

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3420

Appeal MA16-152

Town of Newmarket

March 20, 2017

Summary: The Town of Newmarket withheld the names of election candidates in response to a request for information regarding election sign removal fees the candidates incurred, relying on the personal privacy exemption in section 14(1) of the *Municipal Freedom of Information and Protection of Privacy Act*. The withheld information is about the election candidates in their official capacity and is therefore not personal information under section 2 of the *Act*. The information is ordered disclosed.

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"), 2(2.1), 2(2.2).

Orders and Investigation Reports Considered: PO-2225, MO-2342, M-774, PO-3617, MO-3298, MO-3355.

OVERVIEW:

[1] The Town of Newmarket (the town) received a request under the *Act* for access to records regarding the removal of election signs for a municipal election, specifically:

How much in fines did the Town of Newmarket collect regarding Town of Newmarket municipal election sign violations occurring between September and November 2014? How much in fines remains outstanding (yet to be collected)? What is the plan to collect this outstanding money, including estimated time it will take to collect these fines? What amount in

sign fees fines has been waived, reduced, or forgiven? Who made the decision to waive, reduce or forgive and what was the justification for the decision?

[2] The town responded to each part of the five-part request in a letter. The town's letter set out the total amount of fines levied by the town, the total amount of fines collected, and the outstanding balance, which the town advised had been referred to a collection agency. The town advised there was no specific timeframe for collecting the outstanding amounts. The letter stated that "signs that were damaged or had fallen down were collected but no fines were applied, as such these could be considered waived. These are indicated as no charge in the attached tally sheets." The town also explained that one candidate had fines reduced due to a technical error when downloading evidence of their violations. Finally, the town advised that "all decisions regarding the application of fines and invoicing, including waiving and reducing were made by the Supervisor of Bylaw Enforcement".

[3] In addition to the written answers in the town's letter, the town provided the requestor with spreadsheets (the tally sheets referenced above in the town's letter) containing:

1. the name of the candidate (the name was withheld);
2. each date on which an election sign or signs were removed and whether a charge for removal of the sign was levied or not;
3. the number of signs removed;
4. the number of instances for which a fee for sign removal was and was not levied;
5. the total fee for sign removal;
6. the total amount owing after reducing the total fee for an election sign deposit previously paid to the town.

[4] Candidate names are grouped together in the spreadsheet according to the elected office the candidate was contesting (e.g. Mayor, Regional Councillor, Ward 6 councillor etc.).

[5] The town advised the requester that it withheld the candidate names under section 14(1) of the *Act* (personal privacy).

[6] The town also identified invoices sent to candidates who had incurred sign removal fees in excess of the sign deposit as responsive to the request. The invoices contain much the same information as the spreadsheets, as the town acknowledges in its representations. Information in the invoices that is not in the spreadsheets includes

the candidates' mailing address. The invoices were withheld entirely under section 14(1) of the *Act*.

[7] The requester (now the appellant) appealed the decision of the town to withhold information under section 14(1) to this office.

[8] During mediation, the appellant raised the issue of whether there was a public interest in the disclosure of the records at issue. As a result, the application of section 16 of the *Act* (public interest override) was added as an issue to this appeal.

[9] Further mediation did not resolve the outstanding issues, and the appellant advised that he wanted the appeal to proceed to adjudication, where an inquiry is conducted.

[10] The inquiry began by inviting the town and the affected party candidates to provide representations in response to issues contained in a Notice of Inquiry. The town provided representations and agreed to them being shared with the appellant.

[11] One affected party responded to the Notice of Inquiry consenting to disclosure of their personal information. The town was requested to provide an updated decision letter to the appellant as a result of the affected party's consent. None of the other affected parties provided representations.

[12] The appellant was then invited to respond to the issues set out in a Notice of Inquiry and in the town's representations, and he did so.

[13] This order finds that the withheld information is about election candidates in their official capacity and is therefore not "personal information" under section 2 of the *Act*. The information is ordered disclosed.

RECORDS:

[14] The information at issue is:

1. the names of election candidates contained in the spreadsheets and;
2. election sign removal fee invoices.

[15] The town advised the requester that it withheld the candidate names under section 14 of the *Act* (personal privacy).

[16] The invoices were sent to candidates who had accrued sign removal fees in excess of the sign deposit paid under the town's sign bylaw. The invoices include:

1. the candidates' name and mailing address,

2. an invoice number, customer number and invoice due date;
3. a calculation of the total election sign removal fee owing after deducting the election sign deposit; and
4. a notation listing how many signs were removed and how many of those the town charged a fee for.

