

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 MC13-67

City of Vaughan

March 20, 2015

Summary: The Office of the Information and Privacy Commissioner of Ontario received a complaint alleging that the City of Vaughan (the City) contravened the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) when making the complainant's personal information available on the Internet in relation to a minor variance application made under the *Planning Act*. In response, this office opened a privacy complaint file to determine if the disclosure of the complainant's personal information was in compliance with the *Act*.

The Privacy Complaint Report concludes that the City's decision to disclose the complainant's personal information via the Internet is not in contravention of the *Act*. However, the Report recommends that the City consider implementing privacy protective measures that obscures this type of information from search engines and automated agents.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1), 27, 32(c), 32(e); *Municipal Act*, S.O. 2001, c. 25, section 253; *Planning Act*, R.S.O. 1990, c. P.13, sections 1.0.1, 44(10), 45(3); O. Reg. 200/96.

Cases Considered: *Gombu v. IPC*, [2002] O.J. No. 1776.

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's representative (the complainant) relating to the City of Vaughan (the City). The complainant asserted that the City contravened the *Act* when making her personal information available on the Internet in relation to a minor variance application made under the *Planning Act*.

The complainant provided her personal information to the City via a *Form 1 - Application of Minor Variance*, which was submitted as part of her minor variance application to the City's Committee of Adjustment for their consideration. The personal information in the application included the complainant's name, address, address of the subject property, telephone number, email address and signature.

The City explained that minor variance applications are posted to the Committee of Adjustment's page of the City's website as part of the agenda package. Written submissions from any interested parties are posted in their entirety. The hearings are held in public and applicants are invited to make presentations and any interested parties or members of the public are able to address the Committee of Adjustment. Individuals wishing to address the Committee of Adjustment are required to provide their name and address for the minutes. The minutes are subsequently posted to the City's website in their entirety.

The City asserted that the *Planning Act* establishes the authority of the City's Committee of Adjustment to hold hearings to hear submissions, either in support of or in opposition to, applications for minor variance. The City explained that it is required to circulate a notice prior to a hearing and to invite all interested parties to either attend the public hearing and/or submit in writing their views and concerns. Furthermore, the City stated that the *Planning Act* requires it to maintain and make available to the public the minutes and records of all applications and decisions of the Committee of Adjustment.

The City explained that it has implemented a *Public Record Redaction* procedure, enabling it to exercise discretion regarding requests from individuals to have their personal information redacted from the City's website. The procedure provides that under certain circumstances, the City will consider redacting the house number or apartment number on any document that is posted to the website. The individual's name and street name will remain.

The complainant accessed the City's redaction process and the City agreed to partially accommodate her request by redacting her telephone number, house number of her former address, email address and signature. The City continues to make the complainant's name and address of the subject property where she currently resides available on the Internet. The complainant seeks to remove her name, in association with the minor variance, from the information made available online by the City.

In this report, I find that the City's decision to disclose the complainant's personal information via the Internet was in accordance with the *Act*, but recommend that the City consider adopting measures that obscure this information from public search engines and automated agents.

DISCUSSION:

The following issues were identified as arising from the investigation:

Does the information at issue qualify as the complainant’s “personal information” under section 2(1) of the Act?

Personal information is defined in section 2(1) of the *Act* which states, in part:

“personal information” means recorded information about an identifiable individual, including,

...

(d) the address, telephone number, fingerprints or blood type of the individual,

...

(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.

At the complainant’s request, the City redacted a portion of her former street address, email address and signature from the information made available online. Currently, the information at issue is the complainant’s name in relation to the minor variance application, including the address of the subject property. In my view, this information meets the requirements of paragraphs (d) and (h) of the definition of “personal information” in section 2(1) of the *Act*. This conclusion is not disputed by the parties. For these reasons, the information in question is “personal information” as defined in section 2(1) of the *Act*.

Does section 27 of the Act apply to the personal information in question?

Section 27 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.

