



**Information and Privacy
Commissioner/Ontario**
**Commissaire à l'information
et à la protection de la vie privée/Ontario**

INVESTIGATION REPORT

INVESTIGATION I94-080M

A TOWNSHIP

August 16, 1995



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

INTRODUCTION

Background of the Complaint

This investigation was initiated as a result of a complaint concerning a named township (the Township).

An individual complained that the Township had disclosed to the public a copy of an Appointment of Voting Proxy containing her personal information. The individual was concerned that the disclosure was not in accordance with the provisions of the Municipal Freedom of Information and Protection of Privacy Act (the Act).

The Township acknowledged that it had disclosed all copies of the Appointment of Voting Proxy used in the election, to the members of council shortly after the municipal elections. The Township advised us that it had allowed the press to photograph some of the copies of the Appointment of Voting Proxy, but stated that the press had not published these photographs. The Township also advised that the copies of the Appointment of Voting Proxy would have been made available to any member of the public who might have asked to see them because, in its view, they are public records and thus, section 27 of the Act applied.

Our office conducted an investigation into the complaint and issued a draft report. In response, the Township advised that it was relying on information provided by the Ministry of Municipal Affairs (Municipal Affairs) and Municipal World (a publisher of the Appointment of Voting Proxy Form). The Township also indicated that it had provided both Municipal Affairs and Municipal World with a copy of the draft report. The Township asked that we consider the comments it had received from Municipal World and that we consult with Municipal Affairs. The views of Municipal Affairs as well as those of the Township and Municipal World have all been considered in arriving at our conclusions in this report, along with the views of the complainant as expressed in her original letter of complaint. (The complainant has not made any representations in response to the draft report.)

Issues Arising from the Investigation

The following issues were identified as arising from the investigation:

- (A) Does the copy of the Appointment of Voting Proxy contain the complainant's "personal information", as defined in section 2(1) of the Act? If yes,
- (B) Does section 27 of the Act apply to the copy of the Appointment of Voting Proxy? If no,
- (C) Did the Township disclose the complainant's personal information in compliance with section 32 of the Act?

RESULTS OF THE INVESTIGATION

Issue A: Does the copy of the Appointment of Voting Proxy contain the complainant's "personal information", as defined in section 2(1) of the Act?

Section 2(1) of the Act defines "personal information" as recorded information about an identifiable individual, including,

- (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;

The Township takes the position that the information included in the Appointment of Voting Proxy does not fall under the definition of "personal information."

We have examined the Appointment of Voting Proxy form used by the Township during the last election. This form enables an individual to appoint another person to vote on his/her behalf in a municipal election. Once completed, the Appointment of Voting Proxy contains the elector's name, full address, and the fact that the elector is making an appointment. It would also contain the name and address of the individual appointed to act as the elector's proxy, and whether the two individuals are related.

The complainant advised that she was the person who had been appointed as proxy and that the form was completed in full. Although we were unable to examine the actual document in question, based on the information before us, we are satisfied that the completed Appointment of Voting Proxy would have contained the complainant's personal information as defined in paragraph (h) of the definition of "personal information," in section 2(1) of the Act.

Conclusion: The completed Appointment of Voting Proxy would have contained the complainant's personal information as defined in section 2(1) of the Act.

Issue B: Does section 27 of the Act apply to the copy of the Appointment of Voting Proxy?

Section 27 of the Act states:

This Part does not apply to personal information that is maintained for the purpose of creating a record that is available to the general public.

"This Part" refers to the privacy provisions contained in Part II of the Act.

1. **Appointment of Voting Proxy Form - Notations**

The Appointment of Voting Proxy Form is Form 24, prescribed by regulation under the Municipal Elections Act (the MEA). The Appointment of Voting Proxy consists of an original and a copy. It is our understanding that the Appointment of Voting Proxy is certified by the clerk prior to election day, and the individual appointed as the proxy keeps the original which he/she later presents on election day in order to obtain a ballot. According to the Township and Municipal World, the copy is retained by the clerk, while the original is ultimately placed in the ballot box.

The Township, in arguing that the copy of the Appointment of Voting Proxy is a public record, refers to the notation which appears on the bottom of the copy of the form. This notation is not part of the form as prescribed by regulation, but has been placed there presumably for instructional purposes by the publisher. The notation on the copy reads:

This form contains personal information collected and maintained specifically for the purpose of creating a record available to the general public and is open to inspection by any person upon request in the office of the clerk during normal office hours.