ISSUES:

[17] The issues in this inquiry are:

- A. Does the withheld information 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?
- C. Is there a compelling public interest in disclosure of the information that clearly outweighs the purpose of the section 14(1) exemption?

PERSONAL INFORMATION

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

[18] The town submits that the personal privacy exemption in section 14(1) of the *Act* applies to the names of the individual candidates.

[19] The section 14(1) exemption can only apply to information that qualifies as "personal information," as defined in section 2(1) of the *Act*. Consequently, the first issue in this appeal is whether the candidate's names and the information in the invoices is personal information.

[20] Section 2(1) states in part:

"personal information" means recorded information about an identifiable individual, including,

...

(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,

...

(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;

[21] 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.

[22] 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.¹

[23] 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.²

[24] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.³

Representations

[25] The town submits that the records in issue contain the names of registered candidates for the town's 2014 municipal election.

[26] Regarding the invoices, the town's representation is that they contain information about identifiable individuals relating to financial transactions in which they have been involved, under paragraph (b) of the definition of "personal information" in section 2(1) of the *Act*.

[27] The town submits that the spreadsheets contain information about identifiable individuals relating to enforcement of the town's sign bylaw and the Region of York's

¹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

² Orders P-1409, R-980015, PO-2225 and MO-2344.

³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, 2002 CanLII 30891.

sign bylaw. The town submits that, in general, by-law enforcement information about identifiable individuals is considered personal information, because the associated records are likely to reveal other personal information about an individual. It states that the information pertains to enforcement of a bylaw that resulted in fines being applied and financial transactions taking place. I take this to mean that, like the town's submission regarding the invoices, the town's view is that the information qualifies as personal information under paragraph (b) of the definition of that term in section 2(1) of the *Act*.

[28] The town submits that the information in issue was provided in a personal rather than a professional or official capacity because, as information about election candidates, the individuals have not yet been elected. The town submits that until a candidate registered in the election is elected and takes their declaration of office all information pertaining to them as a candidate is considered personal information and cannot be considered information in an official capacity. To support its position, the town refers to the *Municipal Elections Act* ("*MEA*") definition of a candidate as "a person who has been nominated [under section 33]" and section 232 of the *Municipal Act*, which provides that a person shall not take a seat on the council of a municipality, until the person takes the declaration of office.

[29] The appellant's representations do not directly address whether the withheld information is personal information. However, the appellant does submit that when members of the public register as candidates for a municipal election, they do so with full knowledge that they will be required to give up certain rights under the *Act*. They know, for example, that they must disclose the names and addresses of political donors and they also know that they must make public how much they spent on their campaigns, including records of how the money was spent. The appellant goes on to say that election campaign signs are like any other campaign related expense. The appellant supports this view by referring to the fact that election campaign signs have their own specific rules in the town's sign bylaw and that the fines arise from those rules.

[30] The appellant also suggests that making the information publically available provides transparency, which avoids any allegations of favourable treatment toward incumbent councillors. Specifically, the appellant refers to the town losing information about one candidate's bylaw infractions⁴ and the possibility that some could view that as untoward.

Analysis

[31] In deciding this appeal, I find Order PO-2225 particularly helpful. That order involved a request for information in Ontario Rental Housing Tribunal (tribunal)

⁴ I assume this is a reference to the town's statement about the technical error in downloading evidence of one candidates' infractions.

databases identifying individuals or corporations who owed money to the tribunal. In Order PO-2225, former Assistant Commissioner Tom Mitchinson found that the names of non-corporate landlords owing money to the tribunal was about those individuals in a business rather than a personal capacity, and therefore did not qualify as "personal information" as defined in section 2(1) of the *Act*.

[32] Order PO-2225 set out a two-step analysis for determining whether information should be characterized as "personal" or "business, professional or official"⁵:

1. In what context do the names of the individuals appear? Is it in a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?
2. Is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

[33] The appropriateness of this two-step approach, and the distinction it draws between business, professional or official information and personal information was thoroughly considered by Adjudicator Higgins in Order PO-3617, and found to be consistent with the "modern principle" of statutory interpretation.⁶ As Adjudicator Higgins observed in Order PO-3617,⁷ the two-step analysis in Order PO-2225 is intended to assist in understanding how the term "individual" in the preamble of the definition of personal information, as well as the wording of items (b) and (h) of the definition, would apply to information in the business, professional or official sphere. I will now proceed to consider the information at issue in light of the two-step analysis in Order PO-2225.

