



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

## **ORDER M-700**

Appeals M\_9500613 and M\_9500656

Corporation of the Townships of Casimir,  
Jennings & Appleby



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## NATURE OF THE APPEAL:

The Corporation of the Townships of Casimir, Jennings & Appleby (the Township) received two requests under the Municipal Freedom of Information and Protection of Privacy Act (the Act).

The first request was for a copy of the special auditor's report regarding the handling of certain matters in the Township's Parks and Recreation Department (the Report). This request also sought access to the letter of the employee whose concerns initiated the Report (the Letter). The Township denied access to the Letter on the basis of section 14(1) of the Act (invasion of privacy). Access to the Report was denied on the basis of this section as well as section 7(1) (advice and recommendations).

The requester, a reporter, appealed this decision to the Commissioner's office where it was assigned Appeal Number M-9500613. The requester, now the appellant, maintained that there was a public interest in disclosure of the records, thereby raising the application of section 16 of the Act, the so-called "public interest override".

The Township subsequently received a second request under the Act from another reporter. This request was for a copy of a report prepared by the Township's accounting firm to address concerns regarding the handling of municipal funds. The Township identified the Report as the record responsive to this request and denied access to it based on the exemptions set out above.

The requester appealed the denial of access and this appeal was assigned Appeal Number M\_9500656. This appellant also raised the issue of the application of the public interest override. The appellant indicated that he was not interested in receiving access to the names of any employees that appeared in the Report.

Notices of Inquiry were sent to the Township and the two appellants. Four individuals whose interests might be affected by the disclosure of the records (the affected persons) were also notified of the appeals. Representations were received from the Township and counsel for one of the affected persons.

As one of the documents, the Report, is the record at issue in both Appeal Numbers M-9500613 and M-9500656, I will dispose of both appeals in this order.

The Letter is dated February 2, 1995 from a Township employee to the Reeve. It includes a 2-page statement.

The Report is a 16-page document dated March 20, 1995 prepared by a firm of chartered accountants. It consists of three parts. Part 1 deals with comments regarding the Letter. Part 2 consists of the recommendations concerning the internal procedures that apply to recreation revenues. Part 3 deals with the public's perception of the Township's involvement with the activities of independent local organizations.

## **DISCUSSION:**

### **PRELIMINARY ISSUE**

#### **ADDITIONAL EXEMPTIONS**

In its submissions, the Township states that:

The record [the Report] also presents an analysis of any potential problems, and options for Council's consideration **in the course of law enforcement**. [emphasis added]

As indicated previously, the Township has never claimed that any portions of the Report are exempt from disclosure under the law enforcement exemptions found in section 8 of the Act. The Township's representations do not make reference to the application of any specific subsections of section 8. Nor do they provide any explanation as to how any of these subsections might apply.

Section 8 is a discretionary exemption. In the absence of any information other than the statement quoted above, I am not prepared to consider the application of this exemption.

#### **INVASION OF PRIVACY**

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, and the individual's name where 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.

Information about an employee does not constitute personal information where the information relates to the individual's employment responsibilities or position.

Where, however, the information involves an examination of the employee's performance or an investigation into his or her conduct, these references are considered to be the individual's personal information. In this case, the Report was prepared in response to complaints set out by one of the affected persons in the Letter. The complaints describe several concerns with respect to the activities of another affected person. Portions of the Report itself address these concerns, refer to individuals by name and summarize their positions on these issues.

In these circumstances, I am of the view that such information constitutes the personal information of these affected persons. I find that the Letter and Part 1 of the Report contain the personal information of these two affected persons. Part 3 of the Report contains the personal information of one of these individuals. With one exception, no personal information is found in Part 2 of the Report. This part of the Report addresses systemic problems, related to job descriptions and responsibilities, that are not related to the performance or actions of any identifiable individuals. The one exception is a comment based on the complaint.

The appellant in Appeal Number M-9500656 has indicated that he is not seeking access to the names of any individuals mentioned in the Report. Both the Township and counsel for one of the affected persons submit that even if the names and titles of the affected persons were removed from the records, the remaining information would still constitute their personal information as it would be about "identifiable individuals". The Township and counsel state that, as the department in question only contains two employees, it will be possible to identify these individuals even if their names are removed. In addition, the Township notes that, because of the small size of the community, it is not possible to anonymize the information contained in the records.

