SUPREME COURT OF NOVA SCOTIA

Citation: *MacDonald v. Cape Breton Regional Municipality*, 2020 NSSC 350

Date: 2020-12-03
Docket: *Syd*, No. 498139
Registry: Sydney

Between:

Kevin Tyler MacDonald

Appellant

v.

Cape Breton Regional Municipality

Respondent

Judge:	The Honourable Justice Robin Gogan
Heard:	November 3, 2020, in Sydney, Nova Scotia
Written Decision:	December 3, 2020
Counsel:	Steve Jamael, for the Appellant Demetri Kachafanas, for the Respondent

By the Court:

Introduction

[1] This is an appeal brought by Kevin Tyler MacDonald ("**MacDonald**"). He seeks access to information held by the Cape Breton Regional Municipality ("**CBRM**").

[2] In November of 2016, MacDonald unsuccessfully applied for a position with the Cape Breton Regional Police. As part of his application, MacDonald signed a Confidentiality Agreement. On March 23, 2020, he applied for disclosure of information associated with the application and interview process. He sought any and all records relating to the process.

[3] In a decision dated April 21, 2020, MacDonald received the requested records from CBRM. However, he was advised by CBRM that redactions were made from the record in accordance with ss. 480(1) and 480(3) of the *Municipal Government Act*, S.N.S. 1998, c. 13. He was also advised that the interview questions were redacted in accordance with the Confidentiality Agreement.

[4] MacDonald appealed the decision of the CBRM on May 19, 2020 and sought disclosure of the interview questions. CBRM filed a Notice of Contest on

July 9, 2020 saying that MacDonald does not have a right of access to the interview questions.

[5] This appeal was heard on November 3, 2020. For the reasons that follow, I dismiss the appeal.

Issues

[6] There is a preliminary issue as to whether this appeal falls under s. s. 41 of the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5 ("***FOIPOP***") or Part XX of the *Municipal Government Act* ("***MGA***"). The main issue on the appeal is whether MacDonald has a right of access to the interview questions.

Position of the Parties

[7] As a preliminary point, I note that the Minister of Justice for the Province of Nova Scotia was notified of this appeal and confirmed an intention not to participate.

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[8] MacDonald brings this appeal under the provisions of *FOIPOP*. He says that the provisions of *FOIPOP* should govern. He relies upon s. 4A(1) of *FOIPOP* which provides that the provisions of *FOIPOP* prevail in the event of a conflict with another enactment which restricts or prohibits access by any person to a record.

[9] On the main issue, MacDonald says that he is entitled to have access to the interview questions. He says that they are generic questions that are no longer in use and that s. 5(1) of *FOIPOP* gives him a broad right of access to records in the custody and control of a public body to ensure accountability and fairness in government decision making. MacDonald cites ***O'Connor v. Nova Scotia (Deputy Minister of the Priorities and Planning Secretariat)***, 2001 NSCA 132, ***Unama'ki Board of Police Commissioners v. Canadian Broadcasting Corporation***, 2003 NSCA 124 both of which underscore that the *FOIPOP* regime favours disclosure subject to limited and specific exemptions. He also relies on ***Slauenwhite v. Keizer***, 2010 NSSC 453 and the reasons of Warner, J. on statutory interpretation.

[10] MacDonald notes that an exemption exists for "a record of a question that is to be used on an examination or test". He submits that this is a prospective exemption and does not apply to interview questions used in the past. He further

submits that the exemption for such questions should be interpreted narrowly. MacDonald says that he is not seeking access to questions that are now in use.

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[11] On the preliminary point, CBRM takes the view that Part XX of the *MGA* governs this appeal. It relies upon ss. 4(1) and 12 of *FOIPOP*, s. 7(1)(q) of the *Interpretation Act*, and the language of Part XX of the *MGA* in support of its position that it's the *MGA* applies. CBRM notes that Part XX of the *MGA* for the most part duplicates the *FOIPOP* provisions making Part XX meaningless unless it applies to CBRM and other municipalities. CBRM submits that the authorities that have interpreted and applied the provisions of *FOIPOP* are relevant as a result of the identical language in both statutes.