[34] I agree with the town's submission that the information is about election candidates. In Order M-774, information about election candidates was found, in the circumstances of that appeal, to be personal information.⁸ However, in my view Order M-774 does not stand for the proposition that all information about election candidates is personal information. The correct approach is to consider whether the information at issue is personal information, guided by the questions from Order PO-2225 set out

⁵ I note the quote from Order PO-2225 refers to "official" as "official government," but the word "government" is not contained in the definition in the *Act*.

⁶ Order PO-3617 is the subject of an application for judicial review.

⁷ At para. 69.

⁸ I note that Order M-774 was decided before 2006 amendments which modified the definition of the term "personal information" by adding section 2(2.1) and 2(2.2) excluding an individual's name, title, contact information or designation which identifies that individual in a "business, professional or official capacity". The intent of this amendment was to clarify the distinction between personal and business, professional or official capacity. These provisions are discussed further below.

above.

Step 1: In what context does the information, including the names, appear?

[35] To understand the context of the information at issue it is necessary to consider the process to become a registered election candidate and the town's sign bylaw.

[36] To become a municipal election candidate, a prospective candidate or their agent must file a nomination paper signed by the prospective candidate and a nomination fee with the clerk in the form prescribed by the Ministry of Municipal Affairs.⁹ The clerk must be satisfied that the nominee is eligible to run in order to certify the nomination. Nominees that meet the statutory requirements then become registered candidates for election to the office they are seeking.

[37] The town's sign bylaw contains specific provisions that govern election signs. Town bylaw 2014-11¹⁰ is the sign bylaw that was in force at the time the records in issue were created and the appeal filed.

[38] The bylaw provides for the display of election signs once an election sign deposit has been paid by the candidate or their authorized agent. The bylaw provides that no candidate shall affix, erect or otherwise display an election sign or permit an election sign to be affixed, erected or otherwise displayed unless certain other requirements, primarily regarding sign location and dimensions, are met.

[39] Where an election sign has been affixed, erected or otherwise displayed in contravention of any provision of the bylaw, the town may remove the sign immediately without notice. Where an election sign that infringes the requirements for signage is removed by town bylaw enforcement officers pursuant to the bylaw, the bylaw provides that any costs associated with its removal are deducted from the election sign deposit. Any costs incurred in excess of the deposit are invoiced to the registered candidate. The bylaw provides that unpaid invoices may be collected by [legal] action or the amount may be added to the tax roll and collected in the same manner as taxes.

[40] In Order PO-2225, with respect to the first step, former Assistant Commissioner Mitchinson concluded that the names of the non-corporate landlords appeared in a business context:

⁹ The current Nomination Paper-Form 1, is available at [http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/017-9499P~3/\\$File/9499P_Form1E.pdf](http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/017-9499P~3/$File/9499P_Form1E.pdf) The completed nomination paper, which is available for public review, requires a potential candidate, known as a nominee, to provide their name, details of the address that qualifies them to be a candidate and a mailing address (if different from the qualifying address), amongst other information.

¹⁰ Effective March 3, 2014. This sign bylaw was repealed and replaced by Bylaw 2016-28, effective June 7, 2016.

In my view, when someone rents premises to a tenant in return for payment of rent, that person is operating in a business arena. The landlord has made a business arrangement for the purpose of realizing income and/or capital appreciation in real estate that he/she owns. Income and expenses incurred by a landlord are accounted for under specific provisions of the *Income Tax Act* and, in my view, the time, effort and resources invested by an individual in this context fall outside the personal sphere and within the scope of profit-motivated business activity.

... it is reasonable to characterize even small scale, individual landlords as people who have made a conscious decision to enter into a business realm. As such, it necessarily follows that a landlord renting premises to a tenant is operating in a context that is inherently of a business nature and not personal.

[41] In Order MO-2342, the information at issue was the names of individual defendants charged by the City of Toronto in the course of enforcing licenses and permits issued to "non-stationary" businesses.¹¹ Adjudicator Bhattacharjee agreed with, and adopted, the reasoning in Order PO-2225, finding that the names in issue were not personal information. The individuals charged by the City of Toronto owned or operated businesses, and, like the individual landlords in Order PO-2225, though their businesses were not separately incorporated, Adjudicator Bhattacharjee stated:

In my view, an individual who obtains a business licence or permit from the City is clearly operating in a business context, even if that individual has not formally incorporated his or her business. For example, an individual who has obtained a business license or permit from the City to operate a hot dog cart has done so for the purpose of realizing income and making a profit by selling food to the public. Similarly, an individual who has obtained a licence from the City to operate a taxicab is endeavoring to generate income and make a profit by offering transportation services to the public.

[42] I consider the context here analogous to Order PO-2255 and MO-2342, except that, rather than individuals operating in a business context, here the individuals are operating in an official capacity, as registered election candidates.

