

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-3949-F

Appeal MA14-30-3

Niagara District Airport Commission

August 28, 2020

Summary: This is a final order arising out of the appellant's request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Niagara District Airport Commission (the commission) for access to a number of categories of records relating to his dealings with it. The commission originally relied on the exemptions at sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 10(1) (third party information) and 12 (solicitor-client privilege), either alone or in conjunction with section 38(a) (discretion to refuse requester's own information) of the *Act* to deny access to the requested information. The appellant appealed the commission's decision and challenged the reasonableness of its search for responsive records. The commission's position on a number of records changed in the course of adjudication, resulting in some of the records being disclosed to the appellant. In Interim Order MO-3749-I, the adjudicator granted certain relief but deferred a determination on two emails. In this order, the adjudicator finds that one of the emails qualifies for exemption under section 7(1) and that the other email qualifies for exemption under section 14(1) (personal privacy). The appeal is dismissed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 7(1), 7(2)(k), 14(2)(a), 14(2)(i) and 14(1).

Orders Considered: Orders MO-3131, MO-3360 and MO-3749-I.

OVERVIEW:

[1] The appellant appealed an access decision made by the Niagara District Airport

Commission (the commission) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*). The request was for access to a number of categories of records relating to the appellant's dealings with it.

[2] The commission initially claimed that the request was frivolous or vexatious, a claim that was not upheld in Order MO-3131, which ordered the commission to produce an access decision. In accordance with Order MO-3131, the commission produced an interim access decision and fee estimate.

[3] The appellant took issue with the adequacy of the interim access decision and disputed the fees charged in the estimate. During mediation of the appeal, the commission produced a revised fee estimate. In Order MO-3360, the adjudicator ordered the commission to prepare a final access decision and statement of fees and to invite comment from the appellant during its preparation.

[4] The commission met with the appellant and then issued an access decision, granting partial access to the responsive records it located. The appellant appealed the access decision.

[5] Mediation did not resolve the appeal.

[6] The appeal then moved to the adjudication stage of the appeals process. I conducted an inquiry and I issued Interim Order MO-3749-I.¹ In that interim order, I upheld the reasonableness of the commission's search for responsive records, I ordered the disclosure of certain records that the commission had not disclosed to the appellant but which were no longer claimed to be exempt, and found that certain records qualified for exemption under section 12 (solicitor-client privilege). I ordered that two records that did not qualify for exemption under section 12 be disclosed to the appellant. Finally, I deferred my determination on two attachments to Record B44.

[7] At paragraphs 13 to 16 of Interim Order MO-3749-I, I explained the nature of the two attachments to Record B44:

Four of the records at issue, being records B44 to B46 and B121, consist of a letter to a mediator of this office from the commission along with nine attachments (B44), a duplicate copy of the letter on commission letterhead without attachments (B45) and a duplicate copy of the letter not on commission letterhead and without attachments (B46 and B121).

The Mediator's Report in Appeal File MA13-136 (which involved the same parties and resulted in Order MO-3065) confirms that, with the consent of the commission, the appellant received a copy of the original letter, without the attachments, in the course of mediation.

¹ In Order MO-3769-R, I denied the appellant's request to reconsider Interim Order MO-3749-I.

The appellant was subsequently provided access to copies of six of the attachments to record B44 in the course of the mediation of Appeal MA13-136, which resulted in Order MO-3065. In addition, in that order Adjudicator Justine Wai addressed one of the three remaining attachments and found that the last two were not responsive to the request at issue in the appeal before her.

Accordingly, as access has already been provided to the letter to the mediator and seven of the nine attachments have been addressed, only the two attachments that Adjudicator Wai found to be non-responsive to the request before her remain at issue in this appeal. Accordingly I will not address the other documents which comprise records B44 to B46 and B121 in this appeal.

