



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

ORDER M-774

Appeal M_9500454
(Reconsideration)

Corporation of the Township of Ratter and Dunnet



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BACKGROUND:

This order sets out my decision on the reconsideration of Order M-705 (issued February 9, 1996). To place this order in context, I will briefly set out the history of the matter.

The appellant is a former employee of the Corporation of the Township of Ratter and Dunnet (the Township). Under the Municipal Freedom of Information and Protection of Privacy Act (the Act) he submitted a request to the Township for copies of statements in his personnel file marked "A" to "G". These statements pertain to the election of the Reeve and the Township Council which took place on November 14, 1994.

The appellant later amended his request to include "a copy of all information and documentation signed or unsigned mentioning my name or describing my character in any file of this present Council that deals with any subject pertaining to my performance, integrity, honesty and duties as a past employee and after my resignation".

The Township responded to the request, including the amendment, by indicating that the only responsive records in its possession are the statements marked "A" to "G" in the appellant's personnel file. The Township denied access to these records in their entirety, pursuant to the following exemption in the Act:

- evaluative or opinion material - section 38(c).

The decision to deny access was made by the Township Council (including the Reeve), acting as "head" of the institution.

The appellant filed an appeal of the Township's decision to deny access.

The Act provides an inquiry process which may be used to resolve appeals. I will now outline what occurred in the first inquiry conducted in connection with this appeal. To begin the inquiry, this office sent a Notice of Inquiry to the appellant, the Township, and five individuals mentioned in the records (the original affected persons). In response to this Notice, the Reeve submitted representations on behalf of the Township. One of the original affected persons also made representations.

Subsequent to the initial Notice of Inquiry, it emerged that the Township Council could have had a conflict of interest in deciding the issue of access, since the Reeve, who is mentioned in several records, is a member of Council. For this reason, a supplementary Notice of Inquiry was sent to the appellant, the Township, and the Reeve personally, to solicit representations on this issue. In response to this supplementary Notice, the appellant, the Township and the Reeve all provided representations.

During the first inquiry, which led to the issuance of Order M-705, the appellant agreed that he does not require access to personal information in the records about other municipal employees and several voters in the election. Therefore, information in the records which qualifies as the personal information of these individuals was not at issue in the first inquiry, and it is not at issue now.

In Order M-705, I found that no conflict of interest had been established, and that the claimed exemption (section 38(c) of the Act) did not apply. On this basis, I ordered the Town to disclose the records at issue, except those passages which I found to consist of the personal information of municipal employees other than the appellant, and voters in the election, which the appellant had indicated were not at issue.

After it received Order M-705, the Township submitted a request for reconsideration of the order. By letters dated March 1, 1996, I invited all original parties to the appeal to make submissions as to whether or not I should reconsider the order, which would entail conducting a second inquiry and issuing a new order to supersede Order M-705. These letters reproduced the Township's objections to the order in some detail. In response to my letter, the Reeve and two of the original affected persons made representations supporting a reconsideration. The appellant submitted representations opposing it.

On April 2, 1996, I issued my decision on the question of whether I would proceed to reconsider Order M-705. This was sent by letter to all original parties to the appeal. I decided to proceed with the reconsideration.

In my letter of April 2, I explained why I had reached this decision, as follows:

My reason for making this decision is the fact that the original Notice of Inquiry in this matter did not specifically invite the parties (including the affected persons) to comment on the question of whether disclosure of information about them in the records would be an unjustified invasion of personal privacy under section 14(1) or 38(b) of the Municipal Freedom of Information and Protection of Privacy Act (the Act). Given that privacy protection is one of the fundamental purposes of the Act, I am of the view that this was a significant defect.

In addition, an individual who signed one of the records at issue was not notified of this appeal, on the basis that the record did not appear to contain his personal information. In my view, in the circumstances of this case, this individual should be given an opportunity to submit representations.

