



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER MO-2188**

**Appeals MA-050436-1**

**Haldimand County**



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## **NATURE OF THE APPEAL:**

### **Background**

In 2005, Haldimand County Council retained the Burke Group, a human resources consulting firm, to conduct an independent investigation into a complaint of workplace harassment that was filed against the Mayor of Haldimand County by her administrative assistant.

The Burke Group prepared and submitted to the County a document entitled, "Haldimand County Investigative Report," dated June 2005. On August 10, 2005, Haldimand County Council approved a resolution that stated, in part, "that the Burke Group report dated June, 2005 be released to the public upon request, subject to the Municipal Freedom of Information and Protection of Privacy Act requirements."

The County received several access requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from the public, including the media. It disclosed the report to these requesters, but withheld small portions pursuant to the mandatory exemption in section 14(1) (personal privacy) of the *Act*.

Haldimand County Council had also requested that the Burke Group prepare a supplementary report of additional concerns not directly related to the harassment complaint that were identified by respondents who were interviewed during the investigation. The Burke Group prepared and submitted to the County a second document entitled, "Haldimand County Supplementary Report," dated August 2005.

### **Access request**

Haldimand County (the County) received a request under the *Act* for the following information:

... a copy of any further reports prepared by the Burke Group beyond that with which I have already been provided with through my involvement with the initial report. Any further reports are regarding [the Mayor of Haldimand County].

The County identified the "Haldimand County Supplementary Report" as the record that is responsive to the access request. It then designated the Mayor as an affected party and notified her pursuant to section 21 of the *Act* that it intended to disclose this record to the requester. It invited the Mayor to submit representations to the County as to why the report, or any part of it, should not be disclosed.

The Mayor informed the County that she opposed disclosure of the responsive record and explained why. After receiving the Mayor's representations, the County sent her a letter stating that it had decided to release the Supplementary Report to the requester but would be withholding small portions pursuant to the mandatory exemption in section 14(1) (personal privacy) of the *Act*. The Mayor appealed the County's decision to this office.

The County also issued a decision letter to the requester stating that, "Haldimand County is in possession of records responsive to your request and disclosure is granted in part subject to five specific severances applied to withhold names, email addresses and/or related identifying

information in accordance with Section 14 of the Act ...” The requester did not appeal the County’s decision to sever portions of the record before disclosing it.

In short, the appellant in this appeal is the Mayor, who opposes disclosure of the record to the requester.

During the mediation stage of the appeal process, the mediator informed the parties that section 52(3) of the *Act*, which excludes certain labour relations and employment-related records from the scope of the *Act*, may apply to the record identified as responsive to this request. Moreover, she informed the parties that the Supplementary Report appears to contain information relating to both the requester and other individuals. Consequently, the discretionary exemption in section 38(b) (invasion of privacy) of the *Act* may be at issue.

This appeal was not settled in mediation and was moved to the adjudication stage of the appeal process. Initially, I issued a Notice of Inquiry to the Mayor and invited her to submit representations. Legal counsel for the Mayor submitted representations on her behalf. In these representations, the Mayor’s legal counsel submits that the Supplementary Report is excluded from the scope of the *Act* under section 52(3) or, in the alternative, that disclosure would constitute an unjustified invasion of the Mayor’s personal privacy under the mandatory exemption in section 14(1) of the *Act*.

The Mayor’s legal counsel indicated that her client’s representations could be shared with the County’s freedom of information coordinator and legal counsel but asked that they be withheld in their entirety from the requester. As a result, I issued a sharing order to the Mayor stating that fairness in the adjudication process requires that the requester be given an opportunity to respond to the Mayor’s legal arguments and evidence, except for those portions that fall within the confidentiality criteria set out in *IPC Practice Direction Number 7*. I ordered that a severed version of the Mayor’s representations be shared with the requester.

