



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

ORDER MO-1215

Appeal MA-980271-1

Township of North Stormont



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NATURE OF THE APPEAL:

The Township of North Stormont (the Township) received a request under the Municipal Freedom of Information and Protection of Privacy (the Act) from two former employees. The request was for a copy of reports prepared by two named individuals and an audit completed in relation to the Moose Creek Water & Sewer Project (the Project).

The Township identified two responsive records and, pursuant to section 21 of the Act, notified two parties whose interests might be affected by disclosure. One party expressed no concern with disclosure, and the other party (the affected person) objected.

The Township subsequently issued its decision letter to the requesters, granting access to one record and denying access to the other one, which relates to the affected person, pursuant to sections 6(1)(b), 10(1)(b), 14(1)(f) and 52(3) of the Act. The Township also informed the requesters that the audit had not yet been completed and was therefore “not yet a record in the Township’s possession.”

The requesters (now the appellants) appealed the portion of the Township’s decision relating to the second record.

This record consists of a five-page letter written by the affected person to the Township about the Project.

A Notice of Inquiry was sent to the appellants, the Township and the affected person. Because the record dealt directly with the appellants, I included sections 38(a) and (b) of the Act in the Notice as potentially relevant issues. Representations were received from all three parties.

DISCUSSION:

JURISDICTION

The interpretation of sections 52(3) and (4) of the Act is a preliminary issue which goes to the Commissioner’s jurisdiction to continue an inquiry. These sections read as follows:

- (3) Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.
- (4) This Act applies to the following records:
1. An agreement between an institution and a trade union.
 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
 4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

Section 52(3) is record-specific and fact-specific. If this section applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in section 52(4) are present, then the record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction.

The Township relies on section 52(3)3. The affected person supports the Township's position.

Section 52(3)3

In order for the record to fall within the scope of paragraph 3 of section 52(3), the Township must establish that:

1. it was collected, prepared, maintained or used by the Township or on its behalf;
and
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; **and**
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the Township has an interest.

[Order P-1242]

Requirement 1

The Township explains that the record was prepared on its behalf by the affected person, and subsequently used by Council. The Township has provided me with a copy of Council's resolutions dated March 16, 1998 and March 24, 1998, as well as the sworn affidavit of the Township's Reeve, confirming that the record's preparation was authorized by Council.

In my view, the record was clearly prepared and used for the purpose of reviewing the Project, and I find that the first requirement of section 52(3)3 has been established.

Requirement 2

The Township submits that the preparation and usage of the record was in relation to discussions by Council at an in camera meeting held on April 25, 1998.

The Township has provided me with copies of the minutes of its March 16, 1998, March 24, 1998 and May 12, 1998 meetings, but not its April 25, 1998 meeting. The only evidence that such a meeting took place is a statement to that effect in the affidavit submitted by the current Reeve as part of the Township's representations.

On the basis of the Reeve's affidavit, I find that a Council meeting was held on April 25, 1998, and that the record was used in discussions at this meeting, thereby satisfying the second requirement of section 52(3)3.

It is not necessary for me to determine whether this meeting was a properly authorized in camera meeting for the purpose of my finding.

Requirement 3

The Township states that the discussions at the April 25, 1998 meeting concerned financial irregularities as well as the performance of the appellants regarding the Project. The Township points out that the appellants' employment was terminated shortly after the record was prepared and submitted to the Township.

The Township's representations do not provide much detail regarding the purpose for initiating the review which led to the affected person's report. The best information on this issue is derived from the actual minutes of various Council meetings. On March 16, 1998, Council passed resolution #134, which reads:

That Stanley [the consulting firm that authored the record already disclosed to the appellants] be authorized to examine the audit and books of the Moose Creek Water &

Sewer to advise Council if any subsidized items were overlooked and can be applied for the (sic) help offset the maintenance costs to the residents for Moose Creek.

At the March 24, 1998 meeting, the following related resolution was adopted by Council:

That an addition to resolution #134 to go over the Moose Creek Water & Sewer Project for any extra funding. I would add the names of [the affected person and two other individuals] to assist in the process. This process to begin immediately.

On May 12, 1998, two additional resolutions were passed by Council which relate to the Project:

That further to correspondence received from [the other two individuals named in the March 24, 1998 resolution] concerning their appointment to a committee and their request to be removed from such committee, Council hereby resolves that above residents' request be honoured.

That the firm of [a named accounting firm] be retained to perform an audit on the Moose Creek Water & Sewer Project immediately.

