Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3355

Appeal MA15-314

The Corporation of the Town of Cobourg

September 15, 2016

Summary: The appellant submitted a request to the town under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the names of the unsuccessful applicants to the Waterfront Advisory Committee. The town denied access to the information on the basis of the personal privacy exemption at section 14(1) of the *Act*. The town also relied on the closed meeting exemption at section 6(1)(b). The appellant appealed. In this order, the adjudicator upholds the town's decision to withhold the information under section 14(1), and rejects the appellant's assertion that the public interest override at section 16 applies.

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"), 14 and 16.

BACKGROUND:

[1] The appellant submitted a request to the Corporation of the Town of Cobourg (the town) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> The names of the people who applied to be appointed to the Waterfront Advisory Committee. *Names only-No personal information.

[2] The town located records responsive to the appellant's request, but denied access to them on the following basis:

> The names of the people who applied to be appointed to the Waterfront Advisory Committee is in fact personal information and…the matter was dealt with in a properly held Closed Session meeting of Council of the Town of Cobourg in accordance with Section 239(b) which states that "a meeting or part of a meeting may be closed to the public if the subject matter being considered is (b) personal matters about an identifiable individual, including municipal or local board employees". Also pursuant to section 14 [personal privacy] of the *Municipal Freedom of Information and Protection of Privacy Act* …

[3] The appellant appealed the town's decision. During mediation, the appellant confirmed with the mediator that he is seeking only the names of the unsuccessful applicants to vacancies on the Waterfront Advisory Committee. The town, in turn, confirmed its decision to deny access to this information, pursuant to the personal privacy exemption at section 14(1) of the *Act* and the exemption at section 6(1)(b) for closed meetings.

[4] No mediated resolution was reached and the appeal was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I invited and received representations from the town and the appellant. In the appellant's representations, he submitted that even if the information is exempt under section 14(1) or 6(1)(b), it should be ordered disclosed pursuant to the public interest override found at section 16 of the *Act.*

[5] In this order, I uphold the town's decision that the information at issue is exempt from disclosure pursuant to section 14(1) of the *Act.* I also find that the public interest override at section 16 does not apply. As a result, I dismiss the appeal.

RECORDS:

[6] The records at issue are the Town of Cobourg Advisory Committee Application Forms submitted by applicants who were ultimately unsuccessful. The only information at issue in the records is the names of the unsuccessful applicants.

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

B. Does the mandatory exemption at section 14(1) apply to the information at issue?

C. Does the public interest override at section 16 apply to the information at issue?

DISCUSSION:

Issue A: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[7] 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;

[8] 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.[1]

[9] 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.[2] However, 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.[3]

[10] The town submits that the names of the unsuccessful candidates are personal information and should be treated in the same manner as unsuccessful applicants for employment. The appellant states that he is willing to accept that the records contain personal information.

[11] Having reviewed the records in the context of the appellant's request, I find that the names of the unsuccessful applicants are the personal information of those individuals pursuant to paragraph (h) of the definition of "personal information". Disclosure of the names would reveal the fact that these individuals applied to be appointed to the Waterfront Advisory Committee and were unsuccessful, which is information about an identifiable individual in their personal capacities. While, as noted above, information associated with an individual in a professional capacity is generally not considered to be that individual's personal information, an individual's failed application for a board appointment has a personal aspect to it. This is distinct from a record that, for example, merely identifies an individual in his or her professional capacity as an employee or appointee.

[12] I find, therefore, that the information at issue is personal information.

Issue B: Does the mandatory exemption at section 14(1) apply to the information at issue?

[13] Where a requester seeks personal information of another individual, section

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[1] Order 11.
[2] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[3] Orders P-1409, R-980015, PO-2225 and MO-2344.

14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

[14] If the information fits within any of paragraphs (a) to (e) of section 14(1), it is not exempt from disclosure. The only paragraph with possible application here is paragraph 14(1)(a).

Section 14(1)(a): consent

[15] The appellant points out that there is a passage on the standard application form that reads "only the names of applicants for committees and boards may be released as public information". Although he does not argue that this constitutes consent, I have nonetheless considered whether it does. In my view, a general acknowledgement by the applicants that their names might be made public does not constitute their consent to the release of the information to the appellant in the context of his access request. Previous orders have found that for section 14(1)(a) to apply, the consenting party must provide a written consent to the disclosure of his or her personal information in the context of an access request.[4] There is nothing before me to suggest that the applications were completed and signed in the context of the appellant's access request or any other access request. In fact, the applications pre-date the appellant's access request. I find, therefore, that the exception set out in section 14(1)(a) does not apply.

