

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2963

Appeal MA12-303

The Corporation of the Township of Havelock-Belmont-Methuen

October 10, 2013

Summary: The requester made a request to the town for access to the contents of the building permit file for an identified property. The town notified the property owner of the request and, after considering the owner's opposition to access, decided to grant access to the records with identifiers severed under section 14(1) of the *Act*. The property owner appealed, arguing that the records contain his personal information and that disclosure would constitute an unjustified invasion of personal privacy. The appellant also argued that disclosure of the records would endanger the security of his property such that section 8(1)(i) applied. The adjudicator finds that the appellant cannot claim the discretionary exemption in section 8(1)(i) and that, with one exception, the records do not contain personal information according to the definition in section 2(1) of the *Act*. With one additional portion of the records severed under section 14(1), the town's access decision is upheld and the appeal is dismissed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 8(1)(i), 14(1).

Orders and Investigation Reports Considered: Orders M-23, P-1137, PO-1705, and MO-2792.

OVERVIEW:

[1] This order addresses the issues raised by an individual's request to the Corporation of the Township of Havelock-Belmont-Methuen (the town) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

...the building permit file and all of its contents for [an identified address]. This includes but is not limited to the following:

- Building Permit
- Environmental Permit for rock blasting
- Structural Engineering certificate
- Timber structural engineering certificate
- Whett [sic] Certificate¹
- Foundation inspection
- Framing inspection
- And all inspection approvals done on said home
- Final inspection
- Occupancy permit

[2] Pursuant to section 21(1)(b) of the *Act*, the town notified the property owner of the request to provide an opportunity to make representations concerning disclosure of the records. The property owner submitted representations to the town opposing disclosure of the responsive records.

[3] The town issued a decision letter to the requester granting partial access to the records, as follows:

1. Building Permit – it is our intention to provide you with a copy of the Building Permit, with personal information being struck from the record.
2. Environmental Permit for Rock Blasting – record does not exist
3. Structural Engineering Certificate – record does not exist
4. Timber Structural Engineering Certificate – see item 7 below
5. WHETT [sic] Certificate – it is our intention to provide you with two letters addressing the WHETT [sic] compliance requirements, with personal information being struck from the record.
6. Foundation inspection – it is our intention to provide you with foundation inspection notes dated June 27, 2008.

¹ According to the WETT website (<http://www.wettinc.ca/what.html>) Wood Energy Technology Transfer Inc. (WETT Inc.) is "a non-profit training and education association... [that] ... promotes the safe and effective use of wood burning systems in Canada."

7. Framing inspection – it is our intention to provide you with various inspection and notes prepared by a Professional Engineer concerning the structural integrity of the building, with personal information being struck from the record.
8. Final inspection – record does not exist.
9. Occupancy Permit – record does not exist.

[4] The town also advised the property owner of its decision to grant partial access and provided information on his right to appeal the decision to this office. The owner (now the appellant) exercised his right to appeal the town's access decision.

[5] During mediation, the town clarified that it was relying on section 14(1) (personal privacy) of the *Act* to deny access to the withheld portions of the records. As the original requester did not wish to pursue access to the information severed under section 14(1) of the *Act*, those withheld portions of the records are not at issue in this appeal.

[6] The appellant expressed the view that disclosure of the records to the requester would constitute an unjustified invasion of his personal privacy. The appellant also took the position that disclosure of the records would jeopardize his security because the requester would have access to critical information about the construction of his home. This position raised the possible application of section 8(1)(i) (danger to building security) of the *Act*, as well as the related issue of whether the appellant is entitled to raise a discretionary exemption in opposing disclosure.

[7] A mediated resolution of the appeal was not possible, and it was transferred to the adjudication stage of the appeals process, where an adjudicator conducts a written inquiry. I started my inquiry by sending a Notice of Inquiry outlining the issues to the appellant, initially. When no representations were received, staff contacted the appellant to discuss the submission of representations and continuation of the appeal. Ultimately, the appellant decided not to submit representations in response to the Notice of Inquiry, and asked me to consider the comments that he provided to the town in response to notification instead. I concluded that it was not necessary to seek representations from the town or the original requester.

[8] In this order, I uphold the town's decision on disclosure, with one exception for a brief portion of the engineering inspection record, which is exempt under section 14(1).

RECORDS:

[9] The eight records remaining at issue consist of: two building permits, two W.E.T.T confirmations, building inspector's notes, a Founding and Rebar Inspection Report, a Testing and Inspection Report and an Engineering Inspection Report (11 pages).

ISSUES:

- A. Should the appellant be allowed to claim the discretionary exemption in section 8(1)(i)?
- B. Do the records contain "personal information" and, if so, is it exempt under section 14(1)?

DISCUSSION:

A. Should the appellant be allowed to claim the discretionary exemption in section 8(1)(i)?

[10] The concerns expressed by the appellant after being notified of the request raised the possible application of section 8(1)(i) (danger to building security) of the *Act*. In his letter to the deputy town clerk, the appellant stated:

Should the Township provide as requested, you will be endangering both our dwelling and the livelihood of the residents therein by making public its construction, door and window access, security breaches, and other general information that may be used by others for nefarious purposes. ...