I also issued a Notice of Inquiry to the County. In an accompanying cover letter, I indicated that the County was not required to submit representations in this particular appeal, but that it would be helpful for me to understand why the County decided to disclose the responsive record. In response, the County submitted brief representations to this office.

I then issued a Notice of Inquiry to the requester, along with a severed version of the Mayor’s representations and the complete representations of the County. In response, the requester submitted brief representations to this office that state that the Supplementary Report should be disclosed because it was paid for with public funds, and public officials must be held accountable.

I would point out that I have a related appeal before me (MA-060017-1) in which a different requester is seeking access to the same responsive record (the Supplementary Report). In that appeal, the County denied the requester access to the responsive record under section 15(b) of

the *Act* (information soon to be published). The requester in that matter appealed the County's decision to this office. The Mayor is an affected party in that appeal.

I will be issuing separate orders on both this appeal (MA-050436-1) and Appeal MA-060017-1, but these orders will be released simultaneously.

## **RECORD:**

The record at issue is the "Haldimand County Supplementary Report", dated August 2005, which is divided into six parts:

- Cover page (page 1)
- Index (page 2)
- Executive Summary (pages 3 to 16) – this section consists largely of comments from individuals who were interviewed by the Burke Group that focus on the Mayor's leadership abilities.
- Summary of Areas that Appear to Require Some Attention – Mayor (page 17)
- Summary of Areas that Appear to Require Some Attention – Corporation (page 18)
- Addendum – Supporting Email Documentation – this section consists of emails exchanged between various individuals, including the Mayor. (7 pages)

## **DISCUSSION:**

### **LABOUR RELATIONS AND EMPLOYMENT RECORDS**

#### **General Principles**

Section 52(3) is a provision that excludes certain labour relations and employment records from the scope of the *Act*.

Section 52(3) states:

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.

If the records fall within any of the exceptions in section 52(4), the *Act* applies to them. Section 52(4) states:

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.

The interpretation of sections 52(3) and (4) is a preliminary issue which goes to the Commissioner's jurisdiction to continue an inquiry.

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 term “in relation to” in section 52(3) means “for the purpose of, as a result of, or substantially connected to” [Order P-1223].

### **The Mayor’s representations**

The Mayor’s legal counsel submits that sections 52(3)1 and 52(3)3 apply to the Supplementary Report, and this record is, therefore, excluded from the scope of the *Act*.

At the outset, he states that in assessing whether these provisions apply to the Supplementary Report, it is important to review the original report prepared by the Burke Group – the “Haldimand County Investigative Report,” dated June 2005, which was disclosed to the public. Although he acknowledges that the original report is not the record at issue in this appeal, he submits that it “provides the basis and starting point for the requested Record and places the Record in its proper context.”

The Mayor’s legal counsel then makes reference to several portions of the original report:

#### **Original Report Executive Summary – OVERVIEW, page 4:**

*“Haldimand County wanted to retain the services of the Burke Group to conduct an investigation and present a report of findings on a harassment complaint filed against [the Mayor] by the Mayor’s Administrative Assistant ...*

**Executive Summary, pages 7-10** – extensive references to the Ontario Human Rights Code and the Haldimand County Harassment/Discrimination Policy (Policy No. 01-18).

**Executive Summary, page 11** – Haldimand County Non-Union Policy, Section 22 – Pertaining to Harassment, wherein a distinction is made between Haldimand County staff and third parties clearly implying that elected officials, including [the Mayor] are deemed to be staff.

#### **Key Meetings and Issues, page 13:**

*“[The Mayor] and [her administrative assistant] are in an employer/employee relationship.*

*An employer/supervisor has the responsibilities of providing appropriate training, providing a clear understanding of expectations and an added responsibility of providing an environment free of harassment.”*

**Additional Findings, page 24** – The points and issues outlined here are substantially similar to ... the requested Report.

**Options – page 28** – This page definitely, clearly and unequivocally, recommends employment-related options of a disciplinary and quasi-disciplinary nature.

