<u>SUPREME COURT OF NOVA SCOTIA</u>

Citation: *Raymond v. Nova Scotia (Freedom of Information and Privacy Commissioner)*, 2017 NSSC 322

Date: 20171213
Docket: Hfx. No. 460479
Registry: Halifax

Between:

Michele Hovey Raymond

Applicant

v.

Office of the Information and Privacy Commissioner of Nova Scotia

Respondent

- and -

Halifax Regional Municipality

Respondent

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	June 15, 2017, in Halifax, Nova Scotia
Counsel:	Michele Hovey Raymond, Self-Represented Applicant Jason Cooke and Jennifer Keliher, for the Respondent, OIPC Karen E. MacDonald and Brandon Knill, for HRM

By the Court:

Nature of Application

[1] Judicial review of a decision of the office of the Information and Privacy Commissioner (hereinafter, either "OIPC" or "the Commissioner") is sought on the basis that this respondent declined to review two access to information requests filed by the applicant. The requests had been denied at first instance by the other respondent, Halifax Regional Municipality ("HRM").

[2] The applicant had asked whether she, or her home located on Boscobel Road, were discussed during certain in-camera meetings of HRM Regional Council.

[3] The respondent HRM took the position that the applicant's requests must be denied under s. 473(1) of Part XX of the *Municipal Government Act,* SNS 1998, c. 18, ("*MGA*"). This section allows a municipality to refuse to disclose information that would reveal the substance of the deliberations of a meeting of municipal council held in private.

[4] After having been requested to review HRM's decision, OIPC concluded that the applicant's original requests of HRM had been procedurally non-compliant with the relevant sections of the *Municipal Government Act*. OIPC determined that Ms. Raymond's requests were for information and not for access to records, and that, therefore, they did not meet the threshold requirements in order for the municipality to have processed them in the first place. As a consequence, OIPC concluded that it was without jurisdiction to review HRM's decision. It is in relation to this determination that the applicant seeks judicial review.

Background

[5] At the outset, the applicant's request of March 8, 2014 was refused by HRM. She sought:

> i. Names of all parties in "litigation or potential litigation" discussed in-camera by HRM…on 10 December 2013 (added item 13.4) and general subject

> matter of litigation…location of matters giving rise to potential litigation (Record, Tab 1).

[6] When the form asked as to whether she wished to examine the record or receive a copy of the record, she checked off the latter and added:

> …disclosure of general subject matter, parties and location will suffice.

[7] HRM replied on March 25, 2014, advising Ms. Raymond that the information sought would be denied in accordance with s. 473(1) of the *Municipal Government Act*. (Record, Tab 2).

[8] Ms. Raymond tried again, this time submitting a "Form 1" dated April 15, 2014 seeking "…written confirmation or denial that I (Michelle Raymond)…or my home…Boscobel Rd, or access to my home was/were discussed in-camera by HRM...on 10 December 2013 or subsequently (in-camera). And, if so, whether a decision has been reached." (Record, Tab 3).

[9] The applicant was again asked whether she wished to examine the record or receive a copy of it, and she responded (on the form) "not necessary". This (second) request was also denied pursuant to s. 473(1) of the *MGA*. (Record , Tab 4).

[10] There is reference in the record (an email from Ms. Raymond to HRM, at Tab 5) to a phone call between Ms. Raymond and the HRM Municipal Clerk. This occurred on May 1, 2014. It appears that the applicant had been advised verbally by the clerk that there had been, in fact, no in-camera discussion of her home.

The Review

[11] Not being satisfied with the "unofficial" verbal confirmation that she had received, Ms. Raymond next sought review of the decision rendered by HRM in response to her request (Record, Tab 6). Given that the respondent OIPC is statutorily designated as the review officer not only pursuant to the *Freedom of Information and Protection of Privacy Act,* SNS 1993, c. 5 ("FOIPOP"), but also but also under the *MGA*, her request was accordingly directed to that office.

[12] As noted in the brief filed by OIPC (at p. 4):

> 1) Form 7 dated May 1, 2014 [was filed by the applicant] seeking a review of HRM's March 25, 2014 decision and asking the review officer to

recommend that "need only confirm or deny whether applicant/applicant's home and access were discussed at specified meeting of HRM Council."