Section 27 is found in Part II of the *Act* which is the part that governs the collection, use, disclosure and retention of personal information.

If section 27 applies, the information at issue is excluded from Part II of the *Act* and the privacy provisions found in that part do not apply to the collection, use and disclosure of the personal information at issue. Although the parties made thoughtful submissions on the application of section 27, I find it unnecessary to come to a determination on this issue. I conclude that, even if the privacy protection provisions in Part II of the *Act* apply, the disclosure of the information by the City complies with those provisions.

Does section 32 of the Act apply to the personal information in question?

Section 32 of the *Act* provides a list of exceptions to the general prohibition against the disclosure of personal information by institutions, as follows:

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

...

- (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;

Section 33 defines consistent purpose as referenced in section 32(c) as follows:

The purpose of a use or disclosure of personal information that has been collected directly from the individual to whom the information relates is a consistent purpose under clauses 31 (b) and 32 (c) only if the individual might reasonably have expected such a use or disclosure.

In my consideration of sections 32 and 33, it is necessary to have regard to provisions of the *Planning Act* and *Municipal Act* which signal a legislative intent to make planning matters and processes transparent to the public.

To begin, the *Planning Act* authorizes the City to create a Committee of Adjustment with the authority to grant minor variances. The *Planning Act* requires notice to be provided regarding the Committee of Adjustment's hearing of minor variance applications and for such meetings to be held in public. The public nature of this process is reiterated in the duty imposed upon the Committee of Adjustment to maintain records.

Next, under section 1.01 of the *Planning Act*, information required to be provided to a municipality in relation to planning matters, including minor variance applications, is to be made available to the public.

The *Planning Act's* associated *Regulation 200/96* (Minor Variances) specifies that an Application for Consent/Application for Minor Variance is to include "The name, address and telephone number of the owner of the subject land and of the agent if the applicant is an agent authorized by the owner."

The City's *Form 1 - Application of Minor Variance* provides notice to applicants about the public availability of information collected through the Form. Although this has been amended since the complainant submitted her application in September 2012, the notice as it appeared in the application submitted by the complainant stated:

This information is collected and maintained for the purpose of creating a record that is available to the general public pursuant to Section 27 of [the *Act*], as amended. Questions about this collection should be directed to the Secretary-

Treasurer, City of Vaughan Committee of Adjustment, at the above noted address.

Section 44(10) of the *Planning Act* requires the City to keep on file minutes and records of planning applications and the proceedings of Committee of Adjustment. Section 253(1) of the *Municipal Act* requires the City to make those records available for public inspection, as follows:

Subject to the *Municipal Freedom of Information and Protection of Privacy Act*, any person may, at all reasonable times, inspect any of the records under the control of the clerk, including,

...

- (b) minutes and proceedings of regular, special or committee meetings of the council or local board, whether the minutes and proceedings have been adopted or not;
- (c) records considered at a meeting, except those records considered during that part of a meeting that was closed to the public;

It is clear from the above provisions that personal information contained in variance applications is to be made available to the public, that applications are to be kept on file by the City and that any member of the public may inspect the records at all reasonable times.

The City's position is that its policy of posting information pertaining to minor variance applications before the Committee of Adjustment on its website is consistent with its obligations under the *Planning Act* to make such information publicly available.

In its submissions the City commented on the application of sections 32(c) and 33 of the *Act*, stating:

The personal information at issue was obtained and compiled to process an application for a minor variance to a subject property. The process of obtaining a minor variance is a public process and includes submission of information by the owner, the circulation of information to neighbouring property owners and government agencies, the posting of a sign at the subject property and a public meeting.

Section 33 of [the *Act*] defines "consistent purpose" as "only if the individual might reasonably have expected" the disclosure of the information."