[8] With respect to the two remaining attachments to Record B44, I wrote the following at paragraph 17 of Interim Order MO-3749-I:

Turning now to the two remaining attachments to record B44, which involve individuals who have not been notified of this proceeding, and which the commission claims are subject to section 38(a) in conjunction with sections 6 and 7(1), I have decided, in all the circumstances to defer a determination on the possible application of section 38(a) in conjunction with sections 6 and 7(1) to those two attachments after I have sought representations from affected parties on these issues. As the two attachments may contain information that qualifies as personal information, I will also seek representations from the affected parties I notify on the possible application of sections 14(1) or 38(b) (personal privacy) to these attachments.

[9] I then sought representations from the commission and the individuals that I notified (the affected parties) on the facts and issues set out in a Supplementary Notice of Inquiry. Only two affected parties and the commission provided responding representations. One of the affected parties consented to the release of information relating to him. That information appears in one of the two emails at issue.

[10] I then sought representations from the appellant on the facts and issues set out in a Supplementary Notice of Inquiry which I provided to him along with a copy of the non-confidential representations of an affected party and the commission. Although provided with multiple opportunities, the appellant did not provide responding representations.

[11] In this final order, I find that one of the emails qualifies for exemption under section 7(1) and that the other email qualifies for exemption under section 14(1). The appeal is dismissed.

RECORDS:

[12] The records at issue consist of two emails, one dated April 26, 2012 (the first email) and the second dated January 10, 2013 (the second email).

ISSUES:

- A. Do the two emails contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 7(1) (advice or recommendations) apply to the two emails?
- C. Does the mandatory exemption at section 14(1) (personal privacy) apply to the first email?
- D. Did the institution exercise its discretion under section 7(1) with respect to the second email? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[13] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the first email 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;

[14] 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.²

[15] 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.

[16] 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.³ 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.⁴ To qualify as personal information, it must be reasonable to expect that an individual may be identified if the

² Order 11.

³ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

information is disclosed.⁵

The parties' representations

[17] The commission submits that certain records contain information pertaining to identifiable individuals other than the appellant.

[18] The affected party states that the email dated April 26, 2012 is a statement of events from his perspective, describing what occurred when he was invited out of a meeting and into a personal discussion about his presence at a public meeting. The affected party states that he was not part of a board, committee or an officer or employee of the commission at the time he wrote the email. The affected party states that he only made three short references to the appellant in the email.

[19] In his earlier representations in the appeal, the appellant submitted that his request "related to himself or any corporation to be formed by him".

Analysis and finding

[20] In making my determinations in this order, I have considered the nature of the two emails, their content and the context in which they were created.

[21] In my view, although it can be argued that the affected party sender's position resulted in the first email being created in a business context, the content of the email and the context in which it was created moves it from the business sphere to the personal. The first email relates entirely to an incident involving the affected party and, in my view, the information in the first email as a whole reveals something of a personal nature about the affected party. In addition, it contains the personal information of two other identifiable individuals as it contains recorded information about them in a personal capacity. The first email does not contain the personal information of the appellant, because it relates to the appellant in a professional, official or business capacity rather than a personal capacity and does not reveal something of a personal nature about him.

[22] In my view, the second email does not contain any personal information of the appellant, but may contain a personal email address of an identifiable individual.

Issue B: Does the discretionary exemption at section 7(1) (advice or recommendations) apply to the two emails?

[23] Section 7(1) states:

⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

[24] The purpose of section 7(1) is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.⁶

[25] “Advice” and “recommendations” have distinct meanings. “Recommendations” refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[26] “Advice” has a broader meaning than “recommendations”. It includes “policy options”, which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant’s identification and consideration of alternative decisions that could be made. “Advice” includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.⁷

[27] “Advice” involves an evaluative analysis of information. Neither of the terms “advice” or “recommendations” extends to “objective information” or factual material.

[28] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.⁸

Sections 7(2)(a) and (3): exceptions to the exemption

[29] Sections 7(2) and (3) create a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 7.

[30] The exceptions in section 7(2) can be divided into two categories: objective information, and specific types of records that could contain advice or recommendations.⁹ The first four paragraphs in section 7(2), paragraphs (a) to (d), are examples of objective information. They do not contain a public servant’s opinion pertaining to a decision that is to be made but rather provide information on matters

⁶ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

⁷ See above at paras. 26 and 47.