Although it was not the basis for my decision to reconsider, I also made the following comment about one of the other objections to the order which was raised by the Township:

I also note the Township's comment to the effect that there could be a conflict of interest because two councillors (in addition to the Reeve), and the spouse of another councillor, are mentioned in the records, and Council made the decision

to deny access. I will review this issue in the reconsideration. However, this issue would not, on its own, justify a reconsideration, since the Township had ample opportunity to raise this before.

I enclosed a new Notice of Inquiry with my letter of April 2, 1996, sent to all original parties. The issues raised in this Notice were:

- whether the Township Council, which made the original access decision, had a conflict of interest regarding the access decision;
- whether the records contain personal information within the meaning of section 2(1) of the Act;
- whether the “invasion of privacy” exemptions in sections 14(1) and/or 38(b) apply;
- whether the “evaluative or opinion material” exemption in section 38(c) applies.

This Notice was also sent to the individual not previously notified, who signed one of the records.

In response to the Notice of Inquiry sent on April 2, 1996, the appellant, the Township and two of the original affected persons submitted representations.

Because I have agreed to proceed with a full reconsideration of Order M-705, this order supersedes Order M-705. This order will resolve all the issues identified above.

PRELIMINARY ISSUE:

CONFLICT OF INTEREST

An individual with a personal or special interest in whether records are disclosed should not be the person who decides the issue of disclosure. In Order M-640, Inquiry Officer Holly Big Canoe posed the following questions to assist her in determining whether there was a conflict of interest:

- (a) did the decision-maker have a personal or special interest in the records?
- (b) could a well-informed person, considering all of the circumstances, reasonably perceive a conflict of interest on the part of the decision-maker?

These questions are not intended to provide a precise standard for measuring whether or not a conflict of interest exists in a given situation. Rather, they reflect the kinds of issues which need to be considered in making such a determination.

The Township's letter requesting a reconsideration indicated that the Reeve and three other members of council could be said to have a personal interest in some of the information in the records.

Several of the records contain detailed information about actions undertaken by the Reeve during the election campaign, and in my view, this indicates that she has a personal interest in those records.

The information pertaining to two of the other councillors also relates to their participation in the election and, on this basis, I am again of the view that their interest was of a personal nature. However, the information about these two councillors in the records is very limited, and in my view, quite innocuous, and for this reason I do not believe that a well-informed observer could reasonably perceive that Council had a conflict of interest because the records contain this information.

The alleged personal interest of the third councillor is based on the fact that one of the individuals mentioned in several of the records is married to that councillor. However, this information pertains to a voter in the election, and is not at issue. Therefore, in my view, the existence of this information in the records is no longer a relevant consideration.

In my view, the only member of Council with any substantial personal interest in the records is the Reeve. In the circumstances, I see no reason to alter my decision in Order M-705 to the effect that the Reeve is only one member of Council, and that on balance, a well-informed individual could not reasonably perceive a conflict of interest in this situation.

In the result, I find that no conflict of interest has been established.

DISCUSSION:

PERSONAL INFORMATION

Section 2(1) of the Act defines personal information, in part, as “recorded information about an identifiable individual ...”. I have reviewed the records to determine whether they contain personal information and, if so, to whom the personal information relates.

All of the records at issue are in the appellant’s personnel file maintained by the Township. Records C, D, E, F and G contain direct references to the appellant, either by name or title. These records also refer to the appellant’s professional activities. Records A and B do not refer directly to the appellant.

In the representations submitted by the Reeve on the subject of whether the order should be reconsidered, she states that “ALL information was placed on file re appellant’s job performance”.

The Township’s representations in response to the Notice of Inquiry in this reconsideration state as follows:

In our opinion, the information contained in the subject material is considered to be ‘personal information’. ... The information contains statements about specific problems in the appellant’s job performance.

Previous orders have held that information about an employee does not constitute that individual’s personal information where the information relates to the individual’s normal employment responsibilities or position (see, for example, Orders P-270 and P-721). Where,

however, the information involves an evaluation of the employee's performance or an investigation into his or her conduct, these references are considered to be the individual's personal information (Order P-721).

Since the Township placed these records in the appellant's personnel file because they allegedly reveal "problems" in his job performance, I find that all of the records contain his personal information, including the records which do not refer to him directly.