The Mayor's legal counsel further submits that the theme of the original report is "carried forward seamlessly to the requested Record, the Supplementary Report of August, 2005." He points out that the Supplementary Report relies on unverified opinions obtained in the original report, and he then makes reference to various sections of the Supplementary Report that attack the Mayor's leadership capabilities and competence.

The Mayor's legal counsel asserts that, "It is difficult to conceive of any records which go more directly to the heart of an employment/workplace relationship than the Original and Supplementary Reports of the Burke Group."

With respect to the specific application of section 52(3)1 of the *Act*, the Mayor's legal counsel points out that the original report (page 13) makes reference to a meeting at which the County's solicitors stated, "... if this becomes an issue, the County and the Mayor could be facing a harassment complaint or a constructive dismissal case." Consequently, he submits that proceedings in court (constructive dismissal) or before the Ontario Human Rights Commission (harassment) were both contemplated and anticipated.

In summary, the Mayor's legal counsel submits that the Supplementary Report should not be disclosed to the requester because it inherently relates "to both anticipated legal proceedings (point 1 of section 52(3)) and meetings, consultations, discussions about employment-related matters in which the institution has an interest (point 3 of section 52(3)) of the *Act*."

### **The County and the requester's representations**

Neither the County nor the requester provided any arguments in their representations as to whether the Supplementary Report is excluded from the scope of the *Act* under section 52(3).

### **Analysis and findings**

I have carefully reviewed the Supplementary Report and considered the representations submitted by the Mayor's legal counsel. In my view, sections 52(3)1 and 52(3)3 do not apply to the Supplementary Report, for the following reasons.

#### ***Section 52(3)1: court or tribunal proceedings***

For section 52(3)1 to apply, it must be established that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and
3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

*Requirement 1: collected, prepared, maintained or used*

The Supplementary Report was prepared on behalf of the institution by the Burke Group. In addition, it could be argued the County collected the Supplementary Report from the Burke Group and maintained and used it for various purposes. I am satisfied, therefore, that the first requirement of section 52(3)1 of the *Act* has been met.

*Requirement 2: proceedings before a court or tribunal*

As noted above, in seeking to establish that section 52(3)1 applies to the Supplementary Report, the Mayor's legal counsel points to portions of the original report prepared and submitted by the Burke Group. The original report (the Haldimand County Investigative Report), which is dated June 2005, was the product of an independent investigation into a complaint of workplace harassment that was filed against the Mayor by her administrative assistant.

In particular, the Mayor's legal counsel cites a portion of the original report in which the County's solicitors warned that the County could face a constructive dismissal claim or a human rights complaint from the Mayor's administrative assistant. Consequently, he submits that proceedings in court (constructive dismissal) or before the Ontario Human Rights Commission (harassment) were both contemplated and anticipated, which meets the requirements of section 52(3)1.

In my view, these submissions may be applicable with respect to assessing whether section 52(3)1 applies to the original report, but that report has already been disclosed to the public and is not at issue in this appeal. The only record at issue is the Supplementary Report that the Burke Group prepared and submitted to Haldimand County in August 2005.

I am not persuaded by the Mayor's submission that section 52(3)1 is applicable because the theme of the original report is carried forward "seamlessly" to the Supplementary Report. Although it is evident that the Supplementary Report is connected to the original report, the substance and focus of the Supplementary Report is qualitatively different. This distinction is made clear at the outset of the Supplementary Report, which states:

During the initial investigation, *additional concerns that were not directly related to the harassment complaint were raised by respondents* as a result of answering the questions. The Burke Group was requested by Council to prepare a



supplementary report of the additional concerns that were identified during the original investigation process. (Emphasis added.)

Consequently, the Supplementary Report does not focus on the harassment complaint filed by the Mayor's administrative assistant (which could have led to proceedings before a court or tribunal), but on additional concerns not related to the harassment complaint.