Applicants are made aware of the public nature of the CA/minor variance process through:

- a) Information contained on the application form
- b) The need (at their own expense) to post a sign on the subject property which details the nature of the request for minor variance, the date of

the public meeting and instruction on how to obtain further information

- c) Attending or arranging for an Agent to attend the public meeting where the application will be considered

At the time of the complainant's application, the application form stated that the information provided would be made available to the public.

Like many municipalities, the City has adopted the use of the Internet to disseminate information about its workings. In its submissions, it suggests that the obligation to make information "available" must be interpreted broadly and must include the use of available technology including the Internet, in order to provide citizens with equal access to information to allow for full participation in government processes.

The complainant also addressed the application of section 32, stating:

The publication of the records on the Internet in a manner that permits those records to be cached and indexed is not required by the Legislature. As previously discussed, the Legislature only requires that the information be made "available" to the public. The minimal requirement is that the records be available for inspection on a record-by-record basis. Vaughan's practice goes beyond the requirements, as the alternative practices of the City of Toronto and other municipalities demonstrate.

Accordingly, the question is whether the information is being disclosed for a purpose that is consistent with the purpose for which it was obtained or compiled, having regard to what an individual may have reasonably expected.

At the time [the complainant] made the application, Form 1 stated as follows in relevant part:

Personal information on this form is collected under the legal authority of the Planning Act, R.S.O. 1990 C.P. 13 as amended.
This information will be used to process an application for a minor variance or permission for the Committee of Adjustment.

Information on this application and any documentation submitted in support of or in opposition, becomes the property of [the City].
This information is collected and maintained for the purpose of creating a record that is available to the general public...

Based on the foregoing notice, a reasonable person would conclude that [the City] was collecting information solely for the purpose of processing an application for a minor variance and that any record created for the purpose of being made available to the general public would also be for that purpose. A reasonable person would not expect that the form being submitted would be published on the

internet in a form that would be cached and indexed by a third party for a commercial purpose unrelated to the original purpose for which the records were created.

In my view, the public nature of the minor variance application process, including the signage, the Committee of Adjustment meetings and the notice that the information will be made public supports a finding that the disclosure is consistent with the purpose of collecting the personal information as per sections 32(c) and 33. Taken together, these factors indicate that the complainant “might reasonably have expected such disclosure.”

Turning to the section 32(e) exception, I note that the filing and inspection scheme at section 44(10) of the *Planning Act* and section 253 of the *Municipal Act* are intended by the legislature to be the mechanism for making personal information contained in variance applications available to the public in compliance with section 1.0.1. Together, sections 44(10) and 253 fall within the exception to the prohibition against disclosure at s. 32(1)(e) of the *Act* where disclosure is made “for the purpose of complying with an Act of the Legislature.”

The question before me is whether the exception encompasses the disclosure of personal information in bulk electronic format via the Internet.

As part of the initial complaint, the complainant requested that all personal information be redacted from the material made available online. Subsequently, the complainant disputed the manner in which the information is made available to the public via the Internet. As articulated in the submissions, the complainant states:

[The Complainant] is not saying that the information in [the City’s] files needs to be redacted or made inaccessible on a record-by-record basis. What [the Complainant] objects to is the publication on the Internet in a manner in which [the City] no longer maintains the information.

I will consider the two principal issues arising out of the complainant’s submissions below.

In the circumstances of the complaint, is the City required to redact personal information made available on the Internet?

In *Gombu v. IPC*¹ the matter concerned the disclosure of personal information in bulk electronic format to individual requestors. Making the records available on the Internet is a form of bulk disclosure, albeit to the public at large and not individual requestors.

The Court in *Gombu*, in rejecting the finding made by the IPC in Order MO-1366, adopted the following approach which is useful to determining how to balance conflicts between access and privacy. In *Gombu*, the Court stated:

Although the [Act] expressly equates electronic and paper records, [a reference by the Court to the definition of “record” at section 2 of the *Act*] the Commissioner

¹ *Gombu v. IPC*, [2002] O.J. No. 1776.

gave considerable weight to the perceived danger in the possible inappropriate use of electronic records. He concluded that disclosure of the database would constitute an unjustified invasion of personal privacy that warranted refusal to disclose the material.