I will now consider whether the records also contain the personal information of other individuals.

Record A contains the observations of two councillors about alleged deficiencies in a notification by the Township office. This information is connected to their public duties, since they were both councillors when the record was actually created. In my view, information about the public functions of municipal councillors is analogous to information about professional activities, and would not, generally speaking, qualify as their personal information. However, in this record, the information pertains to their involvement in the election **as candidates**, and in this circumstance, I find that it does qualify as their personal information.

Record B describes activities undertaken by the Reeve as a candidate in the municipal election. Like the information about the two councillors in the previous paragraph, I find that the information about the Reeve's activities in Record B qualifies as her personal information. In addition, Record B contains a reference to a municipal employee other than the appellant.

However, as this information pertains to his normal employment activities only, I find that it does not constitute this employee's personal information. Because the information about this employee is not his personal information, it is **not** excluded from the scope of this appeal by the appellant's agreement that he does not require **personal** information of other municipal employees.

Like Record B, Record C describes activities undertaken by the Reeve as a candidate in the municipal election, and I find that this qualifies as her personal information. This record also contains personal information about a voter in the election. As noted previously, the appellant has agreed that he does not require personal information about voters, and therefore, this particular information is not at issue. I have highlighted this information in blue on a copy of the record which is being sent to the Township's Freedom of Information and Privacy Co-ordinator with a copy of this order. This information should **not** be disclosed. In addition, this record contains a reference to another municipal employee, by title. As with Record B, this information pertains to this individual's normal employment activities only, and I find that it does not constitute his personal information. Therefore, this information remains at issue.

Like Records B and C, Record D describes activities undertaken by the Reeve as a candidate in the municipal election, and I find that this qualifies as her personal information.

Record E contains similar information about the Reeve's activities in the election, and again, I find that this is her personal information. This record also refers to another municipal employee. This passage could be construed as criticizing that employee's performance, and therefore, I find

that it qualifies as that individual's personal information. However, the passage in question also indicates that this employee was under the instruction of the appellant, and the passage could be construed as a criticism of the appellant. Therefore, I also find that this entire passage constitutes the appellant's personal information. Because this passage is not only the other employee's personal information, but the appellant's as well, I find that the appellant's agreement that he does not require the personal information of other municipal employees does **not** apply to it. Therefore, this passage remains at issue in this appeal.

Record F is a letter written by the Reeve to the Ministry of Municipal Affairs. It pre-dates her election as Reeve, and I find that it qualifies as her personal information. The recipient of the letter is an employee of the Ministry, and it is addressed to her in her professional capacity only. I find that this record does not contain any personal information of the recipient. This record also refers to two municipal employees in the context of their duties in the municipal election. These references could be construed as critical of their job performance, and I find that they qualify as the personal information of these individuals. As the appellant has indicated that he does not require this information, it is not at issue. I have highlighted this information in blue on a copy of the record which is being sent to the Township's Freedom of Information and Privacy Co_ordinator with a copy of this order. This information should **not** be disclosed.

I find that Record G contains personal information of two municipal employees other than the appellant, and several voters in the election. As the appellant has indicated that he does not require this information, it is not at issue. I have highlighted this information in blue on a copy of the record which is being sent to the Township's Freedom of Information and Privacy Co_ordinator with a copy of this order. This information should **not** be disclosed. In addition, because it describes activities of the Reeve as a candidate in the election, I find that Record G contains the Reeve's personal information.

In summary, I have found that the records contain personal information as follows:

- Record A: Personal information of the appellant and two municipal councillors.
- Record B: Personal information of the appellant and the Reeve.
- Record C: Personal information of the appellant and the Reeve (and personal information about a voter which is not at issue).
- Record D: Personal information of the appellant and the Reeve.
- Record E: Personal information of the appellant, the Reeve and a municipal employee (and the latter remains at issue because it is also the personal information of the appellant).
- Record F: Personal information of the appellant and the Reeve (and personal information of two municipal employees which is not at issue).
- Record G: Personal information of the appellant and the Reeve (and personal information of two municipal employees and several voters in the election, which is not at issue).