[12] On the main issue, CBRM submits that under s. 495(1) of the *MGA*, this appeal is a trial *de novo* and this court is entitled to make a fresh determination on new evidence (see: ***Keating v. Nova Scotia (Attorney General)***, 2001 NSSC 85, ***Shannex Health Care Management Inc. v. Attorney General of Nova Scotia representing the Nova Scotia Department of Health***, 2004 NSSC 54, and ***Donham v. Nova Scotia (Community Services)***, 2012 NSSC 384). The evidence offered is that the interview questions sought by MacDonald were used in the past,

remain in use, and are likely to be used in the future. On this basis, the questions are exempt from production by virtue of s. 463(2)(d) of the *MGA*.

Analysis

The Preliminary Point – Which Act Applies

[13] On the preliminary issue, I am satisfied that the *MGA* governs this appeal. I come to this conclusion for substantially the same reasons set out in the CBRM submissions dated October 23, 2020.

[14] This is a question of statutory interpretation. The modern principles of statutory interpretation instruct that such questions are resolved by considering the words of a statute in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme and object of the *Act*, and the intention of the legislature.

[15] There is no contest that the record being sought is in the custody and control of the CBRM, a municipal level of government. Although I am of the view that the scope of the *MGA* speaks for itself (see the *MGA* generally, and Part XX specifically), it is clear by virtue of s. 4(1) and 12 of *FOIPOP* and s. 7(1)(q) of the *Interpretation Act*, that *FOIPOP* was not intended to apply to municipal bodies.

[16] Moreover, its seems clear from a reading of the entirety of the *MGA* that it applies. I specifically consider its recitals, s. 2 (purpose), s. 3(ar) (defining municipal governments to include regional municipalities), s. 5 (dealing with CBRM), Part XX generally, s. 461(e), s. 462 and the following sections which I set out here for convenience:

> **Application of Part**
>
> **463(1)** This Part applies to all records in the custody or under the control of a municipality.
>
> …
>
> **Amendments apply**
>
> **502** Any amendments to the *Freedom of Information and Protection of Privacy Act* apply *mutatis mutandis* to this Part to the extent that they may be made to apply to this Part.

[17] MacDonald relies upon s. 4(A)(1) of the *FOIPOP* to say that its provisions apply. This section applies only in the case of conflict between its provisions and another enactment. In the present case there is no such conflict. In fact, both *FOIPOP* and *MGA* contain the exact same language on the relevant points on this appeal (see for example s. 4(2)(f) of *FOIPOP* and s. 463(2)(d) of *MGA*).

[18] The resolution of this preliminary issue is not especially helpful in the present case as Part XX of the *MGA* contains mirroring provisions to those of

FOIPOP. For this reason, I conclude that the authorities that have considered the interpretation of the *FOIPOP* provisions are relevant on this appeal.

The Main Issue – Access to the Interview Questions

[19] Although this appeal was brought under the provisions of *FOIPOP*, I consider it as an appeal brought under s. 494 of the *MGA*. Section 495 set out the scope of review (and is essentially the same as s. 42 of *FOIPOP*):

> **Powers of Supreme Court**
>
> 495(1) On an appeal, the Supreme Court of Nova Scotia may
>
> (a) Determine the matter *de novo*; and
>
> (b) Examine any record in camera in order to determine on the merits whether the information in the record may be withheld pursuant to this Part.
>
> …
>
> (5) Where the responsible officer has refused to give access to a record or part of it, the Supreme Court of Nova Scotia, if it determines that the responsible officer is not authorized to refuse to give access to the record, or part of it, shall,
>
> (a) order the responsible officer to give the applicant access to the record, or part of it, subject to any conditions that the Court considers appropriate; or
>
> (b) make any other order that the Court considers appropriate.
>
> (6) Where the Supreme Court of Nova Scotia finds that a record falls within an exemption, the Court shall not order the responsible officer to give the applicant access to the record, regardless of whether the exemption requires, or merely authorizes, the responsible officer to refuse to give access to the record.