I agree. In Order P-230, Commissioner Tom Wright stated:

If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information.

In my view, based on the submissions of the Township and counsel and my review of the records, there is a reasonable expectation that the affected persons can be identified from the information in the records even if their names and other personal identifiers are removed.

Once it has been determined that a record contains personal information, section 14(1) of the Act prohibits the disclosure of this information unless one of the exceptions listed in the section applies. The only exception which might apply in the circumstances of these appeals is section 14(1)(f), which permits disclosure if it "... does not constitute an unjustified invasion of personal privacy".

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Where one of the presumptions in section 14(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is if the personal information falls under section 14(4) or where a finding is made that section 16 of the Act applies to the personal information.

If none of the presumptions in section 14(3) apply, the Township must consider the application of the factors listed in section 14(2) of the Act, as well as all other circumstances that are relevant in the circumstances of the case.

In his submissions, counsel states that the presumptions in sections 14(3)(b) and 14(3)(g) are applicable. These sections state:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

- (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

- (g) consists of personal recommendations or evaluations, character references or personnel evaluations.

I have been provided with no information to indicate that the personal information was compiled and is identifiable as part of an investigation into a possible violation of law. The Report was prepared in response to complaints made by an employee. It was prepared by a firm of chartered accountants and consists of, in their words, "observations" and "recommendations" that might lead to the formulation and documentation of procedures and policies with regard to the operation of the Township's recreation facilities. There is no indication that the Township ever contemplated that the Letter and/or the Report would be turned over to any law enforcement agency, nor is there any evidence that this was done. Furthermore, there is no information in the records themselves that would identify them as having been compiled as part of an investigation into a possible violation of law. I find that the presumption in section 14(3)(b) does not apply.

Counsel states that section 14(3)(g) is applicable because the Report contains "personnel evaluations" of one of the affected parties. The word "**evaluate**" (evaluation) as defined by The Concise Oxford Dictionary, means "**ascertain amount of; find numerical expression for; appraise, assess**". The Report does not contain any assessments of the affected person based on such measurable standards. Therefore, I find that section 14(3)(g) has no application to the personal information.

Both counsel and the Township submit that there are a number of factors in section 14(2) which support their position that the personal information should not be disclosed. They refer to the following sections of the Act:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (g) the personal information is unlikely to be accurate or reliable;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

I have not received any submissions from either appellant which favour disclosure of the personal information. In these circumstances, I find that disclosure of the Letter, Parts 1 and 3 of the Report and one reference in Part 2 of the Report would constitute an unjustified invasion of the personal privacy of the affected persons referred to in these documents. Accordingly, this information is exempt under section 14(1) of the Act.

## **ADVICE AND RECOMMENDATIONS**

The information remaining at issue is Part 2 of the Report, with the exception of the one personal information reference. The Township claims that this information is exempt under section 7(1) of the Act which states that:

A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

It has been established in a number of previous orders that advice and recommendations for the purpose of section 7(1) must contain more than mere information. To qualify as “advice” or “recommendations”, the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

The Township indicates that the Council retained the chartered accountants to review the accounting and reporting policies at its recreational facilities and to prepare a report with recommendations. Part 2 of the Report addresses various internal procedures for the recording and collection of revenues of the recreation department. Each procedure currently in place is discussed under the following headings: “Weakness”, “Effect” (or “Possible Effect”) and “Recommendation”.

Having reviewed the record, I find that only the Recommendation sections of Part 2 of the Report are exempt pursuant to section 7(1) of the Act. They contain suggested courses of action which may be accepted or rejected by Council. The other sections of Part 2 contain a factual description of the current practices and the potential negative implications of such practices. Their disclosure would not reveal the recommendations nor would it permit the drawing of accurate inferences about the substance of the recommendations. Accordingly, these portions of Part 2 of the Report should be disclosed to the appellants.

Section 7(2) of the Act contains a number of mandatory exceptions to section 7(1). If any of these exceptions apply, this would reverse my finding that the Recommendations sections of Part 2 of the Report are exempt under section 7(1).

In the Notices of Inquiry sent to the parties to these appeals they were asked to consider the mandatory exception found in section 7(2)(e) of the Act. This section reads:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

a report or study on the performance or efficiency of an institution.

The Township submits that the record was not a report or study on the performance or efficiency of an institution; rather it was conducted as a result of actions taken by the Township’s Council in response to an employee complaint.