There is nothing in the Supplementary Record itself or in the evidence submitted by the Mayor's legal counsel that demonstrates that the County collected, maintained, prepared or used this specific record in relation to proceedings or anticipated proceedings before a court, tribunal or other entity, as required by section 52(3)1. Consequently, I find that the second requirement of section 52(3)1 has not been met.

Given that I have found that the second requirement of section 52(3) has not been satisfied, it is not necessary to assess whether the third requirement has been met. I find, therefore, that section 52(3)1 does not apply to the Supplementary Report.

The Mayor's legal counsel does not assert that section 52(3)2 applies to the Supplementary Report. Consequently, I will now consider whether section 52(3)3 excludes the Supplementary Report from the scope of the *Act*.

**Section 52(3)3: matters in which the institution has an interest**

The Mayor's legal counsel submits that the Supplementary Report should not be disclosed to the requester because it inherently relates to "meetings, consultations, discussions about employment-related matters in which the institution has an interest (point 3 of section 52(3)) of the *Act*."

For section 52(3)3 to apply, it must be established that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
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 institution has an interest.

*Requirement 1: collected, prepared, maintained or used*

I have already found that the Supplementary Report was prepared on behalf of the institution by the Burke Group, and that it could be argued that the County collected the Supplementary Report

from the Burke Group and maintained and used it for various purposes. I am satisfied, therefore, that the first requirement of section 52(3)3 of the *Act* has been met.

*Requirement 2: meetings, consultations, discussions or communications*

The Mayor's legal counsel did not provide me with evidence of any meetings, consultations, discussions or communications that took place at the County in relation to the collection, preparation, maintenance, or usage of the Supplementary Report.

I am willing to assume, however, that the County's elected council and senior management likely used the Supplementary Report as the basis for meetings, discussions, consultations and communications relating to the concerns identified by the individuals interviewed by the Burke Group. These concerns relate primarily to the Mayor's leadership abilities and to a lesser extent, to the municipal corporation itself. I am satisfied, therefore, that the second requirement of section 52(3)3 has been met.

*Part 3: labour relations or employment-related matters in which the institution has an interest*

As noted above, the Mayor's legal counsel submits that the Supplementary Report inherently relates to "meetings, consultations, discussions about employment-related matters in which the institution has an interest ...". He does not assert that these meetings, consultations or discussions are about "labour relations" matters.

Consequently, it must be determined whether any meetings, consultations, discussions or communications that the County's elected council or senior management may have had with respect to the Supplementary Report were about "employment-related matters" in which the County has an interest.

The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

The Supplementary Report focuses, for the most part, on issues relating to a single individual (the Mayor). In my view, any meetings, consultations, discussions or communications that may have taken place with respect to the Supplementary Report were not about "employment-related matters," because the Mayor is an elected official, not a County employee.

According to Haldimand County's website, the Mayor is the head of council and the chief executive officer of the Corporation of Haldimand County. (Under section 225(a) of the

*Municipal Act*, it is the role of the head of council to act as chief executive officer of the municipality.)

The Mayor's legal counsel has not brought any statutory provisions or case law to my attention that would suggest that the Mayor is a County employee. However, in his representations, the Mayor's legal counsel states that section 22 of Haldimand County's "Non-Union Policy" makes a distinction between Haldimand County staff and third parties. He submits that this clearly implies that elected officials such as the Mayor are deemed to be County staff.

I am not persuaded by this submission. The Mayor's legal counsel did not provide me with a copy of the County's "Non-Union Policy", so it is not clear to me the extent to which this policy covers elected officials, including the Mayor. However, even if the Mayor is covered by this policy, either explicitly or implicitly, this does not lead to a conclusion that the Mayor is an employee of the County.

*Black's Law Dictionary* (8th. ed.) defines the term "employee" as follows:

A person who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance.

The Mayor's dual role as head of council and chief executive officer does not fit within the definition of an employee. The Mayor was not hired by Haldimand County; she was elected by the voters. By virtue of being elected mayor, she became both head of council and chief executive officer.