The Applicant filed a second Form 7 dated May 30, 2014 seeking a review of HRM's April 23, 2014 decision and asking the review officer to recommend: "HRM confirm or deny existence of record (i.e. minutes of in camera meeting of HRM Council involving my home/access as item of 10 December 2013 council meeting). HRM should disclose <u>subject matter</u> of litigation to Review Officer (tho [sic] not to me) in order to allow Review Officer to verify." (emphasis in original)

For all intents and purposes these two Form 7s were treated as one request.

2) Form 7 dated May 28, 2014 seeking a review of HRM's decision of May 16, 2014 and asking the review officer to recommend: "Confirm/deny existence of in camera discussions by Halifax Regional Council whose subject was […] my home/access.

[13] The applicant followed up the above with a letter to OIPC dated November 28, 2014 (Record, Tab 11):

> […] I can absolutely confirm that [sic] I'm not seeking access to my records, but am seeking only (official, written, FOIPOP-response) confirmation/denial whether HRM has (or had) custody/control of records of in camera meetings that discuss us, our home, or the access to it. If such an official response is forthcoming, and if the provincial FOIPOP office is given the opportunity to confirm its veracity, I will be entirely satisfied with that information, and will not be seeking any more detail on these records […]

[14] The investigator filed her report on November 18, 2016 (Record, Tab 12). The investigator, Heather Burchill concluded: (Record, Tab 12, p. 41)

> PROCEDURAL NON-COMPLIANCE
>
> At the outset, it is my opinion that both Form 1 – applications for access to a record submitted in AR-14-049 and Ar-14-102 are procedurally non-compliant. The Municipality was entitled to reject your applications outright. Instead, it interpreted the applications for access so as to bring them into compliance with the statutory requirements. In my opinion, this approach was entirely consistent with the public body's duty to assist.
>
> Having interpreting your Form 1's as 'applications for access to records', the public body located responsive records generated by Council during their *in camera* meetings. *MGA* s. 473(1) was applied to refuse access to these records. It is my opinion that these records fall within this exemption. There is no evidence that they exercised their discretion in an unreasonable manner in doing so.

[15] Ms. Burchill summarized her findings at p. 55 of her report:

> *MGA* s. 466(2) provides that an applicant 'may ask to examine the record or ask for a copy of the record'. As such, it is my opinion that the Municipality correctly interpreted your request for disclosure of information from the record, as a request for 'access to the record'.
>
> Having correctly interpreted your request so as to conform to the requirements at *MGA* s. 466, the public body did not refuse to confirm or deny that the records of these in camera meetings existed. Rather, they confirmed that there were minutes for the meetings, and refused access to these records, as authorized to do so, under *MGA* s. 473.
>
> Finally, it is [my] opinion that the Municipality was authorized to withhold these records of *in camera* meetings. Having done so, it would not be appropriate for the Commissioner to disclose the contents of these records either directly, or indirectly by way of a confirmation or denial.
>
> [Emphasis added]

[16] Finally, she advised the applicant:

> If you disagree with my analysis, please let me know and I will forward the file to the Commissioner for a formal review. A formal review is a quasi-judicial process in which the Commissioner considers written arguments from both parties and the records in question before making findings of fact and issuing her recommendations.

[17] The Commissioner, after receipt of Ms. Burchill's report, rendered her decision on January 25, 2017. Therein, she made a number of critical determinations. In summary form, she:

i. drew a distinction between a request for a record and one for information;

ii. stated that the applicant was clearly not seeking access to records in the possession of HRM;

iii. determined that, under the *MGA*, the respondent HRM's obligation was to either produce copies of records in response to requests, or to permit those records to be viewed (with some statutory exceptions) ; and

iv. concluded that no review lies to OIPC unless a request for a record is made, at first instance, to the respondent HRM.

