Information and Privacy Commissioner,
Ontario, Canada

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

PRIVACY COMPLAINT REPORT

PRIVACY COMPLAINT MC11-26

Local Services Board of Britt-Byng Inlet

February 12, 2013

Summary: The Office of the Information and Privacy Commissioner/Ontario received a complaint alleging that the Local Services Board of Britt-Byng Inlet (the board) had improperly collected and disclosed the complainant's personal information during a public meeting of the board. In response, the IPC opened a privacy complaint file to determine if the collection and disclosure of the complainant's personal information was in compliance with the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

The Privacy Complaint Report upholds the board's decision to collect the complainant's personal information, but concludes that the board was not in compliance with section 32 of the *Act* when it disclosed the complainant's personal information at a public meeting of the board.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1), 28(2), 29(1), 32(c), 32(d), 32(e); *Northern Services Boards Act*, R.S.O. 1990, c. L.28, sections 10, 16.

Orders and Investigation Reports Considered: Order MO-1290; Privacy Investigation Report MC07-68; Privacy Investigation Report PC07-71.

Cases Considered: *Cash Converters Canada Inc. v. Oshawa (City)*, 2007 ONCA 502.

OVERVIEW:

The Office of the Information and Privacy Commissioner of Ontario (the IPC) received a privacy complaint under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from an individual (the complainant) relating to the Local Services Board of Britt-Byng Inlet (the board). As a local services board, the board is subject to the *Northern Services Boards Act* (the *NSBA*), which in turn falls under the responsibility of the Ministry of Northern Development and Mines (the ministry).[1]

The complainant explained that he had written a letter on or about July 19, 2010 (the July letter), concerning an officer (the officer) of the Ontario Provincial Police (OPP) employed at the detachment responsible for Britt-Byng Inlet. The letter was addressed to the officer's supervisor at the OPP.

In his personal capacity, the officer was also a member of the board.

The complainant stated that sometime after sending this letter to the officer's supervisor, the officer provided a copy to the board and excerpts from it were read out at a public meeting of the board. The complainant stated that the board improperly collected and then disclosed his personal information at this meeting contrary to the *Act*.

In this report, I find that the collection of the complainant's personal information was in accordance with the *Act*, but conclude that the board inappropriately disclosed his personal information at the open meeting of the board in September of 2010.

BACKGROUND:

Privacy Complaint MC10-49

The circumstances of this complaint are related to Privacy Complaint MC10-49 which was also filed by the complainant and which also involved the board. That complaint was filed following the board's open public meeting in the spring of 2010 in which a motion to retain "legal counsel to investigate the potential of commencing legal proceedings" against the complainant for damages based in libel and slander was passed. The complainant stated that the board had improperly disclosed his name in the agenda and minutes of that public meeting.

An investigation into the complaint was conducted by this office. At the conclusion of the investigation, the Investigator found that the disclosure of the complainant's name and the fact that the board was considering the commencement of an action against

[1] Prior to 2011 the ministry was titled "Ministry of Northern Development, Mines and Forestry" and is still referenced as such in the *NSBA*.

him was in accordance with the *Act*. The reasons for the Investigator's decision were set out in correspondence addressed to the complainant and the board.

In the closing letter, the Investigator found that the board was required to address the question of whether or not counsel would be retained to commence legal proceedings on behalf of the board against the complainant in an open meeting pursuant to the *NSBA*. Therefore, the disclosure by the board of the complainant's personal information was in accordance with section 32(e) of the *Act* which permits disclosures that are made for the purpose of complying with an act of the Legislature.

Current Complaint

Following the completion of that investigation, the complainant filed this complaint against the board. In his Complaint Form, the complainant stated that he wrote the July letter (referred to above) to the officer's supervisor setting out his allegations regarding the officer's misconduct, and his concerns for his own safety and that of his family.

The officer subsequently received a copy of the letter from the OPP. The board acknowledged that it received a copy of the July letter from the officer although it did not state exactly when it received the letter. The board stated that the letter was provided by the officer "to the Board to assist the Board in its general consideration as to whether or not all members of the Board including [the officer] should commence legal proceedings."

On September 13, 2010, the July letter was read by the board's Chairperson at a meeting open to the public. The minutes of the meeting contain little information regarding what occurred at the meeting. However, the board acknowledges that, although the letter was not copied and distributed, "the allegations being voiced by [the complainant] in the July [ ] letter were disseminated at the Board meeting."

