' neighbours. In particular, the affected persons submit that the following information about themselves would be disclosed:

- Their addresses [paragraph (d)]
- Their personal opinions or views except as they relate to other individuals including the appellants [paragraph (e)]
- Their correspondence sent to an institution that is implicitly or explicitly of a private or confidential nature [paragraph (f)]
- Their names where they appear with other personal information and disclosure of their names would reveal other personal information about the individual [paragraph (h)].

[17] The affected persons also submit that even if their names and addresses are removed from the records, they would be identifiable to the appellant due to the nature of the information at issue.

[18] The appellants submit that the records contain information about them written by the other individuals. They do not want access to the names or addresses of these individuals. The appellants state:

How can information in the form of a petition be submitted to the municipality as a confidential document? Clearly the intent was to have the municipality act upon the documents submitted and thus the appellants would have the right to know and respond to the information submitted to the municipality.

[19] I have reviewed both the petition and the letters and correspondence sent to the municipality.

[20] I find that the records contain recorded information of the appellants and other identifiable individuals and are their personal information within the meaning of that term as defined in section 2(1) of the *Act*.

[21] In regard to the petition, I find that if the information pertaining to the affected persons is severed from the petition, then the remaining information would identify a group of individuals collectively known as the "neighbours". As the appellants indicated that they are only interested in obtaining access to the substance of the petition, I find that removing only the information that would identify the specific affected persons would mean that the petition would only contain the appellants' personal information and the substance of the petition. Further, I find that the "neighbours" identification does not disclose recorded information about an identifiable individual, and the information remaining would relate solely to the appellants. Thus, with the severed petition, it is not necessary for me to consider whether the appellants' own personal information qualifies for exemption under section 38(b), since its disclosure to them cannot be an unjustified invasion of another individual's personal privacy, as required under that section. Accordingly, I will order the disclosure of the appellants' own personal information to them. I have provided the municipality with a highlighted copy of the petition indicating the portions which have to be sent to the appellants.

[22] The letters and memorandum that comprise the remaining records at issue also contain the appellants' personal information. However, their personal information is so intertwined with that of other identifiable individuals that it cannot be severed. Accordingly, I will proceed to consider whether this personal information is exempt from disclosure under the exemptions claimed.

B. Would disclosure of the records constitute an unjustified invasion of another individual's personal privacy?

[23] Section 36(1) of the *Act* 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(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

[24] If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

[25] Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met. In determining whether the exemption in section 38(b) applies, sections 14(2), (3) and (4) 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.

[26] Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of the personal privacy of another individual. Section 14(2) lists factors to consider in determining whether disclosure would constitute an unjustified invasion of another individual's personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

[27] 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),¹ 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 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 exemption (see Order PO-1764). The application of sections 14(4) and 16 has not been raised and, in my view, neither are available in the circumstances of this appeal.

Section 14(3)

[28] The municipality submits that the presumptions in sections 14(3)(b) and (g) apply to the personal information remaining at issue. These sections state:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

- (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
- (g) consists of personal recommendations or evaluations, character references or personnel evaluations; or

[29] On the application of section 14(3)(g), the municipality states that there are a number of personal evaluations and character references about the situations in which the appellants were involved which could result in pecuniary or other harm to the affected persons.

[30] Based on my review of the remaining information at issue, I find that neither of these presumptions applies. The municipality has not provided evidence that the personal information in the remaining records was compiled and is identifiable as part of an investigation into a possible violation of law. Moreover, the municipality does not provide representations on the nature of the investigation or the law that is allegedly

¹*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767

being violated. Accordingly, I find that the presumption in section 14(3)(b) does not apply.

[31] Further, I do not agree with the municipality's characterization of the events set out in the records as personal recommendations, evaluations, character references or personnel evaluations. The personal information in the records includes the affected persons' views and opinions of the events described therein, including their opinions and views of the appellants' actions. This, in my view, does not constitute a personal recommendation or evaluation for the purposes of the section 14(3)(g) presumption and I find that it does not apply.

Section 14(2)

[32] As I have found that none of the presumptions in section 14(3) apply to the personal information, I must now consider the application of the factors in section 14(2). Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy under section 38(b) [Order P-239].

[33] In order to find that disclosure would constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring *privacy protection* in section 14(2) must be present. In the absence of such a finding, the discretionary section 38(b) exemption does not apply.

[34] The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2) [Order P-99].

[35] The municipality submits that the factors favouring non-disclosure set out in sections 14(2)(e), (f), (h) and (i). The appellants submit that the factors favouring disclosure in sections 14(2)(a) and (d) apply. These sections state:

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;
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[36] The municipality submits that the affected persons provided the personal information in the letters to it in confidence and that the correspondence describes highly sensitive situations and events that have transpired. Further, the municipality submits that the events described, if disclosed, would identify the affected persons to the appellants. The municipality submits that the events described include situations that could give rise to both civil and criminal ramifications if disclosed and could render the affected persons open to pecuniary or other harm.² Finally, the municipality submits that it provided assurances to the affected persons that the documents received would be held in confidence by the municipality and that:

This item was only ever discussed in a closed session of council, in which no documents were distributed, but a verbal update was provided to council at that time.

[37] In support of its positions that section 14(2)(a) applies, the appellants argue that the records were submitted to the municipality for the "purpose of precipitating some response from the municipality that would impact upon the appellants" and thus:

The appellants are therefore entitled to review the information provided to determine whether subsequent actions of the municipality have been influenced by these records.

[38] To that end, the appellants' also argue that the factor in section 14(2)(d) is particularly relevant as:

The appellants are entitled to know the substance of the records in order to fairly assess whether the subsequent actions of the municipality have been influenced by them.