(Decision, Record, Tab 17)

[18] As a consequence, OIPC declined to review either of HRM's determinations. The core of the Commissioner's reasoning is found in the following excerpt from the decision:

> In this case, neither application at issue complied with s. 466. The Municipality could have refused to process them on this basis alone. Instead, the Municipality chose to interpret both applications as requests for records, thereby rendering them compliant with s. 466. Having done so, the Municipality was able to process the requests under *Part XX* of the *MGA*. Normally, such decisions would be reviewable decisions under s. 487. However, in her submissions, the applicant has taken the position that the Municipality was wrong to characterize her requests as requests for "access to a record." She maintains that they were intended as requests for information and she wants them treated as such.
>
> Section 487(1) of the *MGA* is unequivocal, "(a) person who makes any request for access (…) may ask for a review (…)". I was prepared to accept jurisdiction based on the Municipality's willingness to interpret the applicant's Form 1 as compliant with s. 466. However, I have no choice but to accept the applicant's submission that she did not make requests for access to records. I must find that both applications did not comply [with] s. 466 because the applicant is requesting access to information in the form of answers to questions as opposed to access to records. On this basis, I also find that she is not authorized to make a request for review under s. 487(1). Accordingly, I am without jurisdiction under the *MGA* to review either of the Municipality's decisions. (Record, Tab 17, p. 5)
>
> [Emphasis added]

[19] The applicant then applied for judicial review of OIPC's decision. Pursuant to an earlier order of this court (on March 10, 2017), Justice Coughlan directed that HRM be added as a respondent in this matter.

Issues

[20] The applicant raises ten issues arising within in the context of this review. However, I agree, broadly speaking, with counsel for the respondent OIPC, that they may be consolidated, in effect, as he has suggested, with some minor revisions. They are (restated) as follows:

i. Did the Commissioner err in treating the applicant's access to information requests as requests for information rather than request for records?

ii. Did the Commissioner err in declining to review HRM's denial of the applicant's request based on the relevant provisions of the *MGA*?

Standard of Review

[21] Before beginning a substantive analysis of these issues, it is important, at the outset, to consider the applicable standard of review when dealing with them.

[22] The standard which I shall apply to each is that of "reasonableness". It is the more deferential of the two potential standards identified in *Dunsmuir v. New Brunswick,* 2008 SCC 9. I will explain why this is so.

[23] In delivering the majority decision in *Dunsmuir,* at paras. 54 – 56, Justices Bastarache and Lebel wrote:

> 54 Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: *Toronto (City) v. C.U.P.E.*, at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan*, [1975] 1 S.C.R. 517, where it was held that an administrative decision maker will always risk having its interpretation of an external statute set aside upon judicial review.
>
> 55 A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:-
>
>> A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.-
>>
>> A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).-
>>
>> The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard *(Toronto (City) v. C.U.P.E.*, [2003] 3 S.C.R. 77, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

> 56 If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.

[24] Whether the decision is one of true jurisdiction or an issue of law arising from either the decision maker's home statute or one closely connected with its function merits consideration. *Edmonton v. Edmonton East (Capilano) Shopping Centre Limited,* 2016 SSC 47 elaborates upon this concept. At paras. 22 and 23 of *Edmonton East*, *supra,* the court noted:

> 22 Unless the jurisprudence has already settled the applicable standard of review (*Dunsmuir*, at para. 62), the reviewing court should begin by considering whether the issue involves the interpretation by an administrative body of its own statute or statutes closely connected to its function. If so, the standard of review is presumed to be reasonableness (*Mouvement laïque québécois v. Saguenay (City*), 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 46). This presumption of deference on judicial review respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts. A presumption of deference on judicial review also fosters access to justice to the extent the legislative choice to delegate a matter to a flexible and expert tribunal provides parties with a speedier and less expensive form of decision making.
>
> 23 The *Dunsmuir* framework provides a clear answer in this case. The substantive issue here -- whether the Board had the power to increase the assessment -- turns on the interpretation of s. 467(1) of the *MGA*, the Board's home statute. The standard of review is presumed to be reasonableness.

[25] As also noted in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association,* 2011 SCC 61, at paras. 34 and 39:

> 34 The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that definition of jurisdiction. Indeed, in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, <u>unless the situation is exceptional, and</u>

we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.

