

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3152

Appeal MA14-152

Town of Niagara-on-the-Lake

January 22, 2015

Summary: The Town of Niagara-on-the-Lake (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to the improvement of a specific road. The town notified an affected party and then issued a decision granting partial access to the responsive records. Access to the remainder of the records was denied pursuant to the mandatory personal privacy exemption in section 14(1) of the *Act*. During mediation, the affected party raised the application of the mandatory third party information exemption to the records and the appellant advised that he was not interested in receiving access to the personal information of other individuals in the records. This order finds that the remaining information in the records is not exempt under sections 10(1) or 14(1).

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), and 10(1).

OVERVIEW:

[1] The Town of Niagara-on-the-Lake (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for records as follows:

1. Copies of any and all correspondence or documents in the possession of the Town of Niagara on the Lake relating to the division of those costs associated with the development of [name] Road to its present state as divided between the Town of Niagara on the Lake and [a named individual].

2. Copies of any and all reports prepared by a Soil Engineer regarding the ground water flow relating to the property known municipally as [a specified address]

3. Copies of any and all documents relating to the approval of site plan and building permits pertaining to the property known municipally as [another specified address].

[2] The requester subsequently revised his request by making a change to one of the addresses identified in the original request.

[3] The town subsequently notified an affected party and then issued a decision granting partial access to the responsive records. Access to the remainder of the records was denied pursuant to the mandatory personal privacy exemption in section 14(1) of the *Act*. The town stated that:

Pursuant to *MFIPPA* third party information, a head may disclose a record if the person to whom the information relates consents to the disclosure. Third party consent for disclosure was requested from the affected individuals. Please be advised that consent was not given from a third party to disclose certain documents in the Town's possession.

[4] The town's decision also stated that some of the responsive records were available for viewing at the Clerk's Department. The requester then went to the town's office to view and obtain copies of some of the responsive records. The town provided the requester with some of the records that he wanted, but did not provide him with access to any of the records that related to the affected party.

[5] The requester, now appellant, appealed the town's decision.

[6] During mediation, the appellant stated that he was not pursuing access to other individuals' personal information. Accordingly, the portions of information that were denied pursuant to section 14(1) in the following pages of the records were no longer at issue in this appeal: 1a, 2a, 2a1, 3b, 3c, 4b, 7 and 12b.

[7] The appellant also stated that he was not seeking access to letters from the affected party's lawyer. Accordingly, pages 5a, 5b, 13b and 13c were no longer at issue in this appeal.

[8] The appellant advised that he wanted access to the remainder of the responsive records, however.

[9] The town stated that it would be willing to disclose the remainder of the records with consent from the affected party.

[10] The mediator attempted to obtain consent from the affected party, but the affected party denied his consent to the disclosure of his records to the appellant. The affected party raised the application of the mandatory third party information exemption in section 10(1), as well as section 14(1), to the records as he stated that they contain commercially valuable information and he also believed that their disclosure would be an invasion of his privacy.

[11] As mediation did not resolve the issues in this appeal, the file was transferred to the adjudication stage of the appeals process where an adjudicator conducts an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the town and the affected party seeking their representations. Neither party provided representations in response.

[12] In this order, I order disclosure of the records, less the personal information of identifiable individuals, which has been removed from the scope of the appeal.

RECORDS:

[13] The records at issue consist of 12 email chains and attachments.

ISSUES:

- A. Does the mandatory third party information exemption at section 10 apply to pages 1a, 1b, 2a, 2a1, 2b, 3a, 3b, 3c, 4a, 4b, 6, 7, 8a, 8b, 8c, 8d, 9, 10a, 10b, 11a, 11b, 11c, 12a, 12b, 12c, 12d, 13a, 13d, 13e, 13f of the records?
- B. Do pages 1a, 1b, 2a, 2a1, 2b, 3a, 3b, 3c, 4a, 4b, 6, 7, 8a, 8b, 8c, 8d, 9, 10a, 10b, 11a, 11b, 11c, 12a, 12b, 12c, 12d, 13a, 13d, 13e, 13f contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

DISCUSSION:

- A. Does the mandatory third party information exemption at section 10 apply to pages 1a, 1b, 2a, 2a1, 2b, 3a, 3b, 3c, 4a, 4b, 6, 7, 8a, 8b, 8c, 8d, 9, 10a, 10b, 11a, 11b, 11c, 12a, 12b, 12c, 12d, 13a, 13d, 13e, 13f of the records?**

[14] Section 10(1) states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[15] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.¹ Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.²

[16] For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

¹ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.).