INVASION OF PRIVACY

Both sections 14(1) and 38(b) provide exemptions intended to protect personal privacy. Where, as in this case, the records contain the personal information of the individual who made the request, section 14(1) does not apply. Rather, in such a case, the “invasion of privacy” exemption to consider is section 38(b) (Order M-352).

Under section 38(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information. Under section 38(b), the appellant is not required to prove that disclosure would **not** be an unjustified invasion of personal privacy. Rather, the parties resisting disclosure are required to prove, on a balance of probabilities, that disclosure of the information in the records **would be** an unjustified invasion of personal privacy.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found 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 where 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 contained in section 14(3) apply, the institution must consider the application of the factors listed in section 14(2) of the Act, as well as all other considerations that are relevant in the circumstances of the case.

It is important to note that the only information whose disclosure can constitute an “unjustified invasion of personal privacy” under section 38(b) is personal information of an individual or individuals **other than the requester** (i.e., in this case, the personal information of an individual or individuals other than the appellant). Information which does not qualify as personal information, or information which is the personal information of the appellant only, cannot be exempt under section 38(b).

Submissions of the Parties

The Township submits that the factors in sections 14(2)(f) (highly sensitive information) and 14(2)(i) (unfair damage to reputation) are relevant considerations favouring privacy protection.

The Reeve did not make submissions in her personal capacity in response to the Notice of Inquiry issued in this reconsideration. However, in correspondence relating to my previous inquiry, she states:

I believe that [the appellant] would use (make public) these documents, some of which contain my signature, to undermine the present Municipal Council and Reeve in the Municipality.

Although these comments were made in the context of section 38(c), they could also relate to the factor favouring privacy protection in section 14(2)(i) (unfair damage to reputation).

One of the municipal employees submits that the disclosure of information about her would constitute an unjustified invasion of her personal privacy. She refers to unfair damage to her reputation (section 14(2)(i)) and the fair determination of her rights (section 14(2)(d)), and she also submits that the information about her is unlikely to be accurate or reliable (section 14(2)(g)). However, as previously noted, the appellant has indicated that he does not require access to the personal information of other municipal employees, and as a result, none of this individual's personal information is at issue in this appeal and it will not be disclosed. Therefore, I will not consider these submissions further.

The other municipal employee who submitted representations indicates that, in his view, the factor favouring privacy protection in section 14(2)(i) (unfair damage to reputation) is a relevant consideration. Because the appellant has indicated that he does not require personal information pertaining to the municipal employees, most of the personal information about this individual in the records is not at issue and will not be disclosed. The only exception to this is Record E, where I found that the personal information of this individual remains at issue because this same information is also the personal information of the appellant.

The appellant's representations are critical of my decision to proceed with this reconsideration. They do not provide any information or argument with respect to any of the exemptions at issue, including section 38(b).

Findings

Record A

Neither of the councillors mentioned in Record A submitted representations. I am not satisfied that the information in this record is highly sensitive, nor that disclosure would unfairly damage anyone's reputation. In my view, no factors favouring privacy protection have been established. Therefore, it has not been established that disclosure would constitute an unjustified invasion of personal privacy. I find that this record is not exempt under section 38(b).

Record B

I have previously found that the references in Record B to a municipal employee other than the appellant are **not** his personal information, and therefore disclosure of that information cannot be an unjustified invasion of that individual's personal privacy.

I also found that this record contains the Reeve's personal information. However, in my view, the information in this record about the Reeve is not highly sensitive, nor am I persuaded that disclosure could unfairly damage her reputation. In my view, no factors favouring privacy protection have been established with respect to Record B. Therefore, it has not been established that disclosure of Record B would constitute an unjustified invasion of personal privacy. I find that this record is not exempt under section 38(b).

Record C

I have previously found that references to a voter in Record C are not at issue in this appeal, and these will not be disclosed.