Based on the wording of these resolutions, it would appear that the examination conducted by the affected person was not initiated for the purpose of dealing with a labour relations or employment-related matter. However, as the Township indicates in its representations, the discussions at the April 25, 1998 meeting concerned issues of staff performance, and I find that the record qualifies as being about an "employment-related matter" for the purpose of section 52(3)3.

The only remaining issue is whether this is an employment-related matter in which the Township "has an interest".

Previous orders have held that an interest is more than mere curiosity or concern. An "interest" for the purposes of section 52(3)3 must be a legal interest in the sense that the matter in which the Township has an interest must have the capacity to affect the legal rights or obligations of the Township (Orders P-1242 and M-1147).

Several recent orders of this Office have considered the application of section 52(3)3 (and its provincial equivalent in section 65(6)3) in circumstances where there is no reasonable prospect of the institution's "legal interest" in the matter being engaged (Orders P-1575, P-1586, M-1128, P-1618 and M-1161). The conclusion of this line of orders has essentially been that an institution must establish an interest that has the capacity to affect its legal rights or obligations, and that there must be a reasonable prospect that this interest will be engaged. The passage of time, inactivity by the parties, loss of forum or conclusion of a

matter have all been considered in arriving at a determination of whether an institution has a “legal interest” in the records.

The appellants submit that negotiations between themselves and the Township resulted in settlements and a letter of recommendation from the Township’s Reeve. The Township concurs that A[t]he two employees and the Township settled the employment related matters between themselves.”

The only relevant evidence before me in this appeal establishes that a settlement has been reached between the Township and the appellants. Therefore, any legal interests which may have existed have been resolved. Accordingly, I find that there is no ongoing dispute or other employment- related matter involving the Township and the appellants that has the capacity to affect the Township’s legal rights or obligations, and the Township has failed to establish a “legal interest” in the employment-related matter reflected in the record (see also Order M-1164).

Therefore, the third requirement for section 52(3)3 has not been established, and I find that the record falls with the jurisdiction of the Act.

PERSONAL INFORMATION/INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including,

- (d) the address, telephone number, fingerprints or blood type of the individual
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (g) the views or opinions of another individual about the individual.

The Township submits that the record contains the personal information of the affected person because it contains his personal opinions and views as well as his name and home address. The Township further submits that:

It can be asserted that the information contained in the report is not specific enough to be personal information of the staff of the Township, but are only “generalized assertions”.

The affected person submits that he is not an employee of the Township,

... hence the reviews expressed in the report are not those made in a professional capacity, but rather are the personal views of (sic) as an author and a taxpayer, to Council.

The Township has acknowledged that the content of the report submitted by the affected person contributed to its decision to terminate the employment of both appellants. Although the report deals with a number of issues relating to the administration of the Project, it also identifies certain performance-related issues involving the appellants. 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 employment responsibilities or position. However, where 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 (Orders P-721 and P-1318). The record at issue in this appeal falls into the latter category, and I find that it contains the personal information of the appellants.

I also find that the address of the affected person which appears at the end of the record is his personal information. However, the balance of the report does not contain any personal information of the affected person. As the Council resolutions make clear, the affected person was authorized to assist in examining the audit and books of the Project and to advise Council if any eligible funding had been overlooked. In my view, the affected person had no personal interest in the outcome of this review; he was simply performing a voluntary role in helping Council gather facts and opinion on a specific issue of importance to the Township. The affected person has a history of involvement with the Project and, although not hired in a strictly professional sense, it would appear that the Township valued his input in a manner analogous to that of a knowledgeable professional. As far as sections (e) and (g) of the definition are concerned, it is important to note that the views or opinions of the affected person about the appellants are the personal information of the appellants only. They are not the personal information of the affected person (Orders P-972 and P-1082).

Under section 38(b) of the Act, where a record contains the personal information of both the appellants 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.

In this situation, 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.

The appellants' appeal letter and representations do not deal specifically with the affected person's home address. Because the address qualifies and the affected person's personal information, and in the absence of any representations weighing in favour of finding that disclosure of this personal information would **not** constitute an unjustified invasion of personal privacy, I find that it would. Therefore, the affected person's home address is properly exempt from disclosure under section 38(b) of the Act.

Once the affected person's address has been removed, the balance of the record contains the personal information of the appellants only, and I find that it does not qualify for exemption under section 38(b) of the Act.