Haldimand County, which employs County staff, can provide the Mayor with advice. However, it did not "hire" the Mayor and does not have the right to control the details of her work performance. Moreover, it cannot fire the Mayor or remove her from these positions. As a general principle, she can only be removed or "fired" by the voters of Haldimand County. In my view, it is clear, therefore, that the Mayor is not a County employee.

Given that the Mayor is not a County employee, I find that any meetings, consultations, discussions or communications that the County's elected council or senior management may have had with respect to the Supplementary Report did not relate to "employment-related matters" in which the County has an interest.

In my view, the third requirement of section 52(3)3 has not been met. I find, therefore, that section 52(3)3 does not apply to the Supplementary Report.

## **Conclusion**

Given that I have found that sections 52(3)1 and 3 do not apply in the circumstances of this appeal, the Supplementary Report is not excluded from the scope of the *Act* under section 52(3).

I will now consider whether the Supplementary Report contains “personal information,” and if so, whether the privacy exemption in section 38(b) of the *Act* applies to this information.

## **PERSONAL INFORMATION**

### **General principles**

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (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,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual’s name if 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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

### **The Mayor's representations**

The Mayor's legal counsel submits that "virtually every page" of the Supplementary Report contains the "personal information" of the Mayor, as that term is defined in section 2(1) of the *Act*. In particular, he asserts the information relating to the Mayor in this record falls within paragraphs (e) and (g) of section 2(1).

The Mayor's legal counsel further states that although the Commissioner's decisions normally distinguish information about an individual in a personal capacity from information about an individual in an official capacity, the contents of the Supplementary Report are "consistently directed towards [the Mayor's] alleged personal characteristics ...". He submits that this brings the information within the definition of "personal information" in section 2(1) of the *Act*.

### **The County and the requester's representations**

Neither the County nor the requester provided any arguments in their representations as to whether the Supplementary Report contains "personal information," as that term is defined in section 2(1) of the *Act*.

### **Analysis and findings**

I have carefully reviewed the Supplementary Report and considered the representations submitted by the Mayor's legal counsel. In my view, this record contains the "personal information" of several individuals.

#### ***The Mayor***

Three sections of the Supplementary Report contain information relating to the Mayor:

- Executive Summary
- Summary of Areas that Appear to Require Some Attention – Mayor
- Addendum – Supporting Email Documentation

The Mayor, who is a well known elected official in Haldimand County, is named throughout the Supplementary Report. Consequently, the information relating to her is clearly “recorded information about an identifiable individual,” which satisfies the introductory wording of the definition of “personal information” in section 2(1) of the *Act*.

The “Executive Summary” of the Supplementary Report consists largely of comments from individuals who were interviewed by the Burke Group that focus on the Mayor’s leadership abilities. In my view, this information falls within paragraph (g) of section 2(1), which defines “personal information” as including “the views or opinions of another individual about the individual.”

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225]. Consequently, it could be argued that the comments about the Mayor in the Supplementary Report are information about her in an official capacity, not a personal capacity.

However, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

Although many of the comments made by the interviewed individuals are about the Mayor’s leadership abilities, they are also about her personal behaviour and how she relates to other individuals. I agree with the Mayor’s legal counsel that the personal nature of these comments brings this information within the realm of “personal information.”

In short, I find that the information relating to the Mayor in the “Executive Summary” of the Supplementary Report (i.e., the comments made about her by other individuals) constitutes her “personal information,” as that term is defined in section 2(1) of the *Act*. I also find that the one-page section entitled, “Summary of Areas that Appear to Require Attention – Mayor” contains the personal information of the Mayor.