[43] The withheld information is about election sign removal fees incurred by registered election candidates under the town's sign bylaw. More specifically, the information in the spreadsheets is a record of election signs removed pursuant to the bylaw and the removal costs accrued by named election candidates. Only the candidates' names have been withheld in the spreadsheets. The invoice information

¹¹ such as driving schools, pedicabs, refreshment vehicles (e.g. hot dog carts), horse-drawn vehicles, tow trucks, taxicabs, limousines and school buses.

duplicates the spreadsheet information to a large extent, but takes the form of invoices, each addressed to a named candidate, for election sign removal costs where these costs exceeded the amount of the candidate's election sign deposit.

[44] In my view, in the same way that an individual running a business can operate in a business rather than personal context,¹² an individual who is a registered candidate for election has a sphere in which they operate in an official context as a registered candidate, even though they are an individual. Registered election candidates have certain rights and responsibilities arising from their official status as candidates, including complying with various requirements under the *MEA*, such as disclosure of campaign financing.¹³

[45] Registered candidates have rights and responsibilities regarding the display of election signs that an individual acting in a personal capacity does not have. The information at issue arises from candidates' exercise of these rights and responsibilities. Under the town's bylaw election candidates are responsible for the fees charged by the town for removing election signs candidates authorized for display that breach the sign bylaw. Because this responsibility lies with registered candidates, the withheld information is only about registered election candidates. In being held liable under the town's bylaw for election sign removal costs, the town makes candidates responsible for the conduct of their election campaign, which is the official context in which registered election candidates operate. Consequently, I find that the withheld information relates to an official context.

Step two: would disclosure reveal something that is inherently personal in nature?

[46] Under the second step of the analysis in Order PO-2225, even when information appears in an official context, the question is whether disclosure of it would reveal something that is inherently personal in nature.

[47] In Order PO-2225, former Assistant Commissioner Mitchinson found that there was nothing about the names of the non-corporate landlords that, if disclosed, would reveal something of a personal nature about them. He stated:

As far as the information at issue in this appeal is concerned, disclosing it would reveal that the individual:

1. is a landlord;

¹² MO-2342.

¹³ Order MO-3355 found that disclosure of the names of individuals who applied to be on a town committee was personal information, because it revealed that these individuals, whose applications were considered in closed session, had applied to be appointed to the committee and were unsuccessful. In that context, there was no issue of whether individuals were acting in an official capacity.

2. has been required by the Tribunal to pay money to the Tribunal in respect of a fine, fee or costs;
3. has not paid the full amount owing to the Tribunal;
4. may be precluded from proceeding with an application under the TPA.

In my view, there is nothing present here that would allow the information to "cross over" into the "personal information" realm. The fact that an individual is a landlord speaks to a business not a personal arrangement. As far as the second point is concerned, the information at issue does not reveal precisely why the individual owes money to the Tribunal, and the mere fact that the individual may be personally liable for the debt is not, in my view, personal, since the debt arises in a business, non-personal context. The fact that monies owed have not been fully paid is also, in my view, not sufficient to bring what is essentially a business debt into the personal realm, nor is the fact that a landlord may be prohibited by statute from commencing an application under the TPA.

[48] Order MO-2342, applying the same approach, reached the same conclusion.

[49] Applying the above approach, I am satisfied that disclosure of the information at issue would not reveal something that is inherently personal in nature. In this appeal, disclosing the withheld information would reveal:

1. the names of the election candidates held responsible under the town's bylaw for election signs removed under the town's sign bylaw, including the number of times the town removed a candidate's election sign and in how many of those instances the candidate incurred a removal fee; and
2. the mailing addresses of election candidates sent an invoice for election sign removal fees.

[50] For the reasons below, I am satisfied that disclosure of this information would not reveal something of a personal nature about these individuals.

Election sign removal fees

[51] I note that while candidates are responsible for election sign removal fees, the actions that led to the removal fee being incurred do not necessarily relate to the actions of the candidate. The bylaw states "no candidate shall affix, erect or otherwise display an Election Sign or permit an Election Sign to be affixed, erected or otherwise displayed" (emphasis added). Though fees for removal of election signs that violate the town's bylaw are payable by candidates, the infringing action may have been carried out on a candidate's behalf by another individual, for example, a campaign worker. In

this way, the election sign invoices are further removed from the actions of identified individuals than the information at issue in MO-2342 and PO-2255. In MO-2342 and PO-2255 most, if not all, violations would be directly attributable to the actions of the individual vendor holding the license or landlord, respectively.