[20] This appeal concerns a record in the custody and control of the CBRM. Therefore, the outcome of the appeal depends upon the interpretation of the

operative provisions of Part XX of the *MGA*, and the exemption found in s. 463(1)(d). The key provisions follow:

Purpose of 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,

(ii) giving individuals a right of access to, and a right to correction of, personal information about themselves,

(iii) specifying limited exceptions to the rights of access,

(iv) preventing the unauthorized collection, use or disclosure of personal information by municipalities, and

(v) providing for an independent review of decisions made pursuant to this Part;

(b) provide for the disclosure of all municipal information with necessary exemptions, that are limited and specific, in order to

(i) facilitate informed public participation in policy formulation,

(ii) ensure fairness in government decision-making, and

(iii) permit the airing and reconciliation of divergent views; and

(c) protect the privacy of individuals with respect to personal information about themselves held by municipalities and to provide individuals with a right of access to that information. 1998, c. 18, s. 462.

Application of Part

463 (1) This Part applies to all records in the custody or under the control of a municipality.

(2) Notwithstanding subsection (1), this Part does not apply to

> (a) published material or material that is available for purchase by the public;
>
> (b) material that is a matter of public record;
>
> (c) a note, communication or draft decision of a person acting in a judicial or quasi-judicial capacity;
>
> (d) **a record of a question that is to be used on an examination or test**;
>
> …
>
> **Right of access and restriction**
>
> **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)

[21] The purpose of these provisions is to ensure the accountability of municipal bodies and provide for disclosure of all information in their custody and control, subject to "limited and specific" exemptions, to ensure a well informed and participatory public. In keeping with the authorities that have considered *FOIPOP*, and the decision of the legislature to include similar language in *MGA*, I conclude that the disclosure provisions should be given a liberal interpretation and exemptions strictly construed (see both ***O'Conner***, and ***Unama'ki Board of Police Commissioners***, *supra*).

[22] The real question on this appeal is whether the interview questions sought by MacDonald are exempted from disclosure by virtue of the language of s. 463(2)(d). If the questions are captured by s. 463(2)(d), then that part of the record would not be subject to Part XX of the *MGA*. CBRM provided a number of authorities for consideration.

[23] In ***Halifax Regional Police, Re***, 2003 CanLII 49908, a Nova Scotia Review Officer found that interview questions used in a hiring process by the Halifax Regional Police were not subject to Part XX of the MGA:

> Some of the records contain questions used on tests and I agree with HRP that they are not subject to the Act.

[24] In ***Executive Council – Rural Secretariat, Re***, 2006 CanLII 9401, the Newfoundland and Labrador Privacy Commissioner considered the issue of whether a question from a completed interview could constitute a record of questions "to be used" on an examination. The Commissioner found the questions were captured by the exemption if they were subject to future use. The reasoning is persuasive:

> [20] The Secretariat argues that an interview is a test and, consequently, the questions used in an interview are questions as anticipated by section5(1)(g). They state that the questions at issue will be used in the future to assess candidates for similar positions. The Applicant, however, believes that the term "is to be used" eliminates any question that has already been used from the application of this section. He argues that because he and others have

already been asked these questions they no longer qualify for an exemption in accordance with section 5(1)(g). In his submission, the Applicant stated that the term "that is to be used" should not be substituted for the term "that was used".

[21] I will first deal with the issue of whether or not the questions asked in an interview constitute a test. The Concise Oxford English Dictionary 10th Edition, Revised (New York: Oxford University Press, 2002) defines "test' as a "procedure intended to establish the quality, performance, or reliability of something." I believe that an interview process is clearly captured by this definition. I believe that an interview process is clearly captured by this definition. As such, I believe that the questions to which the Applicant is seeking access to are associated with a test, as anticipated by section 5(1)(g). This is also clearly supported by the ATIPPA Policy and Procedures Manual …

[22] With respect to the term "that is to be used", there is no indication in section 5 (1)(g) that such a term is meant to restrict a question to a single use. To accept such an interpretation, one must accept that once a question is asked on an examination or test it cannot be used again. While this may seem appealing, I do not believe that it is reasonable to expect that questions may not be used more than once. It is my opinion, therefore, that the term "to be used" may be interpreted to mean "that was used", as long as the questions will be used again in the future. This too is supported by the above quoted passage from the ATIPPA Policy and Procedures Manual …