The IPC issued a draft report on January 17, 2013, and the complainant and board were each provided an opportunity to comment on the draft. Subsequently, both the complainant and the board responded that they would not be providing further submissions.

DISCUSSION:

The following issues were identified as arising from the investigation:

Does the information in the July letter qualify as the complainant's "personal information" under section 2(1) of the *Act*?

The information at issue in this investigation is contained in the July letter. The issue I must initially determine is whether that information qualifies as the complainant's "personal information" within the meaning of the *Act*.

Section 2(1) of the *Act* states, in part:

> "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,
>
> (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;

I note that the July letter is a letter of complaint addressed to the officer's supervisor about the conduct of the officer. It includes the complaint's name; his address; his marital status; and the personal opinions and views of the complainant in relation to his concerns for his safety and about the actions of the officer. Much of this information is highly sensitive. The letter also includes the following notation: "This letter is confidential and for your eyes only."

The board takes the position that the information does not qualify as the complainant's personal information under the *Act*, stating, in part:

> The only personal information contained in the letter would be the name [of the complainant]. However, there is no evidence or suggestion that the disclosure of the name [of the complainant], would reveal any other personal information about him.

The board also suggests that the July letter contains the personal information of the officer.

Having carefully reviewed the letter, I find that the information in it qualifies as the personal information of the complainant according to paragraphs (a), (d), (e), (f) and (h). In reaching this conclusion, I note that it includes information about the complainant's marital status and address, which falls within the scope of paragraphs (a) and (d), respectively. As the letter was explicitly provided to the OPP supervisor on the basis that it was confidential and was not to be shared, the entire letter qualifies as the personal information of the complainant pursuant to paragraph (f). In addition, the letter includes the complainant's name, which taken together with the other personal information relating to the complainant in the letter, falls within the scope of paragraph (h).

It is not necessary for me to comment on the board's argument that some of the information in the letter may also qualify as the personal information of the officer because if any of this information is the personal information of the officer, it is inextricably intertwined with the personal information of the complainant.

Was the collection of the personal information in accordance with sections 28 and 29 of the *Act*?

Section 28(2) imposes a prohibition on the collection of personal information and then sets out three circumstances where such a collection may be permissible. It states:

> No person shall collect personal information on behalf of an institution unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity.

Section 29(1) provides that an institution shall only collect personal information from the individual to whom it relates unless one of the listed exceptions applies. The board relies on section 29(1)(f) which states:

> An institution shall collect personal information only directly from the individual to whom the information relates unless,
>
> (f) the information is collected for the purpose of the conduct of a proceeding or a possible proceeding before a court or judicial or quasi-judicial tribunal;

The board's position is that the collection of the personal information was permitted pursuant to the third exception in section 28(2) because it was "necessary to the proper administration of a lawfully authorized activity."

Section 28(2) has previously been considered by the Ontario Court of Appeal in *Cash Converters Canada Inc. v. Oshawa* (*Cash Converters*).[2] In that case the Court of Appeal approved the IPC's approach which is "…to examine in detail the types of information being collected and to determine whether each type is necessary for the collecting institution's activity." The Court of Appeal stated that the *Act's* use of the term "necessary" requires that the personal information collected must be more than merely helpful to an activity, and if a purpose of the collection can be achieved by other means, then the institution is required to opt for the alternative.

Privacy Investigation Report MC07-68 found that the onus is on an institution to first identify the "lawfully authorized activity" and second, demonstrate why the collection of personal information is necessary and not merely helpful, to the proper administration of the activity.

In this circumstance, the board states that the collection of personal information was necessary to its consideration of whether or not legal proceedings ought to be commenced by the board against the complainant. Therefore, I must first determine whether this activity was a "lawfully authorized activity."

Was the board engaged in a lawfully authorized activity within the meaning of section 28(2) of the Act?

As to whether it was engaged in a lawfully authorized activity when it collected the personal information, the board stated:

> It was within the lawful authority of the Board to consider whether or not legal proceedings ought to be commenced by the Board against these various individuals, of which [the complainant] was one.

The complainant's position is that the activity was not a lawfully authorized one because:

- The board did not have the legal authority to commence a libel/slander or defamation action.

- The ministry had previously advised the board that it could not use board funds to finance a proceeding such as a libel or slander action.

