



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

INTERIM ORDER M-524

Appeal M-9400669

Goderich Police Services Board



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The Goderich Police Services Board (the Police) received a request from a reporter for the local newspaper for a copy of a transcript taken from the Police communication tapes of February 17 and 18, 1994 which had been submitted to the members of the Board on September 15, 1994. The Police located the responsive record and, by letter dated October 28, 1994, the secretary of the Board denied access to the requester. The decision letter from the secretary of the Board did not, however, refer to any exemptions in the Act under which access was refused, did not give a reason as to why an exemption would apply and did not advise the requester of her right to appeal the denial of access to the Commissioner's office.

The requester appealed the decision to deny access to the transcript. Following receipt of the record and the correspondence relating to the request from the Police, the Appeals Officer assigned to the matter wrote to the Chair of the Board advising that the October 28, 1994 decision letter was defective and requesting that a further decision letter be issued in compliance with the provisions of section 22(1)(b) of the Act.

On January 18, 1995, a second decision letter, signed by the Chief of Police in his capacity as "head" under the Act, was forwarded to the appellant. In this letter, access was denied to the requested record, relying on the following exemptions contained in the Act:

- law enforcement - section 8(1)(a)
- right to a fair trial - section 8(1)(f)
- third party information - section 10(1)
- solicitor-client privilege - section 12
- invasion of privacy - sections 14 and 38(b).

Accompanying the copy of the decision letter which was forwarded to the Commissioner's office, was a letter from the Chief of Police expressing his concerns that he may be in a conflict of interest situation in making the decision on access to a record which, in his view, may contain his own personal information.

During the course of the mediation of the appeal, the Police withdrew their reliance on the exemptions provided by sections 8(1)(a) and 38(b). A Notice of Inquiry was forwarded to the appellant and to the Chief, on behalf of the Police, and in his personal capacity as it appeared that his interests may be affected by the disclosure of the record. The Notice of Inquiry also asked the parties to address the issue of whether a conflict of interest might exist and whether an alternate decision maker to the Chief of Police would be required in the circumstances of this appeal. Representations were received from the appellant and from the Chief of Police on behalf of the Police and in his own personal capacity.

PRELIMINARY ISSUE:

CONFLICT OF INTEREST

In Order M-457, Assistant Commissioner Irwin Glasberg canvassed the question of conflict of interest in the context of the Act.

The question of when a conflict of interest situation might arise under the Act has been canvassed by Management Board of Cabinet in its freedom of information and protection

of privacy publication entitled "Handbook for Municipalities and Local Boards", April 1993. On pages 2 and 3 of this document, the authors address this issue in the following fashion:

A conflict of interest may exist where a public official knows that he or she has a private interest that is sufficiently connected to his or her public duties to influence those public duties. The focus for conflict of interest is frequently financial matters. It may also arise when the head is meeting his or her decision making responsibilities under the Act.

A head may be in a conflict of interest situation where it is reasonable to assume that he or she is making decisions based on their personal interest rather than the public interest. In some situations, the conflict of interest may be more apparent than real. It is recommended that delegations of the head's powers reflect the possibility of conflict of interest and provide alternate decision-makers in those instances.

While the fact situations which define an actual or perceived conflict of interest can vary appreciably, I believe that the comments in the publication present a reasonable view on how these sorts of scenarios should be addressed.

I agree with Assistant Commissioner Glasberg that the above-noted statement accurately reflects the approach which ought to be taken in circumstances where a conflict of interest may arise.

It is a well-established principle of natural justice that a decision-maker must not be biased as "no one shall be a judge in his own cause". In other words, an individual with a personal interest in the disclosure or non-disclosure of a record must not be the decision-maker who makes the determination with respect to disclosure. A breach of this fundamental rule of fairness will cause a statutory delegate, such as a delegated "head" under the Act, to lose jurisdiction. The result of this loss of jurisdiction is to render his or her decision void.

The following questions must be addressed in determining whether a breach of the rule against bias has occurred:

1. Did the decision-maker have any kind of personal or special interest in the records?
2. Would a well-informed person reasonably perceive bias on the part of the decision-maker?

The record consists of a transcript of tape recordings of conversations including conversations between the Chief of Police and other individuals. I am unable to describe in any great detail the contents of the record, as to do so would render the appeal moot. However, based on my review of the record, the
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correspondence between the parties which I have received and the representations of the Chief of Police and the Police Services Board, I find that the Chief has a personal interest in the disclosure or non-disclosure of the records. Therefore, I find that a well-informed person could reasonably perceive bias on the part of the Chief of Police in making this decision.

Having found that a conflict exists in the present situation, I must go on to answer the following additional question:

3. Would an alternative decision-maker have a personal interest in the disclosure or non-disclosure of the records, such as to give rise to a reasonable perception of bias in making this decision?

I can see no reason why the Board itself or another designated delegate other than the Chief of Police could not make the decision regarding the disclosure of the records. It does not appear that the members of the Police Services Board have a personal interest in the records, or that a decision by the Board would give rise to a reasonable perception of bias.

The Chief of Police, as he recognized and brought to the attention of the Police Services Board, has a personal interest in the disclosure or non-disclosure of the records. As such, a reasonable apprehension of bias exists insofar as his ability to render a decision on access is concerned. I find, therefore, that his decision regarding access to the requested record is void and of no effect.

As alternate decision-makers are apparently available, I am remitting the matter back to the Police Services Board for a proper determination in accordance with the Act and the principles of natural justice.

ORDER:

1. I order the Police Services Board to issue a decision on access to the requested record within fifteen (15) days of the date of this interim order. The requester may then appeal that decision to the Commissioner's office within the time frames set forth in the Act.
2. I order that a copy of the decision letter referred to in Provision 1 be provided to me by the Police Services Board within five (5) days of the date after it is issued to the requester.
3. I remain seized of this matter should a further appeal be made by the requester or if direction is required by any of the parties.

Original signed by: _____

Donald Hale
Inquiry Officer

_____ May 15, 1995