DISCRETION TO REFUSE REQUESTERS' OWN INFORMATION

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38(a) provides an exception to this general right of access, as follows:

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

if section **6**, 7, 8, 9, **10**, 11, 12, 13 or 15 would apply to the disclosure of that personal information; [emphasis added]

Under section 38(a) of the Act, the Township has the discretion to deny access to a record which contains the personal information of the appellants in instances where certain exemptions would otherwise apply. Two of the listed exemptions have been claimed by the Township, specifically section 10(1)(b) (third party information) and section 6(1)(b) (closed meeting). I will consider both of these exemption claims as a preliminary step in determining whether the record is exempt under section 38(a) of the Act.

THIRD PARTY INFORMATION

The Township and the affected person claim that the record qualifies for exemption pursuant to section 10(1)(b) of the Act, which states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

For a record to qualify for exemption under section 10(1)(b), the Township and/or the affected person must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
2. the information must have been supplied to the Township in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure of the record must give rise to a reasonable expectation that the harm specified in (b) of section 10(1) will occur.

[Order 36. See also Orders M-29 and M-37]

The Ontario Court of Appeal recently overturned the Divisional Court's decision quashing Order P-373 and restored Order P-373. In that decision the Court stated as follows:

With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words “**detailed and convincing**” do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

[Ontario (Workers Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 (C.A.)]

Part 1 - type of information

The Township and the affected person submit that the record contains labour relations information. The Township submits:

The information contained in the record was provided by the author of the report based on his review of the Township records, or lack thereof. It is labour relations information in that it is an analysis of information concerning two employees of the Township and their performance relative to the Project.

“Labour relations information” has been defined as the collective relationship between an employer and its employees (Order P-653).

While I agree that the record contains some information relating to employee performance, the record in no way concerns the “collective relationship between the employer and employees”, and I find that the record does not contain nor would it reveal labour relations information.

However, because section 10(1)(b) is a mandatory exemption claim, I will consider whether the record contains any of the other types of information listed in the section.

“Financial information” has been defined in previous orders to mean information relating to money and its use or distribution and must contain or refer to specific data. Examples of financial information are cost accounting methods, pricing practices, profit and loss data, overhead and operating costs (Orders P-47, P-87, P-113, P-228, P-295 and P-394).

The Township authorized the affected person and others to “examine the audit and books of the Moose Creek Water & Sewer to advise Council if any subsidized items were overlooked”. The report prepared by the affected person deals with the use of public funds by the Township on the Project, and includes a number of specific references to financial expenditures and funding considerations. I find that the content of the record clearly satisfies the requirements of the definition of “financial information”, although it is relevant to note that this financial information is exclusively that of the Township and not the affected person.

Therefore, part one of the test has been satisfied.

Part 2 - supplied in confidence

All parties would appear to be in agreement that the record was supplied to the Township by the affected person. I concur.

The Township and the affected person both submit that the record was supplied with an explicit understanding that it would be received and held in confidence by the Township.

The appellants argue that there was never any understanding of confidentiality or secrecy, and they believe that the content of the record has been shared with Township staff, members of the public and other government officials. The appellants provide no evidence to support their position.

The record itself contains evidence that it was submitted by the affected person in confidence. Considering the circumstances under which the record was prepared and provided to the Township, I accept that it was supplied to and received by the Township explicitly in confidence.

Therefore, part two of the test has been satisfied.

Part 3 - harms

To discharge the burden of proof under the third part of the test, the Township and/or the affected person must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 10(1) would occur if the information was disclosed [Order P-373].

Only section 10(1)(b) has been raised by the Township. I find that sections 10(1)(a), (c) and (d) are not applicable in the circumstances of this appeal.

Section 10(1)(b)

The Reeve of the Township submits in his affidavit:

The Township of North Stormont is a small community of only 7,000 residents. It is a newly created amalgamated township. As such, Council of North Stormont are not necessarily aware of all issues related to the various townships which were formerly autonomous. As a result it is critical not only as a small community, but as a newly created government structure that we encourage our taxpayers to participate in the governmental structure and support local institutions.

The participation and support shown by [the affected person] in the preparation of the report at the request of Council is just one example of the kind of support the Township needs to encourage.

If the [Information and Privacy] Commissioner were to ignore the request of the taxpayer for this report to remain confidential, I would expect that many taxpayers would be more

hesitant to come forward to assist the Township in expressing their views and opinions on Township matters.

The affected person states that if the record is disclosed he will not supply any opinion, advice or analysis to the Township in the future. He submits:

The Township relies on a volunteer base to assist it in its operations, as there is simply not the financial resources to pay for consultants and employees to perform all Township tasks. Allowing this information to be released will result in [the affected person], and perhaps others, refraining from providing those services to the Township in the future, for fear of reprisals from third parties such as the former employees. It is in the public interest that this information continue to be supplied to the Township. It should therefore be protected.