[2] *Cash Converters Canada Inc. v. Oshawa (City)*, 2007 ONCA 502.

- In support of his position, the complainant referred to a letter dated March 22, 2010 from the ministry to the Chair of the board, which states, in part:

> The retention of legal counsel for the purpose of commencing action in defamation against specific individuals does not appear to be connected to the provision of services in the exercise of [the board's] powers as authorized under the *Northern Services Boards Act* (the "*NSBA*"). As such, unless [the board] is able to establish to the Ministry's satisfaction that the retention of legal counsel for a defamation action is somehow necessary to provide the services within the LSBOBBI Powers, levies or fees charged and collected pursuant to the NSBA and operating grants provided by the Ministry cannot be used to pay legal fees for a defamation action.

Regarding the ministry's March 22, 2010 letter, the board stated that "… the Ministry's letter was not a prohibition nor a definitive assertion that the Board did not have the required power to issue any legal proceedings."

I find that there is nothing in the *NSBA* that would preclude the board from retaining independent legal counsel to advise it regarding the **merits** of a legal proceeding and its **authority** to commence such a proceeding. Therefore, I find that the consultation with its legal counsel regarding a potential law suit by the board was a lawfully authorized activity.

Was the board's collection of the complainant's personal information necessary to the proper administration of the activity within the meaning of section 28(2) of the Act?

As referenced above, the board is required to establish that the personal information collected was more than merely helpful to the lawfully authorized activity. The board's position is that it was required to collect the July letter "to consider whether legal proceedings ought to be commenced by the board against" the complainant.

The board also stated:

- The letter was part of a series of "relentless, vicious attacks being made on the Board generally and [the officer] in particular" and the board had a right to defend itself against the "unfounded, untrue, deceitful, libellous and slanderous allegations."

- It was entitled to collect the information to carry out the proper administration of its lawful activities under the *NSBA* which was to defend itself from the "relentless targeted attacks and to consider

> whether or not legal proceedings ought to be commenced by the Board against the complainant."

The complainant's representations do not specifically address the question of whether the collection was necessary. However, he states that there was no need to collect the July letter for the purposes of the legal proceeding because, in his view, the board had already decided to consult a lawyer regarding a potential proceeding and therefore there was no need to collect this letter for that purpose. He also states that the information in the letter had nothing to do with the activities of the board and the legal proceeding. Finally, he notes that the July letter was written to the OPP and not the board and was confidential.

I appreciate the complainant's concerns regarding the board's collection of the July letter. However, in order for the board to ensure that its counsel was fully apprised of all relevant circumstances regarding the board's relationship with the complainant, in my view, it was necessary for the board to collect the July letter and provide a copy to their legal counsel who was engaged to provide advice regarding the potential proceeding. For these reasons, I accept the board's position that the collection was necessary to the proper administration of the lawfully authorized activity.

Section 29(1)

Regarding the manner of collection, the board relies upon section 29(1)(f) and states that the personal information in the July letter was collected for the purposes of a possible proceeding before a court. Having considered all of the information before me, I find that the indirect collection of the personal information was in accordance with section 29(1)(f).

Was the disclosure of the personal information in accordance with Section 32 of the *Act*?

As noted above, following the collection of the complainant's personal information by the board, it was disclosed by the board at a meeting open to the public.

Section 32 prohibits the disclosure of personal information unless one of the listed exceptions applies. It is the board's position that the disclosure of the complainant's personal information at the public meeting was permitted under sections 32(c), (d) and (e) of the *Act*. Those sections state:

> An institution shall not disclose personal information in its custody or under its control except,
>
> (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, employee, consultant or agent of the institution who needs the record in the performance of their 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 a treaty;

In explaining why it disclosed the personal information at issue, the board stated:

> At the Board meeting … there was a general discussion about the Board having to seek legal representation given the continued attacks on the integrity of the Board and its individual members. The letter was utilized to demonstrate the viciousness of the attacks being levied.

The board also stated:

> The citizenry of Britt-Byng Inlet wanted to know why it is that the Board was considering spending money to commence an action against [the complainant]. The citizenry was entitled to be told the truth.
> …
>
> Therefore, some of the contents of [the July letter] was disclosed to the public to explain the rational for the Board discussing whether or not it would retain a lawyer to commence legal proceedings on its behalf.