[11] As noted above, the appellant's concerns about endangerment raise the related issue of whether the appellant is entitled to raise a discretionary exemption in opposing disclosure that has not been claimed by the institution itself. Some of the exemptions in the *Act* are mandatory, which means that the head of an institution "shall" refuse to disclose a record, if the record qualifies for exemption under that particular section. However, a discretionary exemption uses the word "may." In so doing, the Legislature expressly contemplated that the head of the institution retains the discretion to claim (or not) such an exemption to support its decision to deny access to a record.

[12] In this appeal, the town did not claim the exemption in section 8(1)(i), which states:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

[13] A number of orders of this office have considered the issue of an appellant's entitlement to claim a discretionary exemption. These orders have typically referred to Order PO-1705, where former Assistant Commissioner Mitchinson addressed the raising of discretionary exemptions by an affected party in the context of the *Freedom of Information and Protection of Privacy Act (FIPPA)*, as follows:

During mediation, the third party raised the application of the sections 13(1) and 18(1) discretionary exemption claims for those records or partial records Hydro decided to disclose to the requester. The third party also claimed that Hydro had improperly considered, or neglected to consider, these discretionary exemptions in making its access decision.

This raises the issue of whether the third party should be permitted to raise discretionary exemptions not claimed by the institution. This issue has been considered in a number of previous orders of this Office. The leading case is Order P-1137, where former Adjudicator Anita Fineberg made the following comments:

The *Act* includes a number of discretionary exemptions within sections 13 to 22² which provide the head of an institution with the discretion to refuse to disclose a record to which one of these exemptions would apply. These exemptions are designed to protect various interests of the institution in question. If the head feels that, despite the application of an exemption, a record should be disclosed, he or she may do so. In these circumstances, it would only be in the most unusual of situations that the matter would come to the attention of the Commissioner's office since the record would have been released.

The *Act* also recognizes that government institutions may have custody of information, the disclosure of which would affect other interests. Such information may be personal information or third party information. The mandatory exemptions in sections 21(1) and 17(1) of the *Act* respectively are designed to protect these other interests.³ Because the Office of the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme, the Commissioner's office, either of its own accord, or at the request of a party to an appeal, will raise and consider the issue of the application of these mandatory exemptions.

² These are sections from *FIPPA*, which are the equivalent of sections 6 to 15 of the (municipal) *Act*.

³ The equivalent provisions in *MFIPPA*, or the *Act*, are sections 14(1) and 10(1).

This is to ensure that the interests of individuals and third parties are considered in the context of a request for government information.

Because the purpose of the discretionary exemptions is to protect institutional interests, it would only be in the most unusual of cases that an affected person could raise the application of an exemption which has not been claimed by the head of an institution. Depending on the type of information at issue, the interests of such an affected person would usually only be considered in the context of the mandatory exemptions in section 17 or 21(1) of the *Act*.

[14] I agree with the analysis of discretionary exemption claims by parties other than the institution in Orders P-1137 and PO-1705, and I adopt those reasons in this appeal.

[15] In the Notice of Inquiry sent to the appellant in this appeal, I requested submissions on this issue after setting out the final paragraph of Adjudicator Fineberg's reasons in Order P-1137, as excerpted above, stating:

There is a more detailed outline to this issue regarding the raising of a discretionary exemption by an affected party in Orders MO-2635 and MO-2792, both of which apply the principles discussed in Orders P-1137 and PO-1705. These orders are accessible on the IPC's website: <http://www.ipc.on.ca/english/decisions-and-resolutions/>.

I am asking the appellant to comment specifically on these orders, respecting the claim to section 8(1)(i). In particular, please provide submissions on why this appeal might constitute the "most unusual of circumstances," which is the threshold for this office to permit an affected party to claim a discretionary exemption.

[16] As the appellant declined to submit representations in response to the Notice of Inquiry, I have only the views expressed by him in responding to the town's notification at the time the request was made. Based on my review of those comments and the overall circumstances of the appeal, I find that the appellant has not established that this appeal presents "the most unusual of cases" where he ought to be entitled to raise the application of the discretionary exemption in section 8(1)(i). The town has exercised its discretion against claiming section 8(1)(i) to deny access to the records, and I do not find sufficient grounds to interfere with that decision.

[17] Even if I had allowed the appellant to claim the section 8(1)(i) discretionary exemption in this appeal, I would have found that the evidence provided did not establish that the exemption applies in the circumstances. The use of the words "could

reasonably be expected to" in section 8(1)(i) requires the party seeking to establish the application of the exemption to provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient.⁴ The appellant's concerns are based on disclosure of "construction, door and window access, security breaches, and other general information," but the records at issue do not include this type of detailed information, such as interior or structural plan drawings. In this context, the appellant's representations are not sufficiently detailed or convincing to establish that disclosure of the records at issue could reasonably be expected to endanger the security of his home.