The “Addendum” to the Supplementary Report consists of emails exchanged between various individuals, including the Mayor. I have reviewed these emails in detail. The first email, which is between two employees of the Burke Group, refers to the behaviour of an unnamed individual in a work environment. It is not clear whether this individual is the Mayor. However, I find that if this unnamed individual is the Mayor, the information relating to her in the email is her “personal information”, as that term is defined in section 2(1) of the *Act*.

The remainder of the emails are between the Mayor and various individuals. In my view, the Mayor sent and received these emails in her official capacity. Consequently, any information relating to her in these emails does not constitute her “personal information.”

### ***The requester***

The requester's name appears on two pages of the Supplementary Report in conjunction with other information about her. Although the information on one page identifies the requester in her employment capacity, the information on a subsequent page reveals something of a personal nature about her. Consequently, I find that the Supplementary Report contains the requester's "personal information," as that term is defined in section 2(1).

### ***Other individuals***

The Supplementary Report contains references to other individuals, including employees of the Burke Group, the County's legal counsel, members of Haldimand County Council, a police officer, and the County's senior management. In my view, these references are associated with these individuals in their professional, official or business capacities, not their personal capacities. I find, therefore, that this information does not constitute their personal information.

The emails in the "Addendum" to the Supplementary Report also contain the name of an individual whom the Burke Group sent to work for an unnamed individual at the County, and the name and email address of a constituent who corresponded with the Mayor. In my view, this information constitutes the personal information of those individuals. The County severed this personal information from the Supplementary Report, and the requester did not appeal that decision. Consequently, if I order that the Supplementary Report be disclosed, the information relating to those individuals will remain severed.

### ***Conclusion***

I find that the Supplementary Report contains the personal information of the Mayor, the requester, and other individuals.

I will now consider whether the privacy exemption in section 38(b) of the *Act* applies to the personal information that is at issue.

## **RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/PERSONAL PRIVACY OF ANOTHER INDIVIDUAL**

### **General principles**

Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 38(b) is met. Section 14(1) sets out certain exceptions to the general rule against the disclosure of personal information that relates to an individual other than the requester. The only exception which may have some application in the circumstances of this appeal is set out in section 14(1)(f), which states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except, if the disclosure does not constitute an unjustified invasion of personal privacy.

### **The presumptions in section 14(3)**

Section 14(3) of the *Act* sets out a series of circumstances in which a disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy.

If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

The Mayor's legal counsel submits that the presumption in section 14(3)(g) of the *Act* applies in the circumstances of this appeal. This provision states:

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

consists of personal recommendations or evaluations, character references or personnel evaluations;

The Mayor's legal counsel asserts that the Supplementary Report is "replete and fully based upon" personal recommendations or evaluations and character references.

I have carefully reviewed the Supplementary Report and considered the representations of the Mayor's legal counsel. In my view, section 14(3)(g) of the *Act* does not apply to the Mayor's personal information in the Supplementary Report, for the following reasons.



This office has found in previous orders that the terms “personal evaluations” or “personnel evaluations” refer to assessments made according to measurable standards, not to general opinions, comments or observations [Order P-447, PO-1756].

The “Executive Summary” of the Supplementary Report consists largely of comments from individuals who were interviewed by the Burke Group that focus on the Mayor’s leadership abilities. These comments are general observations about the Mayor, not assessments made according to measurable standards. I find, therefore, that these comments do not constitute “personal recommendations or evaluations” or “personnel evaluations.”

The Mayor’s legal counsel has not provided detailed representations as to whether these comments constitute a “character reference.” However, a character reference is typically a formal recommendation by a former employer to a potential future employer describing the person’s qualifications and dependability. In my view, it is clear that the comments made by other individuals about the Mayor are not a “character reference.”

I find, therefore, that disclosure of these comments relating to the Mayor would not constitute a presumed unjustified invasion of her personal privacy under section 14(3)(g) of the *Act*.

The Mayor’s legal counsel has not claimed that any other section 14(3) presumptions apply in the circumstances of this appeal. Consequently, I will now consider if any of the factors in section 14(2) of the *Act* are applicable to assist in determining whether disclosure of the Mayor’s personal information would constitute an unjustified invasion of her personal privacy.