The record also contains the Reeve's personal information. However, as with Record B, the information in this record about the Reeve is not highly sensitive, nor am I persuaded that disclosure could unfairly damage her reputation. In my view, no factors favouring privacy protection have been established with respect to Record C. Therefore, it has not been established that disclosure of Record C would constitute an unjustified invasion of personal privacy. I find that this record is not exempt under section 38(b).

Records D and F

I have previously found that references to two municipal employees other than the appellant in Record F are not at issue in this appeal, and these will not be disclosed.

Records D and F contain the Reeve's personal information. However, as with Records B and C, the information in Records D and F about the Reeve is not highly sensitive, nor am I persuaded that disclosure could unfairly damage her reputation. In my view, no factors favouring privacy protection have been established with respect to Records D and F. Therefore, it has not been established that disclosure of Records D and F would constitute an unjustified invasion of personal privacy. I find that Record D, and the part of Record F which is at issue, are not exempt under section 38(b).

Record E

This record contains personal information pertaining to a municipal employee other than the appellant. As noted previously, this same information is also the personal information of the appellant.

Having now had the benefit of detailed representations on the application of section 38(b) to this record, I agree that the personal information of the municipal employee other than the appellant is highly sensitive. It is also possible that disclosure of this information could unfairly damage his reputation. Therefore, the relevance of two factors favouring privacy protection (in sections 14(2)(f) and (i)) has been established.

In my view, the fact that this information was placed in the appellant's personnel file as a critique of his performance is, in the context of section 38(b), a relevant factor favouring disclosure.

In balancing the municipal employee's interest in privacy protection against the appellant's interest in disclosure, I find that severing the municipal employee's name and job title from this record will adequately protect his personal privacy, while allowing the appellant access to his personal information. Therefore, I find that the municipal employee's name and job title, where they appear in this record, are exempt under section 38(b). This includes one reference to the employee's name and job title in a passage which relates to normal job duties, but because it could be linked to the other reference which is personal information, I am of the view that this other reference qualifies as personal information and satisfies the requirements for exemption under section 38(b). I have highlighted the exempt information in yellow on a copy of this record which is being sent to the Township's Freedom of Information and Privacy Co-ordinator with a copy of this order.

With respect to the personal information of the Reeve in Record E, it is my view that this information is not highly sensitive, nor am I persuaded that its disclosure could unfairly damage her reputation. In my view, no factors favouring privacy protection have been established with respect to this information. Therefore, it has not been established that this information would constitute an unjustified invasion of personal privacy, and I find that it is not exempt under section 38(b).

Record G

I have previously found that references in Record G to several voters, and information in this record about two municipal employees other than the appellant, are not at issue in this appeal. This information will not be disclosed.

The only personal information of individuals other than the appellant which is at issue in this record pertains to the Reeve. However, as with Records B, C, F and D, the information in Record G about the Reeve is not highly sensitive, nor am I persuaded that disclosure could unfairly damage her reputation. In my view, no factors favouring privacy protection have been established with respect to Record G. Therefore, it has not been established that disclosure of Record G would constitute an unjustified invasion of personal privacy. I find that the portion of this record which is at issue is not exempt under section 38(b).

EVALUATIVE OR OPINION MATERIAL

I have found that all of the records contain the appellant's personal information (as well as the personal information of several other individuals). Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. However, this right of access is not absolute. Section 38 provides a number of exemptions to this general right of access. One such exemption is section 38(b), which I have discussed above. Another such exemption is found in section 38(c), which reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

that is evaluative or opinion material compiled solely for the purpose of determining suitability, eligibility or qualifications for

employment or for the awarding of contracts and other benefits by an institution if the disclosure would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence.

An analysis of section 38(c) indicates that it contains several distinct components, each of which must be satisfied in order for this exemption to apply. These are:

- (1) the information in question must be “evaluative” or “opinion” material relating to the requester (in this case, the appellant);
- (2) the information must have been “compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of contracts and other benefits by an institution”; **and**
- (3) it must be established that disclosure would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence.

As I have previously noted, the Reeve states, in her representations supporting the reconsideration request, that “ALL information was placed on file re appellant’s job performance.”