Candidates' personal liability

[52] In MO-2342, Adjudicator Bhattacharjee found that although individuals issued bylaw infringements in the conduct of a mobile business could be personally liable, that personal liability arose in the context of the individual carrying out their business activity. I have found that the infringements arose from the activities of registered election candidates. Applying the reasoning in MO-2342, any personal liability for election sign removal fees that may ultimately arise, does so from the individual's activity as a registered election candidate. In my view, disclosing the fees incurred therefore does not reveal something that is inherently personal in nature about the candidate.

[53] I have also considered the information provided to me about possible debts that may have been incurred, and whether this would constitute "information relating to financial transactions in which the individual has been involved" under paragraph 2(1)(b), as the town suggested. The invoice and spreadsheet information does not disclose whether the invoices were paid or not. It only discloses the total sign removal fees incurred by each candidate, less a deposit. As a result, the provision in the town bylaw that allows the town to add unpaid sign removal fees to the tax roll and collect that amount in the same manner as unpaid taxes is not relevant. I do not need to decide whether information about any unpaid fees that may have been added to the tax roll is personal information, because the withheld information does not contain information of that type.

Candidates' mailing addresses

[54] The main substantive information withheld in the invoices that is not in the spreadsheets is the mailing addresses of registered candidates.¹⁴ I must consider whether disclosing this information would reveal something that is inherently personal in nature.

[55] I recognize that the mailing addresses for registered candidates may also be their home address. Notwithstanding this, I am satisfied that disclosing this information would not reveal something that is inherently personal in nature and can be disclosed, for the reasons that follow.

[56] First, section 2(2.1), narrows the definition of personal information so that it

¹⁴ As described above, the invoices also contain invoice numbers, customer numbers and other related information.

does not include the name, title, contact information or designation of an individual that identifies that individual in an official capacity. The mailing addresses in the invoices are the contact information for the registered candidates in their official capacity.

[57] Any doubt about the operation of section 2(2.1) where the mailing address for the registered candidate in their official capacity is also their home address is resolved by Section 2(2.2), which states that section 2(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.¹⁵ Section 2(2.2) makes clear that when this information is also an official address, the home address is not personal information.

[58] I also note that the nomination form for election candidates requires the candidate to provide a mailing address (and an address that qualifies them to be a candidate). Completed nomination forms are filed with the town clerk, and, by operation of section 88(5) of the MEA, are publically available.¹⁶

Summary: personal information

[59] In summary, I am satisfied disclosure of the withheld information in the spreadsheets and the invoices would not disclose information that would reveal something of a personal nature or that is inherently personal in nature.

Additional matter: effect of section 88(5) MEA

[60] As a final matter, I note that section 88(5) of the *MEA* states:

Despite anything in the Municipal Freedom of Information and Protection of Privacy Act, documents and materials filed with or prepared by the clerk or any other election official under this Act are public records and, until their destruction, may be inspected by any person at the clerk's office at a time when the office is open.

[61] The town and the appellant discuss the effect of section 88(5) of the *MEA* in addressing whether section 88(5) operates to expressly authorize disclosure of the information at issue under section 14(1)(d) of the *Act*. The town argues that the information falls outside the scope of section 88(5) while the appellant argues the information falls within the scope of section 88(5) and therefore should be disclosed.

[62] Given my conclusion that the withheld information is not personal information, I do not need to consider the effect of section 14(1)(d) of the *Act*. However, I note that

¹⁵ See Order MO-3298 in relation to business addresses which are also the address of a home dwelling.

¹⁶ Therefore, even if candidate's mailing addresses were personal information, the addresses would fall within s 14(1)(d) of the Act, which provides that a head shall refuse to disclose personal information except under an Act of Ontario or Canada that expressly authorizes the disclosure.

some, but not all of the withheld information in the records is information that is publically available through the operation of section 88(5) of the *MEA*.¹⁷

OTHER ISSUES:

[63] Because the exemption at section 14(1) of the *Act* can only apply to “personal information”, it cannot apply in the circumstances of this appeal and I do not need to consider its application, or the possible application of the public interest override, to the withheld information.

ORDER:

1. I find that the information at issue is not personal information for the purposes of the *Act*.
2. I order the town to disclose the withheld information to the appellant, not earlier than **April 19, 2017** and not later than **April 26, 2017**.

Original Signed by: _____
Hamish Flanagan
Adjudicator

_____ March 20, 2017

¹⁷ For example, campaign finance reporting rules under the *MEA* require candidates to disclose the election sign deposit required by the town’s bylaw as an expense and the return of any portion of the deposit as income. This allows the campaign financing reporting information available on the town’s website information to be used to calculate the quantum of sign removal fees for candidates whose fees are equal to or less than their deposit, by comparing the sign expense and income information.