I accept that the affected person volunteered to become involved in the examination of the Project, and that voluntarism is an important component of a healthy community. I also accept that the affected person may personally decline to offer his voluntary service in future, given his experience on the Project. However, I find that the evidence provided by the Township and the affected person is not sufficient to establish a reasonable expectation that the harm specified in section 10(1)(b) will occur if the record is disclosed.

The minutes of Council's meeting on March 16, 1998 clearly indicate that the Township had already retained the service of a professional consulting firm to perform an examination of the Project. This firm completed its work, submitted a report, and was paid for its services. The report of this consulting firm has already been disclosed to the appellants. The Township has also retained the services of a professional accounting firm to perform an audit of the Project. I am not persuaded that the affected person's report was a necessary component of the Township's decision-making process, nor that reliance on volunteers to provide advice of this nature is in the public interest. The Moose Creek Water & Sewer Project is a complex undertaking involving the expenditure of several million dollars. If Council had reason to require an examination of the books of the Project, in my view, the public interest would demand a professional rather than a volunteer assessment. Should similar requirements arise in future, I am not persuaded of the need to rely on community volunteers, nor am I convinced that it is reasonable to expect that professional services could not be obtained.

Accordingly, I find that the Township and the affected person have failed to provide me with detailed and convincing evidence to establish that disclosure of the record could reasonably be expected to result in similar information no longer being supplied to the Township where it is in the public interest that similar information continue to be so supplied.

Therefore, part three of the test has not been satisfied, and I find that the record does not qualify for exemption under section 10(1)(b) of the Act .

CLOSED MEETING

Section 6(1)(b) of the Act states:

A head may refuse to disclose a record,

that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

In order to qualify for exemption under section 6(1)(b), the Township must establish that:

1. a meeting of a council, board, commission or other body or a committee of one of them took place; **and**
2. that a statute authorizes the holding of this meeting in the absence of the public; **and**
3. that disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting.

[Order M-64]

The Township submits that an in camera meeting to discuss the affected person's report was held on April 25, 1998. As stated earlier, the Township's representations include the minutes of the March 16, 1998, March 24, 1998 and May 12, 1998 Council meetings, but not the April 25, 1998 meeting. The only evidence that such a meeting took place is a statement to that effect in the affidavit submitted by the Township's Reeve.

Based on the Reeve's sworn affidavit, I accept that a Council meeting of some sort took place on April 25, 1998, thereby satisfying the first requirement of section 6(1)(b).

In order to satisfy the second requirement, the Township must establish that a statute authorizes the holding of this particular meeting on an in camera basis.

The Township submits that the meeting was held in camera,

... under the authority of section 55(5) of the *Municipal Act*, specifically paragraphs (a), security of the property of the Township; (b) personal matters about identifiable individuals; and (d) labour relations or employee negotiations.

The appellants submit:

At this time we cannot determine whether the contents of [the affected person's] letter was solicited by the Municipality. The committee meeting in question was illegal, it lacked a quorum, an agenda and minutes. Two members of the three appointed refused to be part of the committee. In our opinion, there was no committee, and no committee meeting.

There is nothing in the Township's representations or in the record itself to support its assertion that the subject matter of the record or the meeting was in any way related to the security of the property of the Township. In addition, as I determined in my discussion of section 10(1)(b), the record does not relate to labour relations, nor does it relate to any employee negotiations. Therefore, I find that sections 55(5)(a) and (d) of the Municipal Act are not relevant in the circumstances of this appeal.

As far as section 55(5)(b) is concerned, I accept the Reeve's sworn evidence that a meeting of some sort was held on April 25, 1998, but the Township has not provided me with sufficient evidence to establish that it was a properly constituted in camera meeting of Council or one of its committees. The appellants and the Township obviously have conflicting views on this issue. However, the burden of proof lies with the Township and, in my view, it has not provided sufficient evidence to establish that it was authorized to hold its April 25, 1998 meeting in camera, pursuant to section 55(5)(b) of the Municipal Act.

Similarly, the Township has not provided sufficient details of the subject matter or substance of the deliberations which took place at the April 25, 1998 meeting to persuade me that disclosure of the record would reveal the actual substance of any such deliberations.

Therefore, the second and third requirements of the section 6(1)(b) exemption claim have not been established, and I find that the record does not qualify for exemption under this section.

ORDER:

1. I order the Township to disclose the record to the appellants by **July 2, 1999** but not before **June 28, 1999**.
2. 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 record which is disclosed to the appellants pursuant to Provision 1.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ May 27, 1999