

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3755

Appeal MA16-335

Corporation of the Municipality of Temagami

April 18, 2019

Summary: The Corporation of the Municipality of Temagami (the municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all records pertaining to the Waterfront Wall Project. After mediation, the only information that remains at issue in this appeal is an estimated dollar amount severed from a Letter of Understanding. In this decision, the adjudicator finds that the withheld amount is “personal information” according to the definition in section 2(1) of the *Act*, and she upholds the municipality’s decision to withhold it pursuant to the mandatory personal privacy exemption in section 14(1). The adjudicator further finds that there is no compelling public interest in favour of disclosure under section 16, and she dismisses the requester’s appeal.

Statutes Considered: The *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.

OVERVIEW:

[1] The Corporation of the Municipality of Temagami (the municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all records pertaining to the Waterfront Wall Project, including correspondence between certain named companies/parties and the municipality’s CAO, Clerk, members of Council and the Mayor.

[2] In response, the municipality took two positions, each expressed in separate access decisions. In the first decision, the municipality advised that emails sent to, or from, the councillors’ personal email addresses are not covered by the *Act* because they

are not in the custody and control of the municipality. However, the municipality also notified third party individuals and the company named in the request under section 21(1) of the *Act* to provide these affected parties with an opportunity to make their views about disclosure known. Following notification and receipt of their views, the municipality issued a second decision granting partial access to the responsive records, with severances made under sections 10(1) (third party information) and 14(1) (personal privacy) of the *Act*. The municipality also advised that certain records do not exist and provided an index of records that identified and described the records deemed responsive.

[3] The requester, now the appellant, appealed the municipality's decision to this office. During mediation, the appellant clarified that the main record of interest is a Letter of Understanding (the LOU) outlining arrangements between the municipality and an affected party for the waterfront enhancement project. At this point, the municipality agreed to expand the scope of the request to include the LOU, which is dated after the receipt of the request. After contacting the affected party to obtain their views about disclosure of the LOU specifically, the municipality issued a supplemental decision granting partial access to that record, with severances made under section 14(1) only.

[4] Of those severances, the only one that remains at issue is the estimated amount the affected party intended to spend on the wall, which was redacted from the LOU. As no further mediation was possible, the appeal was transferred to the adjudication stage where an adjudicator may conduct an inquiry under the *Act*. The adjudicator formerly assigned to this appeal commenced an inquiry, and sought and received representations from all parties.

[5] After receiving the representations of the appellant, it was apparent he was raising section 16 (public interest override) as an issue in this appeal. Accordingly, section 16 was added as an issue in this appeal and the adjudicator sought and received representations from all parties on this issue. The affected party responded to the Notice of Inquiry with representations that the adjudicator found to be confidential under this office's *Practice Direction 7: Sharing of Representations*.

[6] Subsequently, the appeal was transferred to me. In this order, I find that the withheld amount qualifies as personal information according to the definition of "personal information" in section 2(1) and the mandatory personal privacy exemption at section 14(1) applies. I also find that there is no compelling public interest in favour of disclosure under section 16, and dismiss the appeal.

[7] I have reviewed and considered all of the representations made by the parties in this appeal. However, I have only summarized those portions I found relevant to my determination below.

RECORDS:

[8] As noted above, the only information at issue is an estimated dollar amount severed from the LOU.

ISSUES:

- A. Does the record 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. Is there a compelling public interest in disclosure of the information that clearly outweighs the purpose of the section 14 exemption?

DISCUSSION:

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

[9] The municipality withheld the information at issue under the personal privacy exemption in section 14(1). Therefore, 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) of the *Act*, and in the circumstances of this appeal, the relevant parts state:

"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,

[10] 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) of the definition may still qualify as personal information.¹ To qualify as personal information, it must be

¹ Order 11.

reasonable to expect that an individual may be identified if the information is disclosed.²

[11] The municipality submits that the withheld amount qualifies as personal information pursuant to paragraph (b) of the definition in section 2(1), because it contains “information relating to financial transactions in which the individual has been involved”.

[12] The appellant submits that the withheld amount is not personal information as it has been made public in open council discussions and in public council packages, which include letters, resolutions, motions and memos from the affected party’s agent. Furthermore, the appellant argues that the withheld amount does not reflect the actual amount the affected party paid to the contractors for work on the wall, and therefore, it cannot be personal information “relating to financial transactions”, because it is an inaccurate figure.