The board explained that the July letter was also disclosed to the public for the purpose of complying with a provincial statute. The board submitted that:

> In order to have a proper decision made on its legal rights, then all information surrounding was required to be considered and, considered in public as mandated by the *NSBA*.

The board also relied upon the analysis of the Investigator in MC10-49 which was referred to above. I note that in reaching the conclusion that the disclosure of the complainant's name was appropriate in that case, the Investigator stated:

> … the public meeting documentation stated that the Board was considering retaining a lawyer in order to commence legal proceedings against the complainant and another individual. Because a decision to retain a lawyer would have clear financial consequences for the Board, I am in agreement with the Board that it was required to address this matter at an open meeting.

> In order to allow for a proper discussion on the feasibility of retaining a lawyer and of pursuing potential legal action at the meeting, the Board would have to discuss the details of its dispute with the complainant as well as the merits of the proposed proceeding. Such a discussion could not take place in a meaningful way without identifying the complainant as the subject of the potential litigation.

The board asserts that this approach should be followed in the circumstance before me now. It claims that if the same approach is followed, section 32(e) of the *Act* would permit the disclosure of the complainant's personal information to the public at the September 13, 2010 board meeting.

It is the complainant's position that the board disclosed the July letter "in contravention of the NSBA with the full knowledge that it was against the board's authority within MFIPPA" and consequently, there was no reason to discuss the matter at a public meeting.

With respect to the board's argument that it was necessary to disclose the letter in an open meeting because of the potential financial consequences for the board that would result from the proposed legal proceeding, the complainant stated:

> The lawyer [for the board] had already been retained a year earlier. Money was already budgeted for the [defamation] action. The ministry required proof that the lawsuit was required for the board to deliver its services and prove that the money was not taxpayer money. The law is clear that the board cannot even threaten to sue people for defamation.

I will now consider the application of sections 32(c), (d) and (e) of the *Act* to the circumstances at issue.

Section 32(c)

Section 32(c) permits the disclosure of personal information for the purpose for which it was obtained or for a consistent purpose. The section 32(c) analysis is a two-step process.[3] First, it is necessary to determine the original purpose of the collection. Second, it is necessary to assess whether the disclosure can be properly characterized as being either for the original purpose of the collection, or for a purpose that is consistent with that original purpose.

In the circumstances of this complaint, I will not be addressing the issue of "consistent purpose" because that is only relevant where the collection of personal information was

[3] IPC Privacy Complaint Report PC07-71.

directly from the individual to whom the personal information relates[4] which was not the case here.

As noted above, the board's stated reason for collecting the July letter was to assist it in considering whether it would conduct a proceeding against the complainant. I have already found above that the collection was appropriate because it was necessary for the purposes of the legal action that was under consideration by the board's counsel.

For the reasons set out below, I find that the purpose of the disclosure at the public meeting was not the same as the purpose of the collection. In arriving at this conclusion, I note the following:

- The board described the purpose of its collection in a number of ways. It stated that the collection was (a) to consider whether or not legal proceedings should be commenced; (b) to defend itself against attacks; and (c) to provide it to legal counsel.
- As was noted by the complainant, the board had already decided to retain legal counsel in the spring of 2010 to provide advice to the board regarding the proposed legal action. Therefore, no useful purpose would be served by having a discussion of the merits of the action at a meeting open to the public in September 2010 – the matter was already under consideration by the board's counsel at that time.

- Accepting that the letter was collected as potential evidence in support of the proposed action or for consideration by counsel for the board, it does not follow that the disclosure of that evidence at the public meeting would have served the same purpose.

Taking into account all of the information and documentation provided, I find that even though the collection was for the purpose of the legal proceeding that was under consideration by the board and its counsel, the disclosure to the public at this meeting cannot be said to have been for the same purpose.

Section 32(d)

The board appears to have relied on section 32(d) to support its decision to disclose the letter to legal counsel as agent for the board. Assuming that is the case, I note that the complainant is not complaining about the disclosure to counsel in the circumstances of this complaint. In terms of the disclosure at the open meeting, I find that section 32(d) applies in circumstances where the disclosure is made to officers, employees or agents of the institution and it does not apply to the disclosure made at the public meeting in September 2010.

[4] Section 33 of the *Act*.