At p. 18 of his reasons, the Commissioner stated:

In the circumstances of the present appeal, I am satisfied that the disclosure of the personal information in electronic form, where it can be massively disseminated, matched and merged, and used for purposes far beyond those for which the information was collected in the first place, is a relevant factor to consider, and weighs significantly in favour of non-disclosure of the personal information in that format.

In my opinion, the view taken by the Commissioner of the dangers of misuse of the database is not reasonable, particularly in the context of the present electronic age in which governments are increasingly moving to electronic information-storing. Moreover, any danger of misuse exists even with the paper version presently available to the public. In today's electronic age, the paper version can be converted to electronic form by use of an electronic "scanner". Once thus converted, the danger of inappropriate use of the material remains.

The definition of "record", as previously noted includes information recorded in both paper and electronic form; and, in any event, paper material may be converted to an electronic database. Hence, the distinction drawn by the Commissioner did not provide a reasonable basis for refusal to disclose the requested database. Furthermore, the reasonableness of his interpretation must be considered in light of the importance of freedom of information legislation in furthering the democratic process through public scrutiny and transparency.

In a contextual consideration of the overall legislative scheme, it must be remembered that s. 88(5) of the *Municipal Elections Act*, when read with the accompanying regulations, specifically overrides the privacy interests otherwise required to be considered under the [Act], and mandates disclosure of campaign contributors' names, addresses and amounts given. The telephone numbers of the contributors is the only personal information contained in the electronic database that is not contained in the hard copy material already disclosed. In my view, given the availability of an electronic database that may be easily accessed, collated and cross-referenced, its disclosure would achieve the important objective of enhancing the transparency of the political process with only a minimal further intrusion upon the personal privacy of contributors, whose names, addresses and amounts contributed are already subject to disclosure. It was, in my view, unreasonable for the Commissioner to place that minimal intrusion ahead of the importance of furthering public accountability in the political process.

A concern raised in *Gombu* was that disclosing records in an electronic format was detrimental to privacy because it removed the de facto privacy protection created by the relative obscurity of paper records. As noted by the Court, circumstances have changed such that records are expected to be provided in electronic format.² Part of this is the ease of use for individuals wishing to access records and databases which in turn increase transparency. Indeed, in *Gombu* this was the complainant's stated purpose for requesting an electronic copy of the database.

In confirming that the records could be disclosed in bulk electronic format, the Court noted that this would make them more easily accessible with minimal further intrusion upon personal information contained within given that they were already subject to disclosure.

In the circumstance of this complaint, sections 1.0.1. and 44(10) of the *Planning Act* and 253 of the *Municipal Act*, taken together, specifically override the privacy interest of individuals engaging the minor variance process and, as in *Gombu*, mandate the disclosure of personal information in association with that process. I conclude that the City's decision to disclose the complainant's personal information in electronic format is in compliance with the *Act*.

In response to the argument that this information should not be disclosed via the Internet, in the circumstances of this complaint I cannot identify any basis that would prohibit information otherwise subject to the section 32 exceptions from being disclosed via the Internet. I note that Committees of Adjustment are required to demonstrate accountability via a transparent process that permits individuals to participate, scrutinize and to hold institutions such as the City accountable. As such, making these records available online facilitates this goal in a manner consistent with the *Act*.

In the circumstances of the complaint, is the City required to obscure personal information from search engines and automated agents?

The complainant asserts that publishing records online with the personal information contained within searchable via third party commercial search engine providers is contrary to the *Act*. The complainant states:

What [the City] has done is to publish records in bulk on the Internet in a manner that allows those records to be cached, indexed and used by third party commercial search engine providers....[The City] is not "maintaining" the records for the purpose of creating a record that is available to the general public when it publishes and distributes those records in a manner that permits a third party commercial entity to cache the content of those records, index the records, and then serve up excerpts of those records, including cached copies, within the commercial search engine's platform. It is the third party that is making the records available.