We note that the **original** form also contains a statement which has been placed on the form by the publisher. This statement reads:

This form, once placed in the ballot box in the custody of the clerk, is not open to public inspection, except under the order of a judge. Municipal Elections Act, R.S.O. 1990, s. 84(1) and s. 105(1).

As noted above, it is the original Appointment of Voting Proxy which remains with the individual. The statement contained at the bottom of the copy would only be seen if the individual actually looked at the copy (which presumably the individual would have no need to do). Given that the original states that the "form" (presumably in its entirety, not just the "original") will not be open to public inspection, and the fact that it is the **original** which the individual retains, it is our view that an individual completing the proxy form would have the impression that the information on both the original and the copy of the Appointment of Voting Proxy would be held in strictest confidence.

2. **Legislative Provisions of the MEA**

1) Section 105

Section 105(1) of MEA deals with access to the contents of the ballot box. It reads:

No person shall be allowed to inspect the contents of a ballot box in the custody of the clerk except under the order of a judge.

Section 84 outlines what is to be placed in the ballot box:

The deputy returning officer shall place in the ballot box, the polling lists, the packets containing the ballots, and all other documents or packets that served at the election, except,

- (a) the original statement;
- (b) the oath of the poll clerk;
- (c) the oath of the person, if any, chosen to deliver the ballot box to the clerk.

It is not disputed that the original Appointments of Voting Proxy are placed in the ballot box. However, it is the position of Municipal World that the current wording of section 105 implies that copies of voting proxies should be publicly available.

In its submission, Municipal World argued that based on the difference in wording between section 105(1) and earlier legislation, the legislature intended that copies of voting proxies be made publicly available. The earlier legislation read:

No person shall be allowed to inspect any ballot or other document relating to an election in the custody of the clerk except under the order of a judge.

Municipal World posited that since the only change to the section was to delete the reference to "other document," it was the intention of the legislature to place documents, other than the contents of the ballot box, in the public domain.

We asked Municipal Affairs to provide us with information respecting the change in wording, as well as the general intention of section 105(1). Municipal Affairs stated that the only information available respecting the intention of section 105(1) was the following:

... that the requirement for judicial permission to inspect election documents be restricted to the inspection of the actual ballots (Ministry correspondence Nov. 20, 1973).

Municipal Affairs further added that:

The current intention of the section is that public access only be limited in respect of the contents of the ballot box. Ballot boxes include items that may need to be reviewed as part of the recount or court proceeding and as such their contents should not be distributed except by court order.

Based on the limited information provided, we were unable to conclude that the wording in section 105(1) was intended to make copies of the Appointment of Voting Proxy public documents. In our view, the deletion of the words "other documents relating to an election" are

not sufficient to find that copies are intended to be public records. In addition, the information provided by Municipal Affairs is not persuasive. According to the excerpted Ministry correspondence, the purpose of section 105 is to require court permission only for inspection of ballots. However, the wording of section 105 refers to the "contents of the ballot box" which is defined by section 84 to include more than just ballots.

With respect to Municipal Affairs' other comment, the Ministry appears to be arguing that section 105(1) is intended to protect the **contents** of the ballot box, as opposed to the actual information contained therein. Without more information respecting the purpose of section 105(1), it is difficult to accept that the same information which is protected and available only upon court order should nonetheless be a public record with absolutely no privacy protection. In our view, section 105(1) is a strong indicator that the information contained on the copy of the Appointment of Voting Proxy is not intended to be a public record, as contemplated by section 27.

2) Section 104

Part I of the MEA deals with voting procedures and election documents. Proxy voting is provided for under Part I, section 73 of the MEA. We note that there is no provision in Part I of the MEA respecting access to copies of voting proxies.

The Township and Municipal Affairs have both referred to section 104(3) of the MEA as support for the view that voting proxies should be available to the public. Section 104(3) reads:

Subject to subsection (1), the clerk shall retain in his or her possession all oaths, nominations, qualification documents, statements of the votes cast, and other documents relating to an election until the successors to the persons elected at such election have taken office, and may then destroy them. R.S.O. 1980, c. 308, s. 89(2).

Municipal Affairs has also referred specifically to the list of electors and to section 107 of the MEA which prohibits the commercial use and sale of lists of electors. It is our view that the analogy between voting proxies and lists of electors is not compelling. Electors lists are posted prior to the election pursuant to the MEA and, while they may remain with the clerk under section 104(3), the electors list which is inserted in the ballot box on election day indicates whether an elector has in fact voted. The situation regarding voting proxies is different in that the original and the copy of the voting proxy contain the same identical information.