Section 32(e)

Section 32(e) permits disclosures made for the purpose of complying with an act of the Legislature. The board stated that section 32(e) read together with the provisions of the *NSBA* which require it to hold meetings open to the public, permitted the disclosure of this letter at the open meeting in September. The board also relies on the findings made by the Investigator in Privacy Complaint MC10-49.

As noted above, the board is subject to the *NSBA* and several of its provisions are relevant to this matter. Section 10 of the *NSBA* states:

> (1) A majority of members of the Board constitutes a quorum.
>
> (2) The concurrent vote of the majority of the whole number of Board members is necessary to pass any by-law or approve any measure.
> (3) All meetings of the Board shall be open to the public.

Section 16 of the *NSBA* concerns the purpose of public meetings and states:

> A Board shall conduct sufficient public meetings so that the inhabitants may,
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> (a) participate in a discussion of the current and proposed programs of the Board;
>
> (b) participate in the preparation of the annual estimates of the Board; and
>
> (c) participate in a discussion of the annual audit report.

These provisions of the *NSBA* require local services boards to be transparent and accountable with respect to their programs, activities and financial matters. Transparency and accountability are furthered through the statutory requirement in the *NSBA* that board meetings occur in public.

A comparison between the circumstances of this complaint and those of MC10-49 illustrates an important distinction between the two. MC10-49 concerned the disclosure of the complainant's personal information in the context of a motion to retain "…Legal Counsel to Investigate the Potential of Commencing Legal Proceedings in the Superior Court of Justice against [the Complainant and others] for Damages Based in Libel and Slander or any other cause of Action". The minutes from the March 22, 2010 meeting note that the board's Chair read to the public the "Statement of Position" and heard comments from the floor. The minutes also note that the motion was moved and seconded thereby approving the retention of legal counsel.

Subsequently, in a board meeting dated July 5, 2010 the board passed a motion (By-Law 100705d) to establish a reserve fund in relation to a possible action against the complainant and others.

After considering these circumstances, the Investigator concluded that:

> The NSBA also requires that financial matters, and matters relating to current and proposed programs, be dealt with by the local services boards in public meetings.
>
> …
>
> Because a decision to retain a lawyer would have clear financial consequences for the Board, I am in agreement with the Board that it was required to address this matter at an open meeting.

As noted above, in the matter before me, the board asserted that it disclosed the July letter to assist it in a general discussion summarizing the outstanding legal action and to assist it in considering whether it would conduct a proceeding against the complainant. However, unlike the March 22, 2010 meeting, there is no information before me to indicate that there was a motion or discussion concerning expenditures or allocation of funds relating to the action. In addition, I note that the board had already approved a decision to expend financial resources to retain counsel in the spring of 2010 and therefore the collection of this letter did not raise any issues of a financial nature. I also note that the July letter did not concern the activities of the board or its members, and it did not concern the proposed legal proceeding or the status of that legal proceeding. Instead, the letter relates to the officer in his capacity as an OPP officer, and not in his capacity as a member of the board. Having regard to all these circumstances, I find that while the board may have decided that it was appropriate to collect the July letter in order to provide it to counsel, it was not necessary or appropriate to have a meeting under the *NSBA* to discuss the letter and its contents.

As it was not necessary or appropriate to have a meeting to discuss the letter and its contents, it cannot be said that the board was permitted or required to disclose the complainant's personal information at a public meeting pursuant to the *NSBA*. Therefore, after considering all of the evidence and arguments of the complainant and the board, I conclude that the disclosure of the complainant's personal information at the September 13, 2010 board meeting was not in accordance with section 32(e).

In summary, I find that none of the exceptions in section 32 apply to permit the disclosure of the complainant's personal information at the public meeting, and therefore it was not permissible under the *Act*.

CONCLUSION:

1. The July letter included the "personal information" of the complainant as defined under section 2(1) of the *Act*.

2. The board's collection of the complainant's personal information was in accordance with sections 28 and 29 of the *Act*.

3. The board's disclosure of the complainant's personal information at the public meeting in September 2010 was not in accordance with section 32 of the *Act.*

RECOMMENDATIONS:

1. I recommend that the board ensure that a copy of this Report is provided to all current members of the board.

2. I recommend that the board limit its disclosure of personal information to that which is permitted by section 32 of the *Act*.

By **March 14, 2013**, the board should provide the IPC with proof of compliance with recommendations 1 and 2.

In light of the above, this file has been closed.

Original signed by: February 12, 2013

Jeffrey Cutler
Investigator