² Some of the municipality's representations on this issue were withheld due to my confidentiality concerns.

[39] The appellants also dispute the municipality's position on the factors favouring disclosure. The appellants submit that I should give little weight to the factor in section 14(2)(h) as the records were submitted to the municipality for the purpose of affecting the appellants' rights. Accordingly, they argue that the municipality should not have given the affected persons any assurances of confidentiality.

[40] The only factor I find that applies in favour of disclosure is section 14(2)(d). For section 14(2)(d) to apply, the appellants must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.³

[41] In my view, the personal information remaining at issue was submitted by the affected persons in support of their petition. The petition relates directly to the appellants' ownership of property. As a result, I accept that the appellant would have some interest in the personal information in the records. However, the appellants have not established the need to have the information for a particular proceeding or hearing; nor have they established the significance of the information to a fair determination of their rights. Despite asserting the need to have the information to review the municipality's "subsequent actions", the appellants do not describe or set out the municipality's actions or how disclosure may assist them in taking further action. For this reason, I give little weight to this factor favouring disclosure.

[42] Further, I give no weight to the consideration that the disclosure of the personal information is desirable for the purpose of subjecting the activities of the institution to public scrutiny in section 14(2)(a). The records at issue and the personal information relate to private individuals and not the actions of the municipality. Section 14(2)(a)

³ Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny [Order P-1134].

[43] On the other hand, I give significant weight to the fact that the personal information in the records was supplied by the affected persons to the municipality in confidence, as contemplated by section 14(2)(h). The personal information in the remaining records describe events and views about a situation between the appellants and their neighbours. The records contain the affected persons' requests to the municipality that the information is kept confidential. The municipality confirms that it gave assurances of confidentiality when receiving the records. And finally, the affected persons' representations in this appeal similarly request that the information in these particular records be kept confidential. Accordingly, I find that the factor in section 14(2)(h) has significant weight.

[44] In order for section 14(2)(f) to apply, the personal information must be highly sensitive. To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.⁴

[45] Based on my review of the personal information and the affected persons' representations, I find that this factor should be considered relevant. As stated above, the personal information in the records describes the affected persons views and opinions about events that occurred and include a description of the appellants' actions. The affected persons allege that disclosure could result in additional or worsening tensions between themselves and the appellants. I accept the municipality and the affected persons' submissions that it would be reasonable to expect that disclosure of the personal information could result in significant personal distress to the affected persons. Accordingly, I conclude that the factor in section 14(2)(f) applies.

[46] Finally, I considered whether the factor in section 14(2)(e) applied. This consideration applies where disclosure would expose the affected persons unfairly to pecuniary or other harm. In order for this section to apply, the evidence must demonstrate that the damage or harm envisioned by the clause is present or foreseeable, and that this damage or harm would be "unfair" to the individual involved.

[47] The affected persons and the municipality allege that disclosure could reasonably result in some harm. Based on the lack of evidence before me from the municipality or the affected persons as well as my consideration of the information in the records, I am unable to determine whether this damage or harm would be "unfair" for the individuals involved. Moreover, I am not in a position, with the evidence before me, to assess whether the harm is foreseeable and present. Accordingly, I only give no weight to the factor in section 14(2)(e).

⁴ Orders PO-2518, PO-2617, MO-2262 and MO-2344

[48] Based on my review of the personal information in the records, I find that the factors favouring non-disclosure outweigh the factors favouring disclosure. I conclude that as the municipality and the information in the records itself establishes the application of sections 14(2)(e), (f), and (h). Further, given the nature of the events described in the records and the fact that the appellants and the affected persons are neighbours, I give great weight to these factors, which favour the protection of the personal privacy of the affected persons.

[49] In summary, I have found that the factors in favour of non-disclosure of the personal information outweigh those in favour and as such disclosure of the personal information in the record constitutes an unjustified invasion of the affected persons' personal privacy, and thus section 38(b) of the *Act* applies to exempt the personal information from disclosure, subject to my consideration of the municipality's exercise of discretion.

C. Was the municipality's exercise of discretion proper?

[50] The section 38(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.

[51] 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.

[52] 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)].

[53] In support of its exercise of discretion, the municipality considered the following:

- The privacy of the individuals referenced in the records.
- The relationship between the affected persons and the appellants.
- The confidentiality extended to the authors of the records at issue.

- The sensitivity of the information in the records.
- The potential for harm on the part of the affected persons.
- The fact that the appellants were requesting records containing their own personal information and that they should have a right of access to their own personal information.

[54] The municipality submits that it contacted the affected persons in order to try and disclose some of the information, particularly the substance of the petition.

[55] The appellants submit that the municipality should not have exercised its discretion to withhold the petition as it affects the appellants directly.

[56] I find that the municipality properly exercised its discretion to withhold the remaining records at issue. The municipality properly considered the relationship between the appellant and the affected persons, the sensitivity of the information at issue, and the appellants' need to receive the information at issue. Accordingly, I uphold the municipality's decision to withhold the remaining personal information at issue.

ORDER:

1. I order the municipality to disclose the petition by providing them with a copy of the record by **November 2, 2011** but not before **October 28, 2011**. I have provided the municipality with a copy of the petition with the information not to be disclosed highlighted. To be clear, the information highlighted should **not** be disclosed.
2. I uphold the municipality's decision to withhold the remaining records.
3. In order to verify compliance with order provision 1, I reserve the right to require the municipality to provide me with a copy of the information sent to the appellant.

Original Signed by: _____
Stephanie Haly
Adjudicator

September 27, 2011 _____