² Orders PO-1805, PO-2018, PO-2184 and MO-1706.

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

[17] The records at issue are emails between the affected party and the town about improvements to be made to a road. Attached to one email is a diagram of a part of the road. Attached to another email is a quote issued to the town by a contractor to undertake certain improvements to the road. Attached to another email is letter from the affected party to the town.

[18] The application of the mandatory third party information exemption in section 10(1) to the records was raised only by the affected party.

[19] In this appeal, even if I was to find that parts 1 and 2 of the test under section 10(1) had been satisfied, on the basis of the contents of the records and in the absence of representations from the town and the affected party, I would not find that part 3 of the test, the harms test, has been met.

[20] To meet part 3 of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.³

[21] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.⁴

[22] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 10(1).⁵

[23] Parties should not assume that harms under section 10(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.⁶

[24] Based on my review of the records, and in the absence of representations from the town and the affected party, I find that I do not have sufficient evidence to find that the records are exempt under the section 10(1) exemption.

³ *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

⁴ Order PO-2020.

⁵ Order PO-2435.

⁶ Order PO-2435.

B. Do pages 1a, 1b, 2a, 2a1, 2b,3a, 3b, 3c, 4a, 4b, 6, 7, 8a, 8b, 8c, 8d, 9, 10a, 10b, 11a, 11b, 11c, 12a, 12b, 12c, 12d, 13a, 13d, 13e, 13f contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[25] 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;

[26] 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.⁷

[27] Sections 2(2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[28] 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.⁸

[29] 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.⁹

[30] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.¹⁰

[31] The records are emails and attachments about a road improvement that concerns the affected party. The records do not contain the personal information of the appellant.

[32] As stated above, during mediation, the appellant stated that he was not pursuing access to other individuals' personal information. According to the mediator, the portions of information that were denied pursuant to section 14(1) in the following pages of the records were no longer at issue in this appeal: 1a, 2a, 2a1, 3b, 3c, 4b, 7 and 12b.

⁷ Order 11.

⁸ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁹ Orders P-1409, R-980015, PO-2225 and MO-2344.

¹⁰ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[33] The remaining information consists of communications between the affected party and the town about a road improvement. The affected party communicated with the town about the road improvement using his work email and work letterhead. Concerning the information at issue, I find that the only remaining personal information that is apparent to me from my review of the records are the details about the affected party's marital and family status, in accordance with paragraph (a) of the definition of personal information in section 2(1).

[34] As the appellant has stated that he is not interested in receiving access to the personal information of other individuals, I will order the town not to disclose the personal information of individuals in the records that I have identified to be withheld by the town, in addition to the personal information that the appellant indicated that he was not interested in during the mediation stage of the appeal.

[35] Once the personal information of identifiable individuals is removed from the records, the remaining information, which is not personal information, cannot be subject to the mandatory personal privacy exemption in section 14(1). As no other exemptions have been claimed for this information and the mandatory exemptions in sections 10(1) and 14(1) do not apply, I will order the records disclosed, less the personal information of identifiable individuals in the records.

ORDER:

1. I order the town to disclose to the appellant the information in the records less the personal information contained therein, by **February 27, 2015** but not before **February 23, 2015**. For ease of reference, I have provided the town with a copy of the records highlighting the personal information that should not be disclosed to the appellant.
2. In order to verify compliance with this order, I reserve the right to require the town to provide me with a copy of the information disclosed to the appellant upon my request.

Original Signed by: _____
Diane Smith
Adjudicator

_____ January 22, 2015