[16] In any event, the appellant does not argue that the unsuccessful applicants consented to the release of their names. Rather, he argues that, because of the existence of the above-noted passage on the standard application form, the applicants had a diminished expectation of privacy. I will address this argument below in my discussion of section 14(1)(f).

Section 14(1)(f): unjustified invasion of personal privacy

[17] Under section 14(1)(f), if disclosure would not be an unjustified invasion of personal privacy, it is not exempt from disclosure.

[18] Sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy. None of the circumstances listed in section 14(4) apply here.

[19] 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

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[4] Orders PO-1723 and PO-2280-I. See also Order 180.

14(1)(f). The town does not argue that any of the presumptions apply, and I find that none apply to the circumstances present in this appeal.

Do any of the section 14(2) factors apply?

[20] 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.[5] The factors at sections 14(2)(a) through (d), if present, weigh in favour of disclosure, while the remainder, if present, weigh in favour of non-disclosure. The list of factors under section 14(2) is not exhaustive, however. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).[6]

[21] In order to find that disclosure does *not* constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances (whether listed or unlisted) 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.[7]

[22] The arguments made by the appellant raise the possible application of section 14(2)(a), while the arguments made by the town raise the possible application of section 14(2)(f). These provisions are as follows:

> (2) 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;
> >
> > (f) the personal information is highly sensitive;

[23] In addition, the appellant argues that the following two unlisted factors are present and weigh in favour of disclosure: (i) that the applicants had a diminished expectation of privacy by completing the application form, and (ii) that disclosure will ensure public confidence in the town. The appellant's arguments under the second factor also raise, in my view, the possible application of the factor at section 14(2)(a): that disclosure of the names of the unsuccessful applicants is desirable for the purpose

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[5] Order P-239.
[6] Order P-99.
[7] Orders PO-2267 and PO-2733.

of subjecting the town's activities to public scrutiny.

[24] I begin by addressing each of the factors raised by the appellant.

Do the applicants have a diminished expectation of privacy?

[25] The standard form application filled out by the applicants contains the following notes:

> 3. Personal information contained on this form is collected under the authority of the Corporation's procedure for local board/committee appointments and will be used to determine eligibility and qualifications for serving on a local board or committee.
>
> 4. Please note that only the names of applicants for committees and boards may be released as public information.
>
> Personal information on this form is collected under the authority of the *Municipal Freedom of Information and Protection of Privacy Act*… Inquiries about the collection of personal information should be directed to the Municipal Clerk.

[26] The appellant states:

> It should be noted that nowhere on the application form is the information submitted considered to be "confidential". This notice is a declaration of limited privacy rights and as such applicants acknowledge that names may be released to the general public… If an applicant did not want their names released to the public they should not have applied knowing that they had accepted limited privacy. This committee is a political committee composed of interested Citizens who volunteer to sit on it. There can be no comparison between this application for a public position, and a job application for a position in the Municipal Corporation. Members of Municipal Committees are serving the public and as such appear in public answerable to both their political masters – Council and the Citizens. We do not hold secret elections and thus political selection for committees should be open and transparent.

[27] The town did not provide representations on the interpretation of the notes reproduced above. However, in my view, the statement on the application form that "*only* the names of applicants…*may* be released as public information" implies, firstly, that information other than the names will not be released as public information (hence

the word "only").

[28] Secondly, the word "may" implies that even the names will not be automatically released as public information. The form also states that the applicants' personal information is collected under the authority of the *Act*. In my view, applicants reading these notes would assume that the town, in deciding whether or not to release their names, will consider all relevant factors in accordance with the *Act.*

[29] I conclude that the notes relied on by the appellant are a neutral factor that do not weigh either in favour of, nor against disclosure of the names of the unsuccessful applicants. I now turn, therefore, to the other factors raised by the appellant.

Will disclosure ensure public confidence in the town? Is disclosure desirable for the purpose of subjecting the town's activities to public scrutiny?

[30] The appellant submits that disclosure should ensure public confidence in the town. He submits:

> In this case a major reason for asking for the records was to maintain confidence in the process as the establishment of the committee took place in a highly charged political atmosphere.