…

39 What I propose is, I believe, a natural extension of the approach to simplification set out in *Dunsmuir* and follows directly from Alliance (para. 26). True questions of jurisdiction are narrow and will be exceptional. When considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness. As long as the true question of jurisdiction category remains, the party seeking to invoke it must be required to demonstrate why the court should not review a tribunal's interpretation of its home statute on the deferential standard of reasonableness.

[Emphasis added]

[26] In the case at bar, I am in agreement with the submission of counsel for the respondent HRM when she states at para. 29 of her brief:

29. OIPC's home statute is the *Freedom of Information and Protection of Privacy Act,* SNS 1993, c. 5 ("FOIPOP"). However, Part XX of the *MGA* is almost identical to the *FOIPOP Act*. Within the definitions set out section 461 of the *MGA,* the "Review Officer" is the individual appointed by the Governor in Council pursuant to the *FOIPOP Act;* this is Ms. Tully. Further, Part XX of the *MGA* is a statute which is closely connected to the OIPC's function, and with which it has familiarity…deference must be given to decisions rendered by Ms. Tully in this matter. It is submitted that the Standard of Review on this judicial review is reasonableness.

[27] The Commissioner, in her deliberations, was not resolving a question of central importance to the legal system as a whole. Rather, the issue involved is more comparable (although obviously not identical) to that encountered in the *Alberta Teachers Association*, *supra.* The comments at p. 32 thereof are apposite:

32 And it is not a question of central importance to the legal system as a whole, but is one that is specific to the administrative regime for the protection of personal information. The timelines question engages considerations and gives rise to consequences that fall squarely within the Commissioner's specialized expertise. The question deals with the Commissioner's procedures when conducting an inquiry, a matter with which the Commissioner has significant familiarity and which is specific to PIPA. Also, in terms of interpreting s. 50(5) PIPA consistently with the purposes of the Act, the relevant considerations include the interests of all parties in the timely completion of inquiries, the

> importance of keeping the parties informed of the progression of the process and the effect of automatic termination of an inquiry on individual privacy interests. These considerations fall within the Commissioner's expertise, which centres upon balancing the rights of individuals to have their personal information protected against the need of organizations to collect, use or disclose personal information for purposes that are reasonable (s. 3 PIPA).

[28] As we have seen, deference usually is the result where the issue in question involves the interpretation by the decision maker of its home statute or statutes with which it will have a great deal of familiarity. Here, the Commissioner engaged in an interpretation of Part XX of the *Municipal Government Act.* Specifically, she considered whether the legislation could countenance the release of information by HRM, to the applicant, rather than the records containing the information themselves.

[29] The *MGA* is a statute with which the OIPC will have "particular familiarity" (to borrow the idiom employed at para. 54 of *Dunsmuir)*. Section 146(1) names the review officer appointed pursuant to FOIPOP (in other words, the respondent OIPC) for the purpose of reviews initiated under s. 488 of the *MGA*. Thus, the Commissioner was required to determine the scope of her duty within the context of a statutory regime which requires her to balance the public need for access to municipal records in relation to the other interests with which the legislation is concerned.

[30] For all of these reasons, the standard of review applicable to issue No. 2 is that of reasonableness.

[31] The first issue was very clearly fact based. That said, it was also integrally related to the statutory disclosure scheme with which OIPC regularly deals. As the court in *Dunsmuir* pointed out at para. 51

> As we will now demonstrate, questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness.

[32] The applicable standard of review with respect to the first issue is also that of reasonableness.

What does "reasonableness" mean in this context?