In my view, the reason why such a report or study was commissioned is not determinative of its characterization as a record under section 7(2)(e) of the Act. Rather, one must examine the nature and contents of such a record.

The record in the present appeals is clearly a report in that it consists of a formal statement or account of the results of the collation and consideration of information. Furthermore, Part 2 of the document involves the study of a number of issues and concerns relating to the internal procedures for the recording and collection of revenues of the recreation department, identifies the potential weaknesses in the existing system and makes recommendations to strengthen the system. The corrective recommendations are designed to assist the Township in establishing efficient accounting and control systems to ensure that the appropriate cash and revenues of the department flow through to the Township. They are also designed to improve the operations of the recreation department. These portions of Part 2 fit squarely within the section 7(2)(e) mandatory exception.

In reaching this conclusion, I am mindful of the differences between the wording of the exception in section 7(2)(e) of the Act and the concordant section, section 13(2)(f), of the provincial Freedom of Information and Protection of Privacy Act which states:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy.

Previous orders of the Commissioner's office have adopted a broad interpretation of this section in order to not restrict access to those reports and studies which focus on one or more discrete program areas within an institution, rather than the institution as a whole. This interpretation is consistent with the general principle of providing requesters with a general right of access to government information and accords with the plain meaning of this exception (Orders P-348, P\_603 and P-658).

There are several other differences between the exceptions set out in section 13(2) of the provincial legislation and section 7(2) of the Act. Some obviously reflect the different application of the legislation to the functions of provincial as opposed to municipal institutions. As far as the others are concerned (including section 7(2)(e)), there appear to be no substantive reasons for the differences.

In my view, the circumstances in which the performance or efficiency of an entire municipal institution as defined in section 2 of the Act would be reviewed would be rare indeed. Institutions seldom commission studies of their operations in their entirety; rather particular programs or policies are examined. If the interpretation of section 7(2)(e) of the Act was limited to performance or efficiency reports of an institution as a whole, the exception would be rendered virtually meaningless and result in an anomalous distinction between the scope of access provided under the municipal as opposed to the provincial legislation. In my view this

distinction would be nonsensical given that the purposes and principles of both access schemes are the same.

Accordingly, I am of the opinion that the exception in section 7(2)(e) of the Act should be interpreted in the same manner as section 13(2)(f) of the provincial legislation. That is, it should apply to policies and programs of an institution, such as those at issue in the present appeals.

In the result, none of the information found in Part 2 of the Report (with the exception of the personal information which I have highlighted on the copy of page 8 which is being sent to the Township's Freedom of Information and Privacy Co-ordinator with a copy of this order) is subject to protection under section 7(1) of the Act. This portion of the Report should therefore be disclosed to the appellants.

### **COMPELLING PUBLIC INTEREST IN DISCLOSURE**

I have found that the Letter and Parts 1, 3 and one reference in Part 2 of the Report are exempt under section 14(1) of the Act. As I have previously indicated, during the course of these appeals, both appellants raised the issue of the application of the public interest override to the requested records.

Section 16 of the Act states:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and **14** does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

It has been stated in a number of previous orders that, in order to satisfy the requirements of this section, there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption. I have been provided with no submissions by either of the appellants. I have reviewed the records and considered the disclosure which the appellants will now receive. In my view, this disclosure will satisfy the public interest concerns identified by the appellants in their communications with this office, while at the same time protecting the privacy of two of the affected persons.

In the circumstances of these appeals, I am not convinced that there is a compelling public interest sufficient to outweigh the purpose of the exemption under section 14, which is essentially the protection of personal privacy. It is my view that section 16 of the Act does not apply in the circumstances of these appeals.

### **ORDER:**

1. I uphold the decision of the Township to deny access to the Letter, Parts 1 and 3 of the Report, and the highlighted portion of page 8 of Part 2 of the Report which is being sent to the Township's Freedom of Information and Privacy Co\_ordinator with a copy of this order.



2. I order the Township to disclose the non-highlighted portions of Part 2 of the Report to the appellants by sending them a copy not later than **March 13, 1996** and not earlier than **March 8, 1996**.
3. In order to verify compliance with the terms of this order, I reserve the right to require the Township to provide me with a copy of the records which are disclosed to the appellants pursuant to Provision 2.

Original signed by: \_\_\_\_\_

Anita Fineberg  
Inquiry Officer

\_\_\_\_\_ February 7, 1996