[13] After considering the representations of the parties and reviewing the record, I agree with the municipality that the withheld amount qualifies as personal information pursuant to paragraph (b) of the definition in section 2(1) of the *Act*. Specifically, I find that the withheld amount is the personal information of the affected party, because it contains information relating to a financial transaction in which they were involved. The fact that this amount represents an estimate and may have later changed does not affect my finding on this issue. Accordingly, I will consider whether the mandatory exemption at section 14(1) applies to this information.

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

[14] Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

[15] The section 14(1)(a) to (e) exceptions are relatively straightforward. The section 14(1)(f) exception, allowing disclosure if it would not be an unjustified invasion of personal privacy, is more complex, and requires a consideration of additional parts of section 14.

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

² Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[17] 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. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the “public interest override” at section 16 applies.³

[18] If no section 14(3) presumption applies and the exception in section 14(4) does 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.⁴ In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances 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.⁵

[19] The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).⁶

The municipality’s representations

[20] The municipality submits that the mandatory exemption at section 14(1) applies to the withheld amount. The municipality argues that releasing the withheld amount would be a presumed unjustified invasion of privacy under section 14(3)(f) as it “describes an individual’s financial history or activities” and its disclosure could cause unfair harm to the affected party.

The appellant’s representations

[21] Although the appellant did not make representations directly on the section 14(1) exemption, he made extensive representations with respect to the public interest in disclosure of the withheld amount as part of his argument that the public interest override at section 16 applies. While I will address the appellant’s arguments on the public interest override below under Issue C, I am setting out his arguments here because they are relevant to the factors at section 14(2), specifically paragraphs (a) and (b).

[22] The appellant argues there is a compelling public interest in the withheld amount, because the wall is not structurally sound, and the concrete sections of the

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

⁴ Order P-239.

⁵ Orders PO-2267 and PO-2733.

⁶ Order P-99.

wall were crumbling prior to the affected party covering it with wood. The appellant argues that the LOU with the withheld amount now represents a matter of public health and safety, because of the prior state of the wall. Therefore, the appellant argues that the withheld amount should be disclosed as a matter of public health and safety.

[23] The appellant submits that it is very important that the withheld amount be disclosed, because ownership of the wall, the subject of the LOU, is questionable. The appellant argues that to his knowledge, the municipality does not own the wall and if the municipality does not own the wall, the LOU has tied the municipality to the maintenance "in perpetuity" of a property that is not an asset of the municipality. The appellant argues that for this reason, every detail, including the withheld amount, should be released to the taxpayers whose future exposure to liability in relation to maintenance of the wall has been created by this LOU. The appellant further argues that outside of the withheld amount in the LOU, there is no other mechanism for the taxpayers to assess the value of the work that has been completed on the wall.

[24] The appellant argues that there is a compelling public interest in the withheld amount, because the municipality circumvented its own tendering bylaw by allowing the affected party to work on the wall without the involvement of the municipality and the withheld amount is determinative of the fundamentally flawed nature of this route. The appellant submits that this agreement was created and signed without input or review from the councillors. The appellant argues that the withheld figure should be released on the basis that it is reasonable and compelling for the public to be privy to all details of this agreement for transparency, because taxpayers of the municipality are a party to this agreement.

Analysis and findings

[25] The parties did not argue that any of the exceptions at sections (a) to (e) of 14(1) apply and I find that none of the exceptions apply to the withheld amount. The parties also did not argue that any of the exceptions in section 14(4) apply, and I find that none of them apply in the circumstances of this appeal.

[26] While the municipality has argued that the section 14(3)(f) presumption applies, because the withheld amount describes the affected party's "financial history or activities", I am not persuaded by this argument. I find that the presumption at section 14(3)(f) does not apply, because the withheld amount does not actually describe the financial history or activities of the affected party.⁷ As argued by the appellant, the withheld amount is just an estimate and does not accurately reflect the actual amount paid by the affected party for the work on the wall.

⁷ Order PO-3892.

[27] Since I found that no section 14(3) presumption applies and the exception in section 14(4) does not apply, I must consider if there are any section 14(2) factors that may weigh in favour or against disclosure of the withheld amount. From the appellant's representations, it appears that he is arguing that the factors at paragraphs (a): public scrutiny, and (b): public health and safety of section 14(2) may apply. From the municipality's representations, it appears that it is arguing the factor at paragraph (e): pecuniary or other harm of section 14(2) may apply.