[23] Similar conclusions have ben reached by the Information and Privacy Commissioner of Alberta and the Review Officer for Nova Scotia. In his Order F2002-012, the Alberta Commissioner agreed that the questions on a previously administered examination were excluded from Alberta's Freedom of Information and Protection of Privacy Act. In that case, and applicant had requested access to a copy of her son's English 10-H final exam questions and answers. In a letter setting out his reasons for his oral decision, the Alberta Commissioner stated that "I find that the questions are clearly going to be used on examinations in the future and therefore fall within section 4(1)(g) …

[24] In a similar case in Nova Scotia the applicant was an unsuccessful job candidate for a position with the Halifax Regional Police and was seeking information, including interview questions. In his Report FI-03-27(M) the Nova Scotia Review Officer concluded that questions used on tests are not subject to the Municipal Government Act. …

[25] CBRM also relied on the decision of the Privacy Commissioner in ***Memorial University of Newfoundland (Re)***, 2008 CanLII 71147 which found the word "question" to include anything related to the interview questions such as the scoring rubric and instructions to interviewers.

[26] The CBRM evidence on this appeal came from Deanna Evely, Director of Human Resources with the Municipality since 2016. In her affidavit, she deposed:

> 2. I have reviewed the interview questions which have been requested by the Appellant in this matter.
>
> 3. CBRPS changes the questions used in its interview with each new hiring routine. However, the interview questions for each CBRPS hiring routine are drawn from a combination of new questions and questions used on previous interviews. The interview questions that have been requested by the Appellant remain in use as part of the pool of past interview questions used by the CBRPS and are likely to be used on other interviews in the future.
>
> 4. The scoring process, question categories and the general structure of the CBRPS interview process has not changed since 2017.
>
> 5. To the best of my knowledge, there have been no changes in the Respondent's hiring practices since 2017 that have resulted in the use of these questions being discontinued.

[27] Ms. Evely was consistent when cross-examined. She indicated that she is confident that the interview questions sought by MacDonald will be used again in the future. She explained that some questions are difficult to modify and this is the

case with questions used in police interviews. MacDonald offered nothing to contradict the CBRM evidence on this point.

[28] CBRM provided the Court with a sealed copy of the record sought by MacDonald. The Court has the discretion to review this record *in camera* (s. 495(1)(b)) and did so. This record was compared with what was disclosed to MacDonald already. CBRM withheld both the interview questions, and the information provided to those conducting the interview about what was being sought by way of answer. I would characterize the information provided to interviewers beyond the questions themselves as scoring prompts. If MacDonald covered the information in his answer, or provided other information not contemplated, then the record created by that part of the interview was disclosed to him.

[29] Having reviewed the unredacted record, I have the benefit of seeing the nature of the interview questions. They are designed to test the applicant's knowledge of policing and the operation of the Cape Breton Regional Police Service. I accept that it would be challenging to modify these questions for future use. I readily conclude that they are the type of questions contemplated by s. 463(2)(d). In my view, it is reasonable for the scoring prompts associated with

questions to be redacted. Otherwise, the nature of the question would be apparent and the purpose of the exemption would be defeated.

[30] Much of the argument on this appeal focused on the future use of the questions. The exemption from the *MGA* found in s. 463(2)(d) is prospective. It relates to a question "to be used" on an examination or test. Whether or not the questions will be used in the future is an evidentiary assessment. The uncontradicted evidence on this appeal is that the questions, once used, go into a pool of interview questions that are likely to be used again.

[31] I find that the redacted material meets the criteria for the exemption to apply. By virtue of s. 463(2)(d), the questions and scoring prompts are not subject to Part XX of the *MGA*. MacDonald has no right of access to this information as a result of the operation of s. 465(2) of the *Act*.

Conclusion

[32] I conclude that the information sought by MacDonald is caught by the exemption in s. 463(2)(d) of the *MGA*. CBRM has discharged the onus upon it to establish that MacDonald has no right of access to the information sought on appeal. In this finding, I agree with the decision appealed from, *albeit* for different reasons.

[33] The CBRM is successful on this appeal and is entitled to costs. The parties shall attempt to agree on costs, failing which written submissions may be made on or before December 18, 2020.

[34] The sealed records provided by CBRM shall be retained but resealed by order of the Court.

[35] Order accordingly.

Gogan, J.