The mere fact that the copies of the voting proxies are in the possession of the clerk does not make them a public record. We note that an earlier section of the MEA, which stated that nomination papers were to remain with the clerk, was amended in 1990 to expressly provide that nomination papers are to be open to inspection by a person during the clerk's normal office hours. Thus, it would appear that the legislature felt it was necessary to draft an explicit provision in order to provide for access.

Similarly, Parts II and III of the MEA which deal with election finances, allow for inspection of documents by the public. Section 155(1) provides that documents, financial statements, reports

and declarations filed with the clerk under this Part are public records and may be inspected by any person upon request at the office of the clerk during normal office hours. Section 199(1) contains a comparable provision.

Given the presence of certain express access provisions in the MEA respecting certain documents, it is clear that the legislature turned its mind to this issue. Accordingly, in the absence of an express access provision respecting access to voting proxy copies, we cannot conclude that section 104(3) renders the copies of voting proxies public records.

3) Section 111

The Township referred us to the provisions of section 111 of the MEA:

Under Section 111 of the Municipal Elections Act it states what is to be secret including the act of voting. It does not include a listing of documents not addressed in Section 84, "What to be placed in ballot box."

Section 111 of the MEA sets out the basic principle that the act of voting must be conducted in secret and prohibits persons from communicating or inducing others to disclose how an elector has voted. Section 111 is set out below:

- (1) Every person in attendance at a polling place or at the counting of the votes shall maintain and aid in maintaining the secrecy of the voting.
- (2) No person shall interfere or attempt to interfere with an elector when marking his or her ballot paper, or obtain or attempt to obtain at the polling place information as to how an elector is about to vote or has voted.
- (3) No person shall communicate any information obtained at a polling place as to how an elector at such polling place is about to vote or has voted.
- (4) No person shall directly or indirectly, induce or attempt to induce an elector to show his or her ballot paper after the elector has marked it so as to make known to any person how he or she has voted.
- (5) Subject to section 69, an elector shall not show his or her ballot paper, when marked, to any person so as to make known how the elector voted.
- (6) No person who has voted at an election shall, in any legal proceeding to question the election or return, be required to state how or for whom he or she has voted. R.S.O. 1980, c. 308, s. 95.

It is our view that section 111 of the MEA does not support the view that copies of voting proxies should be made public.

3. Section 53(2) of the Act

In its original submissions, the Township raised the confidentiality provision in section 67 of the provincial Freedom of Information and Protection of Privacy Act. However, the applicable legislation in this case is the municipal Act. Section 53(2) of the municipal Act contains the following confidentiality provision:

(2) The following confidentiality provisions prevail over this Act:

1. Section 105 of the Municipal Elections Act.

...

Section 53(2) states clearly that section 105 of the MEA prevails over the provisions of the municipal Act. However, since copies of the Appointment of Voting Proxy are not placed in the ballot box, and only the contents of a ballot box are protected from inspection by section 105, copies are not covered by section 105; accordingly, section 53(2) does not apply.

4. All Information on Voter Proxies is Public Information

The Township advised that all the information contained within the Appointment of Voting Proxy was public information obtainable from the Assessment Roll as well as the voters list prepared by the Ministry of Finance.

Similarly, in its submissions, Municipal World wrote that a proxy form constituted an amendment to the list of electors -- a document that is in the public domain. Municipal World added that the proxy form contained no information about the person(s) for whom the elector or representative intended to vote and therefore did not constitute an invasion of privacy regarding the secrecy of voting.

In considering these points we noted that some of the information on the Voting Proxy does not appear publicly elsewhere -- the Assessment Roll does not list the electors' appointing proxies, or electees who are appointed proxies. Neither does the voters list prepared by the Ministry of Finance contain this information. Therefore, the information at issue is not in fact the same.

5. Electoral Scrutiny

In response to the draft report, the Township advised that it had consulted with Municipal Affairs and Municipal World, since they produced the forms used by the Township. The Township stated:

Upon speaking with representatives from the Ministry of Municipal Affairs, all were of the opinion that the proxy vote applications, which remain in the possession of the Clerk, were public documents. The main reason for this, they believe, is that the municipal elections process is elector regulated and the elector must have access to some of the election documents during and immediately after

the conclusion of the election to ensure compliance with the provisions of the election regulations and legislation.