[31] The appellant also submits that disclosure would be in the public interest. Although I will address under Issue C, below, the appellant's arguments regarding the "public interest override" found at section 16, those arguments are also relevant here. The appellant states:

> Because the applicants had applied to sit on a newly established committee, struck by Council after a contentious public issue campaign about Harbourland issues, a case can be made that [the public interest override at section 16] is applicable…
>
> The compelling issue here is the lead up to the establishment of the Committee. The harbourlands and the land uses therein have been the subject of intense public debate years before and after the recent municipal election. After the election one of the new Council's political acts was to establish a "Waterfront Committee". Any person who successfully applied to sit on this committee would have been a public figure, within this highly charged political atmosphere. It was definitely in the public interest to know who the applicants were. Judging the unsuccessful applicants with the successful ones would have contributed to this "compelling public interest" thus the request for those names was made.

[32] As noted above, the appellant also argues that political selection for committees should be open and transparent. In essence, the appellant appears to be arguing that disclosure of the names of the unsuccessful applicants is desirable for the purpose of subjecting the activities of the town to public scrutiny within the meaning of section 14(2)(a), reproduced above.

[33] I have carefully reviewed the appellant's arguments. While the appellant correctly points out that the names of the successful applicants are in the public realm and these individuals are public figures, it does not follow that the unsuccessful candidates' identities must be made public. These individuals are not public figures.

[34] The appellant stresses that the creation of the Waterfront Committee took place in a politically charged atmosphere, and that disclosure of the unsuccessful candidates' names will allow them to be judged against the successful candidates. However, the appellant has not elaborated on what he means when he refers to a "politically charged atmosphere". While there may have been "intense public debate", as the appellant puts it, about the use of the harbour lands, the appellant has not explained what, if any, debate or controversy existed with respect to the process for selection of appointees to the Waterfront Advisory Committee or the ultimate selection of appointees. The appellant's assertions are not sufficient for me to conclude that disclosure of the unsuccessful applicants' names would assist in fostering confidence in the town or subjecting its activities to public scrutiny. As a result, I conclude that this is not a factor weighing in favour of disclosure.

[35] Since there are no factors favouring disclosure of the information at issue, the exception in section 14(1)(f) is not established and the mandatory section 14(1) exemption applies.[8] As a result, it is not necessary for me to consider the town's argument that the disclosure of the unsuccessful applicants' names could be potentially damaging and embarrassing for them.

[36] I conclude that the information at issue is exempt from disclosure under section 14(1). In light of my conclusion on this matter, it is not necessary for me to consider whether the information is also exempt under section 6(1)(b).

Issue C: Does the public interest override at section 16 apply to the information at issue?

[37] In his representations, the appellant raised the potential application of the public interest override at section 16 of the *Act*, which provides:

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[8] Orders PO-2267 and PO-2733.

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[38] For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[39] The *Act* is silent as to who bears the burden of proof in respect of section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, this office will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[9]

[40] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[10] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[11]

[41] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[12] A compelling public interest has been found to exist where, for example, the records relate to the economic impact of Quebec separation;[13] the integrity of the criminal justice system has been called into question;[14] public safety issues relating to the operation of nuclear facilities have been raised;[15] disclosure would shed light on the safe operation of petrochemical facilities[16] or the province's ability to

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[9] Order P-244.
[10] Orders P-984 and PO-2607.
[11] Orders P-984 and PO-2556.
[12] Order P-984.
[13] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).
[14] Order PO-1779.
[15] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805.
[16] Order P-1175.

prepare for a nuclear emergency;[17] and where the records contain information about contributions to municipal election campaigns.[18]

[42] The appellant's representations on the public interest override are reproduced above under my discussion of issue B. To summarize, he submits that the use of the harbour lands has been the subject of intense public debate, and that there is a compelling public interest in comparing the unsuccessful applicants to the successful ones.

[43] While I accept that there is a public interest in the use to which the harbour lands are put, I am not satisfied that disclosure of the names of the unsuccessful applicants to the Waterfront Advisory Committee responds to that public interest or would serve the purpose of informing or enlightening the citizenry about the town in that regard. Again, the appellant has hinted at controversy, without elaborating on what the controversy was or whether the appointments process itself was subject to controversy. Although the appellant may be interested to know who the other applicants to the committee were, he has not provided me with enough information to satisfy me that there is a public interest, compelling or otherwise, in the disclosure of this information.

[44] I conclude that the public interest override at section 16 does not apply to the information at issue.

ORDER:

I uphold the town's decision to withhold the information at issue pursuant to section 14(1), and dismiss the appeal.

Original Signed by: September 15, 2016
Gillian Shaw
Adjudicator

[17] Order P-901.
[18] *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.