² In *Gombu*, the Court makes the same observation and cites section 15(1) of the *Electronic Commerce Act*, 2000, S.O. 2000, c. 17, which states:

15(1) If a public body [defined in s. 1 to include a municipality and its local board] has power to create, collect, receive, store, transfer, distribute, publish or otherwise deal with information and documents, it has power to do so electronically.

In previous matters, the IPC has recognized that the format of the records affects the level of privacy protection. For example, in Investigation Report PC-980049-1 former Commissioner Ann Cavoukian addressed the distinction between records that are disclosed on a “record-by-record” basis, and “bulk access.” In considering whether land registration information was being properly disclosed, she stated:

Since the information in question is available only one record at a time, there is also a practical limit to the ability of recipients to obtain and possibly abuse the personal information in the documents.

Similarly, limiting the “search ability” of an individual by restricting the information that is identifiable by search engines operates on a similar principle to provide a veneer of privacy. The information is still available to the public, but the personal information only arises upon reviewing a document. For example, a global search conducted by entering a person’s name into a search engine would not generate a link to the record, although accessing the record via a database made available by an institution online would identify the individual.

The City has implemented its *Public Record Redaction* procedure as an attempt to balance transparency and privacy, stating in its submissions:

[T]he City strives to strike a balance between its legislative obligations to provide compliant, transparent and accountable government and to ensure the necessary protections for disclosure of personal information and privacy of individuals.

The process requires individuals to submit a request detailing the potential harm that may result from making the information available on the City’s website. The complainant has availed herself of this process and the City has redacted her telephone number, house number, email address and signature. The City continues to make the complainant’s name and street number available online.

The *Public Redaction Procedure* is a commendable and appropriate measure to address concerns of individuals based on their particular circumstances. However, the fact remains that personal information that the City continues to make available on the Internet is subject to widespread dissemination through public search engines and automated agents.

Although I have concluded that in the circumstances of this complaint, the City is permitted under the *Act* to disclose personal information on the Internet, I also believe that the City should explore additional measures that would better balance transparency and privacy. The City could consider technological measures that obscure the contents of minor variance applications, or the personal information in such applications, from search engines and automated agents that systematically index and copy site contents. Two examples of the possible measures the City could consider are the implementation of a “robot exclusion” and the use of “no-index metatags”. There are other technological solutions that may also be feasible. These solutions may be implemented generally, or upon request, as an adjunct to a *Public Record Redaction* procedure. Implementing such measures does not require the redaction of the complainant’s name from the record made available online. To the contrary, the records would still be available

online with the complainant's personal information, but with a layer of privacy protection afforded by shielding it from search engines and automated agents.

As municipalities move towards greater transparency by embracing the principles of Open Government, they must still ensure that personal privacy is protected. The use of the Internet to implement Open Government principles raises issues that justify further discussion and development than is possible within the context of this complaint. While this office has made a specific recommendation to the City, we will also be contacting it as part of the development of new guidelines on the protection of personal information contained in proactive disclosure disseminated through the Internet. The complainant's views will also be canvassed, if she wishes to participate.

CONCLUSION:

1. The City's decision to disclose the complainant's personal information via the Internet is not in contravention of the *Act*.

RECOMMENDATION:

I recommend that the City consider implementing measures to configure personal information relating to minor variance applications that it makes available online in order to obscure this information from search engines and automated agents. Specifically, the City is asked to consider implementation of the "robot exclusion" and "no-index metatags" identified above, as well as other technological means of preventing the information from being cached and indexed in third-party search engine results. The City is asked to consider implementation of these measures generally, in relation to the posting of minor variance application materials, or upon request of individuals, as an adjunct to its *Public Record Redaction* procedure.

Original signed by:

Jeffrey Cutler
Investigator

March 20, 2015