⁸ Order P-1054.

⁹ *John Doe v. Ontario (Finance)*, cited above, at para. 30.

that are largely factual in nature.

[31] The remaining exceptions in section 7(2), paragraphs (e) to (k), will not always contain advice or recommendations but when they do, section 7(2) ensures that they are not protected from disclosure by section 7(1). In this appeal the appellant references section 7(2)(k). That section reads:

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

(k) the reasons for a final decision, order or ruling of an officer or an employee of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution.

The commission's initial representations

[32] In its initial representations, which the commission relied upon in its supplementary representations, it submitted that section 7(1) applied because the records refer to various instances where the commission sought the advice of their legal counsel. It submits that although the records do not contain the advice provided, disclosure of the record could reveal the advice provided.

[33] The commission submits that the exceptions in section 7(2) do not apply to the records because they do not contain the types of content set out in section 7(2).

The appellant's initial representations

[34] In his initial submissions in the appeal, the appellant took the position that the records withheld under section 7(1) were subject to an exception at section 7(2)(k) of the *Act*. The appellant submitted that this was because the records were reasons for a final decision, order, or ruling of an officer or employee of the commission made during or after the exercise of discretionary power conferred by or under an enactment or scheme administered by the commission.

[35] The appellant submitted that:

... the commission is not the decision maker for policy matters. That power rests with the liaison committee ever since this power was pulled from the commission. The relationship between the commission and the committee is set out in the three-party agreement between the managing municipalities.

The appellant further submits that advice and facts are not the same. By withholding facts which the commission alleges it relied on to make

decisions, the commission has created a situation where the appellant is not able to review and dispute any false information.

Analysis and finding

[36] I find that, based on the nature of the information in the second email, as well as the sender and recipient of the email, it falls within the scope of section 7(1) of the *Act*. I find that the information either consists of advice or recommendations or that disclosing it would reveal the advice or recommendations sought and provided.

[37] In my view, the exception in section 7(2)(k) does not apply. This is because the information is email correspondence and is not a final decision, order or ruling of an officer or an employee of an institution made during or at the conclusion of the exercise of a discretionary power. As a result, subject to my discussion on the exercise of discretion below, I find that the second email qualifies for exemption under section 7(1) of the *Act*.

[38] In my view, the first email does not contain information that meets the definition of "advice or recommendations" that would fall within the scope of section 7(1).

[39] As I have found that the first email does not qualify for exemption under section 7(1), I will go on to consider whether the exemption at section 14(1) might apply to it.

Issue C: Does the mandatory exemption at section 14(1) apply to the first email?

[40] Under section 14(1), where a record contains personal information of another individual but *not* the requester, the institution is prohibited from disclosing that information unless one of the exceptions in paragraphs (a) to (e) applies, or unless the section 14(1)(f) exception applies. Section 14(1)(a) provides that a party may consent to the disclosure of his or her personal information in the context of an access request. An affected party did provide their consent to the disclosure of their personal information. However, it related to the second email, which I found to be subject to exemption under section 7(1) of the *Act*, not the first email remaining at issue. Section 14(1)(a) is therefore not applicable. None of the exceptions at sections 14(1)(b) to (e) were raised and I find they do not apply.

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

[42] In applying the section 14(1)(f) exception to the section 14(1) exemption, sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy. In addition, section 14(4) lists situations that would not be an unjustified invasion of personal privacy.

Sections 14(2) and (3)

[43] 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.

[44] For records claimed to be exempt under section 14(1) (records that do not contain the requester's personal information), a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if a section 14(4) exception or the "public interest override" at section 16 applies.¹⁰

[45] If the records are not covered by a presumption in section 14(3), section 14(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy, and the information will be exempt unless the circumstances favour disclosure.¹¹ 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).¹²

The commission's representations

[46] The commission does not claim the application of any presumptions, but relying on section 14(2)(i), submits that disclosing the information in the first email could cause unfair damage to the reputation of two named individuals given the contents of the records at issue.