[33] Many courts have taken the opportunity to attempt to answer this question. It is customary to begin with para. 47 of *Dunsmuir*:

> 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[34] Our Court of Appeal has also provided guidance with respect to this question. For example, Justice Fichaud observed in *Delport Reality v. NS (Registrar General of Nova Scotia),* 2014 NSCA 35 (at para. 25) that:

> 25 Reasonableness means the court respects the Legislature's choice of decision maker by analyzing that tribunal's reasons to determine whether the result, factually and legally, occupies the range of reasonable outcomes. The question for the court isn't -- What is correct or preferable? The question is -- What is reasonable? If there are several reasonably permissible outcomes, the tribunal, not the court, chooses among them. If there is only one and the tribunal's conclusion isn't it, or several and the tribunal's decision isn't among them, the decision is set aside. *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, paras 50-51. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board*), [2011] 3 S.C.R. 708, paras 7-11. *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, paras 20, 31-41. *Coates v. Nova Scotia, supra*, para 46.

[35] Then, in *Egg Films v. Nova Scotia Labour Board,* 2014 NSCA 33 at para. 26, the court noted:

> 26 Reasonableness is neither the mechanical acclamation of the tribunal's conclusion nor a euphemism for the reviewing court to impose its own view. The court respects the Legislature's choice of the decision maker by analysing that tribunal's reasons to determine whether the result, factually and legally, occupies the range of reasonable outcomes. The question for the court isn't -- What does the judge think is correct or preferable? The question is -- Was the tribunal's conclusion reasonable? <u>If there are several reasonably permissible outcomes the tribunal, not the court, chooses among them. If there is only one and the tribunal's</u>

> conclusion isn't it, the decision is set aside. The use of reasonableness, instead of correctness, generally has bite when the governing statute is ambiguous, authorizes the tribunal to exercise discretion, or invites the tribunal to weigh policy. *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, paras 50-51. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, paras 11-17. *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, paras 20, 31-41. *Coates v. Nova Scotia (Labour Board)*, 2013 NSCA 52, para 46.
>
> [Emphasis added]

[36] More recently, in *CUPE Local 3912 v. Nickerson,* 2017 NSCA 70, Justice Fichaud emphasized that:

> 35 The reviewing judge's perspective is wide-angled, not microscopic. The judge appraises the reasonableness of the "outcome", with reference to the tribunal's overall reasoning path in the context of the entire record. The judge does not isolate and parse each phrase of the tribunal's reasons, and then overturn because the judge would articulate one extract differently.

Analysis

a. Did the Commissioner err in treating the applicant's access to information requests as requests for information, rather than requests for records?

[37] Recourse to Part XX of the *MGA* is necessary to respond to both of the issues raised in this review. It is clear that Part XX of the legislation consistently speaks in terms of access to records. So, for example, s. 462 reads, in part:

> 462 The purpose of this part is to
>
> a) ensure that municipalities are fully accountable to the public by
>
> i. Giving the public a right of access to records.

[38] Then we have:

> 463 (1) This part applies to all records in the custody or under the control of a municipality.
>
> [Emphasis added]

[39] Then at paras. 465(1) and (2):

> 465 (1) A person has a right of access to any record in the custody, or under the control, of a municipality upon making a request as provided in this Part.
>
> (2) The right of access to a record does not extend to information exempted from disclosure pursuant to this Part but, if that information can reasonably be severed from the record, an applicant has the right of access to the remainder of the record.
>
> [Emphasis added]

[40] Section 466(1) provides the procedure to be followed when access is sought:

> 466 (1) A person may obtain access to a record by
>
> (a) making a request in writing to the municipality that has the custody or control of the record;
>
> (b) specifying the subject matter of the record requested with sufficient particulars to enable an individual familiar with the subject matter to identify the record; and
>
> (c) paying any fees required pursuant to this Part.
>
> (2) The applicant may ask to examine the record or ask for a copy of the record.
>
> [Emphasis added]

[41] The respondents have pointed to the interpretative portions of Part XX of the *MGA*. They specifically refer to the definition of "record" contained there:

> 461 In this Part,
>
> …
>
> (h) "record" includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records;
>
> [Emphasis added]

[42] It is readily apparent from the words used by the applicant herself that what she sought was information as opposed to records. As we have seen, her Form 1 request dated April 15, 2014 was explicit:

> I am writing to clarify that I am asking only for written confirmation or denial that I (Michele Raymond) and/or my home… or access to my home was/were

> discussed in-camera by HRM Regional Council on December 10, 2013 or subsequently. (Record, Tab 2)

[43] She further wrote that examination of the record or receipt of the copy of the record was “not necessary”.