In its submissions to the draft report, Municipal Affairs wrote:

Municipal government is structured with an assumption that an informed and motivated public will accept responsibility for the enforcement of legislation that regulates municipal conduct. The Municipal Elections Act provides for enforcement by an elector, with a few exceptions, not by a provincial agency. To facilitate this enforcement it is necessary that relevant election documents be available.

The certified copy of the proxy that remains in the possession of the Clerk is one such document that is available for inspection to ensure the integrity of the election. In making the proxy form available, it permits the public to scrutinize the conduct of the election and provide the necessary checks and balances to the process. Only through access to the proxy form can an elector determine whether all steps described above have been complied with.

We share the view that electoral scrutiny is extremely important. However, in our view, there are other less intrusive means by which to achieve this objective. As noted earlier, individuals may apply to the court under section 105(1) to examine the original voting proxies. Section 105(1) allows for the inspection of the contents of a ballot box upon the order of a judge. Section 105(2) provides that such an order may be made where a judge is satisfied by affidavit or other evidence that the inspection is required for the purpose of maintaining a prosecution for an offence, or corrupt practice, or of taking proceedings for contesting an election or return.

In addition, voting proxies can be checked by a scrutineer on election day or by the clerk prior to or after the election. Presumably the clerk maintains a list of the voting proxies, since an individual can only serve as a proxy once, unless he or she is acting for family members.

In summary, we are unable to conclude that the information contained in the copies of the voting proxies should not be afforded any privacy protection. In reaching this conclusion we could not ignore the strict protection given to the same information by section 105(1) of the MEA. This, together with the absence of any explicit access provision relating to copies of voting proxies, compels us to conclude that section 27 of the Act does not apply.

Conclusion: Section 27 of the Act does not apply to the copies of the Appointment of Voting Proxy.

Issue C: Did the Township disclose the complainant's personal information in compliance with section 32 of the Act?

Section 32 of the Act states that an institution shall not disclose personal information except under certain specific circumstances.

Although the Township did not make any submissions under section 32 of the Act, we have reviewed the provisions of this section. It is our view that none of the provisions of section 32 apply. Therefore, the Township's disclosure was not in compliance with section 32 of the Act.

Conclusion: The Township's disclosure of the complainant's personal information was not in compliance with section 32 of the Act.

SUMMARY OF CONCLUSIONS

- The completed Appointment of Voting Proxy would have contained the complainant's personal information as defined in section 2(1) of the Act.
- Section 27 of the Act does not apply to the copies of the Appointment of Voting Proxy.
- The Township's disclosure of the complainant's personal information was not in compliance with section 32 of the Act.

RECOMMENDATION

We recommend that the Township cease disclosing copies of the Appointment of Voting Proxy, effective immediately.

Within six months of receiving this report, the Township should provide the Office of the Information and Privacy Commissioner with proof of compliance with the above recommendation.

Original Signed by:
Ann Cavoukian, Ph.D.
Assistant Commissioner

August 16, 1995
Date

32. An institution shall not disclose personal information in its custody or under its control except,
- (a) in accordance with Part I;
 - (b) if the person to whom the information relates has identified that information in particular and consented to its disclosure;
 - (c) for the purpose for which it was obtained or compiled or for a consistent purpose;
 - (d) if the disclosure is made to an officer or employee of the institution who needs the record in the performance of his or her duties and if the disclosure is necessary and proper in the discharge of the institution's functions;
 - (e) for the purpose of complying with an Act of the Legislature or an Act of Parliament, an agreement or arrangement under such an Act or treaty;
 - (f) if disclosure is by a law enforcement institution,
 - (i) to a law enforcement agency in a foreign country under an arrangement, a written agreement or treaty or legislative authority, or
 - (ii) to another law enforcement agency in Canada;
 - (g) if disclosure is to an institution or a law enforcement agency in Canada to aid an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
 - (h) in compelling circumstances affecting the health or safety of an individual if upon disclosure notification is mailed to the last known address of the individual to whom the information relates;
 - (i) in compassionate circumstances, to facilitate contact with the next of kin or a friend of an individual who is injured, ill or deceased;
 - (j) to the Minister
 - (k) to the Information and Privacy Commissioner;
 - (l) to the Government of Canada or the Government of Ontario in order to facilitate the auditing of shared cost programs.