The Township submits as follows:

- the records constitute evaluative or opinion material provided by two individuals;
- the purpose for providing the information was to determine the appellant’s suitability for his position;
- the resolution requesting the information in the appellant’s personnel file was passed at a closed session of council, in order to keep the information confidential at the request of the individuals who supplied it.

In my view, in order to meet requirement (1), above, it is not sufficient that the purpose for providing the information was to determine an individual’s suitability for employment, which, if anything, relates to requirement (2). Rather, the information must actually constitute an evaluation, or an opinion, which clearly relates to the individual in question.

I find that Records A, B, C, D and F contain no information of any kind which could be construed as “evaluative” or “opinion” material, and this defect is not cured by their presence in the appellant’s personnel file. Accordingly, these records have not met requirement (1) above, and they are not exempt under section 38(c).

Record E contains one comment which could be construed as an evaluation or opinion. However, this comment refers to two employees, and it is not clear who is being criticized. I find that this reference is too vague to qualify as “evaluative” or “opinion” material. Once again, this defect is not cured by the presence of this record in the appellant’s personnel file, nor by

later explanations that it was intended to be an evaluation of the appellant. Requirement (1) has not been met, and I find that no part of Record E is exempt under section 38(c).

Record G contains a number of comments which could be construed as “evaluative” or “opinion” material. Most of this information pertains to other municipal employees and is not at issue, as noted previously. One paragraph on page 2 of this record, under the heading “Lack of Performance of Duties”, pertains to the appellant and could also be construed as an evaluation.

However, turning to requirement (3), I note that Record G has not been signed and contains no indication of who provided the evaluative or opinion material. There is a reference to the Reeve elsewhere in this record, but this reference only indicates that, during the campaign, she called to request the posting of a list. There is no indication that, when she did this, the Reeve requested her identity to be kept confidential. Nor is there any evidence to support a reasonable expectation that her comments would not be conveyed to the appellant in order to facilitate a response, since the area of her complaint was related to his job functions. Therefore, in my view, it cannot be said that when she made this phone call, she “furnished the information in circumstances where it may reasonably have been assumed” that her identity would be held in confidence. In my view, later decisions that the document in which this information is recorded would be treated confidentially do not alter this assessment.

Therefore, I find that this record does not meet requirement (3), above, and it is not exempt under section 38(c).

CONCLUSION

In summary, parts of Records C, F and G are not at issue because they consist of personal information about voters, and personal information about other municipal employees. This information is highlighted in blue on a copy of these records which is being sent to the Township’s Freedom of Information and Privacy Co-ordinator with a copy of this order.

In addition, part of Record E is exempt under section 38(b). This information is highlighted in yellow on a copy of this record which is being sent to the Township’s Freedom of Information and Privacy Co-ordinator with a copy of this order.

The parties may be interested in knowing whether, and to what extent, the conclusions reached in this order differ from those in Order M-705.

The differences are minor and relate only to Records E, F and G. Having had the benefit of the parties’ representations on this reconsideration, I have found that several additional passages in Records F and G are the personal information of municipal employees other than the appellant. These references are not at issue and will not be disclosed.

In Record E, I have decided to withhold the name and job title of a municipal employee (other than the appellant). Having had the benefit of detailed representations on section 38(b), I have decided that it applies to this information.

In other respects, my decision as to what information should be disclosed is the same as the determination reached in Order M-705.

ORDER:

1. I uphold the Township's decision to deny access to the part of Record E which is highlighted in yellow on a copy of this record 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 Records A, B and D to the appellant in their entirety. I further order the Township to disclose Records C, E, F and G to the appellant, except the passages which are highlighted in either yellow or blue on the copies of these records which are being sent to the Township's Freedom of Information and Privacy Co-ordinator with a copy of this order. The highlighted information is **not** to be disclosed.
3. I further order the Township to effect the disclosures required by Provision 2 of this order by sending copies of the records to the appellant by **June 25, 1996** but not earlier than **June 20, 1996**.
4. In order to verify compliance with the provisions 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 appellant pursuant to Provisions 2 and 3.

Original signed by: _____

John Higgins
Inquiry Officer

_____ May 21, 1996