[44] In her earlier Form 1 of March 8, 2014 (previously discussed), she had checked the box “I wish to receive a copy of the record” but added the words “disclosure of general subject matter, parties and location will suffice”.

[45] In her submissions to OIPC, Ms. Raymond wrote: (Quoted in Decision, Record, Tab 17, p. 93)

- It has been suggested that HRM reframed my initial request for identifying particulars (13 March 2014) as a request for access to the record; if this was the case, this was not “assisting” me since this unnecessary reframing resulted in denying access.
- These two separate requests for confirmation or denial of existence of records which would have been created on 10 December 2013 and 29 April 2014.
- I do not need access to the in-camera record, but do want to know if a record exists involving myself and my personal information and interests.
- I have at no time requested access to the records of either in-camera meeting; I have of course asked for the information as to whether or not a record exists.
- I have not gone so far as to ask for access to the record, but only for information as to whether or not a record exists including my personal information.
- Yes I can absolutely (sic) confirm that t (sic) I’m not seeking access to any records.

> [Emphasis added]

[46] During oral submissions in this court, Ms. Raymond reiterated the above position, at one point referring to the fact that she was aware that had she requested the records themselves, she would have been refused. Section 473 of the *MGA* reads:

> 473 (1) The responsible officer may refuse to disclose to an applicant information that would disclose the minutes or substance of the deliberations of a meeting of the council, village commission or service

> commissioners or of the members of the municipal body held in private, as authorized by law.

[47] Ms. Raymond’s request, restated, was (in effect) “I don’t need to see the record (I know I’m not allowed to see it anyway) but I would like to know whether a record exits (in the minutes of the in-camera meetings referred to in my applications) of contemplated legal action involving me or my home”.

[48] Such a request placed the municipality in a “no-win” situation. For example, suppose the municipality had answered “yes, such a record exists”. In doing so, it would have revealed one of the topics discussed during the in-camera meeting, notwithstanding the fact that the record itself was not divulged. This would blatantly contravene s. 473(1) of the *MGA*.

[49] If the topics discussed at the meetings in question did indeed involve potential litigation, legal counsel would likely have been present. Thus, to reveal (or even deny) that a particular topic was discussed might also potentially contravene s. 476 of the *MGA* which reads:

> 476 The responsible officer may refuse to disclose to an applicant information that is subject to solicitor-client privilege.

[50] As earlier mentioned, HRM initially chose (notwithstanding the applicant’s denial that this was the case) to characterize her request as one for access to records, and then to refuse the request pursuant to s. 473(1). Sometimes, it may be necessary for a municipality to make such efforts in furtherance of its “duty to assist” as contained (in Nova Scotia) in s. 467(1) of the *MGA*. In *Penetanguishene (Town)(Re),* 2013 CanLii 60184 (ON IPC), by way of an example, we find at para. 39:

> 39. <u>What can be distilled from the above quoted authorities is that a right to “information” does not embrace the right to require the institution to provide an answer to a specific question. However, an institution is obligated to consider what records in its possession might, in whole or in part, contain information which would answer the questions asked in a request</u>.
>
> [Emphasis in original]

[51] HRM framed the application’s requests (notwithstanding their substance) in such a manner as would permit them to considered. Having considered them, this Respondent concluded that answering would involve disclosure of information as to the substance of a meeting of council held in private, and refused the requests

under s. 473(1) of the *MGA*. These efforts on the part of HRM in reframing the requests, however, cannot alter the essential nature of Ms. Raymond's queries themselves.

[52] Given the manner in which the applicant's requests were framed, and in particular, the applicant's (subsequent) strident denials that she sought "records", the respondent OIPC's conclusion that these requests were, in substance, requests for information (rather than for access to the records themselves) was one of the reasonable outcomes available to her on the basis of her reasons. Moreover, the Commissioner's written decision (explaining her reasons for characterizing Ms. Raymond's application thus) was intelligible and transparent. Her thought process is easy to identify and follow.