[47] Section 14(2)(i) reads:

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,

the disclosure may unfairly damage the reputation of any person referred to in the record.

The affected party's representations

[48] The affected party reproduces a portion of his representations in an earlier appeal¹³ in which he wrote:

- the email was a statement of events from his perspective, describing for the recipients what occurred.

¹⁰ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

¹¹ Order P-239.

¹² Order P-99.

¹³ Being Appeal MA13-137, which resulted in Adjudicator Wai's order MO-3073.

- that he was not part of a board, committee nor an officer of the commission at the time that he authored the email.
- he made three short references to the requester/appellant through the just over 900 words of text in the email and the requester/appellant is not the main subject of any sentence in the email.

The appellant's representations

[49] The appellant did not provide any submissions regarding this issue. However, the circumstances described in the appellant's initial representations in the appeal appear to raise the possible application of the factor favouring disclosure at section 14(2)(a).

[50] That section reads:

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,

the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

Analysis and finding

[51] Section 14(2)(a) contemplates disclosure in order to subject the activities of the institution (as opposed to the views or actions of private individuals) to public scrutiny.¹⁴ I am not satisfied that disclosing the content of the email would accomplish that purpose. Accordingly, I find that section 14(2)(a) does not apply to the email.

[52] The commission raised the possible application of section 14(2)(i). The application of that section is not dependent on whether the damage or harm envisioned by section 14(2)(i) is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved.¹⁵ I have reviewed the information at issue and find that any damage or harm that may arise from its disclosure would not qualify as "unfair". Accordingly, I find that section 14(2)(i) does not apply.

[53] I have found that no factors raised by either the commission or inferentially raised by the appellant apply. In my view there are no other factors whether listed or unlisted that may apply. As noted above, unless there are factors favouring disclosure, the information is exempt under section 14(1).

[54] Accordingly, I am satisfied that the appellant has not established that disclosure of the first email would not be an unjustified invasion of personal privacy. Accordingly, I

¹⁴ Order P-1134.

¹⁵ Order P-256.

find that the first email qualifies for exemption under section 14(1) of the *Act*.

Issue D: Did the institution exercise its discretion under section 7(1) with respect to the second email? If so, should this office uphold the exercise of discretion?

[55] The section 7(1) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to do so.

[56] In addition, this office may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[57] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁶ This office may not, however, substitute its own discretion for that of the institution.¹⁷

[58] The commission submits that it did not exercise its discretion in bad faith or for an improper purpose and took all relevant factors into account when exercising its discretion.

The appellant's initial representations

[59] In his initial representations, the appellant submitted that he is seeking his own information, and that he should have the right to access his own information regardless of its source. He added that any exemption from this right should be limited and specific, and that generic reasons for such limitation should not be provided by the commission. He submitted that the commission had not provided any specific reasons to support the exercise of its discretion and although the commission made a general statement that it considered all relevant factors, it failed to provide any details or evidence of what factors those were, or how it took those factors into account.

The commission's representations

[60] The commission submitted that in exercising its discretion, it considered the purposes of *MFIPPA*, the wording of potential exemptions and the interests those exemptions seek to protect, as well as the nature of the information sought and the extent to which it is significant to the commission and other affected persons.

¹⁶ Order MO-1573.

¹⁷ Section 43(2).

Analysis and finding

[61] I am satisfied that the commission did not exercise its discretion in bad faith or for an improper purpose and only took relevant factors into account. I am satisfied that in proceeding as it did, and based on all the circumstances, the commission considered the purposes of *MFIPPA*, the wording of section 7(1) and the interests this exemption seeks to protect, as well as the nature of the information sought and the extent to which it is significant to the commission and other affected persons. In all the circumstances and for the reasons set out above, I uphold the commission's exercise of discretion under section 7(1).

[62] Given my findings, I do not need to consider the possible application of the exemption at section 6(1)(b) (closed meeting).

ORDER:

I uphold the commission's decision that section 14(1) applies to the first email and that section 7(1) applies to the second email and dismiss the appeal.

Original signed by _____
Steven Faughnan
Adjudicator

_____ August 28, 2020