14(2)(a): public scrutiny and 14(2)(b): public health and safety

[28] Paragraph (a) of section 14(2) contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.⁸ Paragraph (b) of section 14(2) contemplates disclosure in order to promote public health and safety.

[29] The only information at issue is the withheld amount severed from the LOU and I have found that to be personal information of the affected party. Other than the withheld amount, all the substantive portions of the LOU have been released to the appellant. Having reviewed the parties' representations and the record, I am not satisfied that disclosure of the withheld amount would assist in exposing the municipality's activities to public scrutiny.

[30] While one of the main purposes of the *Act* is to shed light on the operations of government, I find in this instance that disclosure of the withheld amount would not increase the public's ability to scrutinize the actions of the municipality, or add any transparency to the process by which the LOU was negotiated.

[31] I am also not satisfied that disclosure of the withheld amount would assist in promoting public health and safety. The appellant's concern is with the state of the wall prior to being covered with wood and the crumbling concrete that he witnessed. While I agree that a crumbling concrete wall could be a matter of public health and safety, I find in this appeal that disclosure of the withheld amount would not assist in the promotion of public health and safety. Disclosure of the withheld amount would not assist in determining the structural integrity of the wall, or whether it poses a risk to the public's health and safety.

14(2)(e): pecuniary or other harm

[32] In order for this section to apply, the evidence must demonstrate that the damage or harm envisioned by the clause is present or foreseeable, and that this damage or harm would be "unfair" to the individual involved.

⁸ Order P-99.

[33] While the municipality states that the disclosure of the withheld amount could cause unfair harm to the affected party, it did not provide any evidence or arguments in support of this statement. Based on this and my own review of the record, I am not satisfied that any harm or damage is present or foreseeable, and I find that paragraph (e) of section 14(2) does not apply.

[34] In order 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 established. In the absence of factors favouring disclosure, the exception in section 14(1)(f) is not established, and the mandatory section 14(1) exemption applies.⁹ Since I have found that there are no factors favouring disclosure of the withheld amount, I find that the exception in section 14(1)(f) does not apply and the mandatory section 14(1) exemption applies to the withheld amount.

Issue C: Is there a compelling public interest in disclosure of the information that clearly outweighs the purpose of the section 14 exemption?

[35] Section 16 states:

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.

[36] 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.

[37] 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, the IPC 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.¹⁰

[38] 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.¹¹ 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

⁹ Orders PO-2267 and PO-2733.

¹⁰ Order P-244.

¹¹ Orders P-984 and PO-2607.

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.¹²

[39] The word “compelling” has been defined in previous orders as “rousing strong interest or attention”.¹³ The existence of a compelling public interest is not sufficient to trigger disclosure under section 16. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[40] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.¹⁴

[41] The appellant’s representations about the public interest override in section 16 were set out above, and I will not repeat them here. The municipality and the affected party submitted representations regarding this issue, but they were withheld under this office’s *Practice Direction 7: Sharing of Representations*.

Analysis and findings

[42] As stated above, in order for section 16 to apply, there are two requirements which must be met: there must be a compelling public interest in disclosure of the amount, and this interest must clearly outweigh the purpose of the section 14(1) exemption.

[43] For reasons similar to those set out above in my discussion of section 14(2)(a) and (b), I find that there is no public interest, compelling or otherwise, in the disclosure of the withheld amount. All substantive parts of the LOU was disclosed to the appellant, with the exception of the withheld amount, the estimated cost of the wall. To the extent that the appellant has based his public interest arguments on matters related to the ownership of the wall, among other concerns, I find that the withheld amount does not respond to these concerns.

[44] The withheld amount would not shed any light on the cost of replacing or maintaining the wall. As the appellant has conceded, the withheld amount is an inaccurate figure, which does not reflect the actual amount paid for the wall. Furthermore, the withheld amount is not relevant to the issues of ownership, and public health and safety of the wall.

¹² Orders P-984 and PO-2556.

¹³ Order P-984.

¹⁴ Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.).

[45] Since I found that there is no compelling public interest in favour of disclosure, I do not have to consider whether the public interest clearly outweighs the purpose of the section 14(1) exemption. Accordingly, I dismiss the appeal.

ORDER:

I uphold the municipality's decision to withhold the estimated dollar amount pursuant to section 14(1) of the *Act*, and I dismiss the appeal.

Original signed by _____

Anna Truong
Adjudicator

_____ April 18, 2019