B. Do the records contain "personal information" and, if so, is it exempt under section 14(1)?

[18] The personal privacy exemption in section 14 of *Act* is mandatory. Where a record contains personal information only of an individual other than the requester, the institution must refuse to disclose that information unless disclosure would not constitute an "unjustified invasion of personal privacy". However, before determining whether section 14 applies, it is necessary to decide first whether the record contains "personal information" and, if so, to whom it relates. The exemption in section 14 cannot apply if the record does not contain "personal information," as it is defined in section 2(1) of the *Act*.

[19] Personal information is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information about the individual or where disclosure of the name would reveal other personal information about the individual.⁵

[20] The appellant submits that an individual is not required to divulge their personal information to any other individual, thereby suggesting that the *Act* should not permit that same disclosure when it is against the wishes of one of them. The appellant then expresses concern about providing information "of any sort to any individual," and submits that:

... in so providing, you will continue ... the harassment that has plagued us for some two years from a specific individual, and probably the same involved in this request.

[21] As noted, I did not seek representations from the town or the original requester.

⁴ Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

⁵ Paragraph (h) of the definition in section 2(1) of the *Act*.

Analysis and findings

[22] To reiterate, since the original requester has not appealed the severances made to the records under section 14(1), I am only determining whether the remaining portions of the records at issue contain personal information.

[23] As stated above, personal information is defined, in part, as recorded information about an identifiable individual. 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.⁶

[24] Past orders reviewing this issue have often relied on the reasoning of former Commissioner Linden in Order 23. In that order, the former Commissioner referred to the introductory wording of the definition in section 2(1) of the *Act*, outlined above as "...any recorded information about an identifiable individual..." In Order 23 and the orders that follow it, building permit information has been found to be information *about a property* and not about an identifiable individual.⁷

[25] I adopt this approach in the appeal. The building permit information at issue consists of copies of correspondence, inspections and permit forms related to the construction on the property in question. With regard to most of this information, I am not satisfied that its disclosure would reveal anything of a personal nature about the appellant. Rather, I find that this is information about the property. Since the information remaining at issue, with the exception of a phrase described below, does not include recorded information about the appellant, I find that it does not qualify as "personal information" within the meaning of section 2(1) of the *Act*.

[26] The exception to this finding is a phrase that appears on the second page of the last record, the engineering inspection report. I am satisfied that this phrase represents "the views or opinions of another individual about the individual" for the purpose of paragraph (g) of the definition of personal information in section 2(1) of the *Act*. I find that this portion of the last record contains the personal information of the appellant.

[27] Since the requester did not appeal the town's severances of "personal information" under section 14(1), those withheld portions of the records are not at issue. However, with respect to the personal information in the engineering inspection report, where a requester seeks personal information of another individual, section 14(1) of the *Act* prohibits the release of this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

⁶ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁷ See, for example, Orders MO-2081, MO-2695, and MO-2792.

[28] I have considered the exceptions in paragraphs (a) to (e) of section 14(1), and I find that they do not apply in the circumstances. The section 14(1)(f) exception is more complex, and requires a consideration of sections 14(2), (3) and (4) in determining whether disclosure of the personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. The analysis starts with consideration of section 14(3) because if any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is *presumed* to be an unjustified invasion of personal privacy under section 14. In the circumstances of this appeal, I find that none of the presumptions in section 14(3) apply to the personal information of the appellant on page two of the engineering inspection report.

[29] If no section 14(3) presumption applies and the exceptions in section 14(4) do not apply, 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.⁸ To begin, I find that this particular personal information does not fit within any of the section 14(4) exceptions.⁹ Next, in order for me to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors favouring disclosure in section 14(2) must be present. In the absence of such a finding, the exception in section 14(1)(f) is not established and the mandatory section 14(1) exemption applies.¹⁰ The factors favouring disclosure are found in paragraphs (a) to (d) of section 14(2). Based on the nature of the personal information at issue, I am not satisfied that its disclosure is necessary to subject the town's activities to public scrutiny, promote health and safety or informed choice in the purchase of goods and services, or for a fair determination of the requester's rights. In the circumstances of this appeal, therefore, I find that none of the section 14(2) factors favouring disclosure apply. Accordingly, I find that disclosure of the appellant's personal information in the engineering inspection report would constitute an unjustified invasion of personal privacy, and that it is exempt under section 14(1).

[30] In sum, I have upheld the town's decision to disclose the responsive records to the requester, with the exception of the personal information exempt under section 14(1). Having considered the appellant's correspondence to the town, and comments made to staff from this office, I appreciate that this finding will not be to the appellant's liking. However, as the mandatory exemption in section 14(1) can only apply to personal information and no other mandatory exemptions apply to the information at

⁸ Order P-239.

⁹ Section 14(4) provides that: Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it, (a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution; (b) discloses financial or other details of a contract for personal services between an individual and an institution; or (c) discloses personal information about a deceased individual to the spouse or a close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons.

¹⁰ Orders PO-2267 and PO-2733.

issue, I find that the records must be disclosed, subject to the severance of the phrase marked on the copy of the record provided to the town with this order.

ORDER:

With the exception of the phrase highlighted in orange on page 2 of the engineering inspection report, I uphold the town's decision and dismiss the appeal.

Original signed by: _____
Daphne Loukidelis
Adjudicator

_____ October 10, 2013