[53] The applicant's submissions with respect to the first issue are accordingly without merit.

b. Did the Commissioner err in declining to review HRM's denial of the applicant's request based on the relevant provisions of the MGA?

[54] We have earlier reviewed the procedure contemplated by s. 466 of the *MGA* which governs an individual's right to seek information. It clearly deals with information contained in a record and speaks of a person's right to "…obtain access to a record", and also provides that "the applicant may ask to examine the record or ask for a copy of the record."

[55] Section 467(1) prescribes the duty of a responsible officer. This duty arises "…where a request is made pursuant to this part for access to a record…"

[56] "Responsible officer" is defined in s. 461(i)(i):

> (i) regional municipality, town or county or district municipality, the chief administrative officer, if one has been appointed or, if one has not been appointed, the clerk,

[57] Sometimes Part XX of the *MGA* refers to information. An example is found in s. 465, in ss. (1) and (2) thereof:

> 465 (1) A person has the right of access to any record in the custody, or under the control, of a municipality upon making a request as provided in this Part.

> (2) The right of access to a record does not extend to information exempted from disclosure pursuant to this Part but, if that information can reasonably be severed from the record, an applicant has the right of access to the remainder of the record.
>
> [Emphasis added]

[58] That said, the *Act* is very clear that the two concepts are not to be conflated to an artificial equivalence. What the legislation contemplates is "access to a record" and ss. 465 and 466 make this obvious.

[59] Moreover, there is no provision in the legislation for a question and answer, or inquisitorial process. The information to which one is entitled is to be gleaned by reference to the record containing it, unless the record itself is exempt from production pursuant to one of the exceptions. One such exemption is found s. 473 of the *MGA,* as we have seen.

[60] Broadly speaking, the process set forth in the *MGA* has been discussed. It begins with s. 465(1) and the articulation therein of a person's "right of access to any record in the custody of a municipality".

[61] The "chain" then extends to:

> 466 (1) A person may obtain access to a record by
>
> (a) making a request in writing to the municipality that has the custody or control of the record;
>
> …
>
> 467 (1) Where a request is made pursuant to this Part for access to record, the responsible officer shall
>
> (b) consider the request and give written notice to the applicant of the decision with respect to the request.

[62] The respondent OIPC's role is triggered by s. 487(1):

> 487 (1) A person who makes any request for access or for correction of personal information may ask for a review of any decision, act or failure to act of the responsible officer that relates to the request.

[63] "Access" to what is not specified in s. 487(1), however, the context is clearly supplied by reference to the antecedent sections of the legislation. Moreover, s.

487(3), which supplies the alternative remedy to an aggrieved applicant, is more explicit:

> (3) A person who makes a request pursuant to this Part for access to a record or for correction of personal information may, within thirty days after the person is notified of the decision or within thirty days after the date of the act or failure to act, appeal directly to the Supreme Court of Nova Scotia as provided in this Part, if no third party has been notified or if a third party who has been notified consents to that appeal.
>
> [Emphasis added]

[64] Subsections (1) and (3) have been applied so as to provide two alternative remedies to an individual whose request has been denied at first instance:

i. a right to request a review of the decision by a reviewing officer (which was the option chosen by the applicant in this case), or

ii. an appeal to this court.

[65] Accordingly, and if necessary, I would have concluded that the word "access" in s. 487(1) should be read as though it was followed by the words "to a record".

[66] However, it is not necessary for me to make a decision on the "correctness" of the respondent OIPC's interpretation of the legislation. The Commissioner, pursuant to ss. 465 and 466 of the *MGA*, concluded that a valid application had not been made at first instance because the applicant (as repeated many times in her own words) was not seeking access to a record in the possession of the municpality. The Commissioner concluded that, since this was a condition precedent to the applicant's right to request a review of HRM's decision under s. 487(1), she was without jurisdiction to proceed with a review. Her interpretation of the relevant portions of the *MGA*, a statute with which she was very familiar, was, at the very least, an eminently reasonable one.

Conclusion

[67] I dismiss the application. If costs are sought, I will accept short written submissions with respect to same within twenty days.

Gabriel, J.