**The factors in section 14(2)**

If no section 14(3) presumption applies, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.

Section 14(2) states:

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,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
- (b) access to the personal information may promote public health and safety;
- (c) access to the personal information will promote informed choice in the purchase of goods and services;

- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (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.

The factors in paragraphs (a), (b), (c) and (d) of section 14(2) generally weigh in favour of disclosure, while those in paragraphs (e), (f), (g), (h) and (i) weigh in favour of privacy protection (Order PO-2265).

***Factors weighing in favour of privacy protection***

The Mayor's legal counsel submits that the following section 14(2) factors are relevant in determining whether disclosure of the Mayor's personal information in the Supplementary Report would constitute an unjustified invasion of her personal privacy: sections 14(2)(e) (pecuniary or other harm), 14(2)(f) (highly sensitive), 14(2)(g)(inaccurate or unreliable), and 14(2)(i) (unfair damage to reputation).

***Section 14(2)(e): pecuniary or other harm***

The Mayor's legal counsel submits that disclosure of the Supplementary Report could cause both pecuniary and political harm to the Mayor:

She is the Mayor of the Municipality, an elected official. This is a municipal election year. She has announced her intention to run for re-election.

The opinions in the requested Record, while unverified, could nonetheless cast [the Mayor] in unjustified disrepute in the eyes of the electorate thereby denying her a fair chance at political office and the significant financial recompense which comes with the position.

In my view, this submission is now moot. The Mayor's legal counsel submitted his representations to this office prior to the municipal elections that took place in November 2006. In those elections, his client was re-elected to a new four-year term as Mayor of Haldimand County. I would note that the Mayor was re-elected notwithstanding the fact that the original report (the Haldimand County Investigative Report), which is highly critical of the Mayor, was disclosed to the public in 2005.

In short, I find that the section 14(2)(e) factor is not relevant in determining whether disclosure of the Mayor's personal information in the Supplementary Report would constitute an unjustified invasion of her personal privacy.

*Section 14(2)(f): highly sensitive*

In order for personal information to be regarded as "highly sensitive" [section 21(2)(f)], it must be established that its release would cause excessive personal distress to the individuals involved. It is not sufficient that release might cause some level of embarrassment to those affected [Order P-434].

The Mayor's legal counsel submits that the comments about the Mayor listed in the Supplementary Report and the conclusions of the report's author are "clearly and on their face personal attacks on the personal integrity and character of [the Mayor]":

The publication of such material (whether unverified as it is or even if verified) would expose [the Mayor] to unwarranted public ridicule and scorn.

Anyone reading the catalogue of opinions can readily see that, both individually and collectively, this information cannot do anything but "cause excessive personal distress" to [the Mayor].

In my view, disclosure of the comments that other individuals have made about the Mayor in the Supplementary Report might cause some level of embarrassment or distress for her. However, I am not convinced that it would cause her *excessive* personal distress.

The Mayor is not an ordinary citizen; she is an elected official who is actively involved in the rough-and-tumble of municipal politics. In my view, although the information relating to the Mayor in the Supplementary Report may be sensitive, it is not "highly" sensitive, which is the threshold required by section 14(2)(f).

In short, I find that this factor in section 14(2)(f) is not relevant in determining whether disclosure of the Mayor's personal information in the Supplementary Report would constitute an unjustified invasion of her personal privacy.

*Section 14(2)(g): inaccurate or unreliable*

The Mayor's legal counsel submits that the information contained in the Supplementary Report is "highly suspect, both in form and content":

There is no indication of the context within which the presumably abbreviated opinions were proffered.

There is no opportunity to verify the opinions, their origin or their context.

[The Mayor] certainly disputes the veracity of the opinions but there is no appropriate process to investigate and determine the veracity of the opinions as even the most basic principles of natural justice would require ...

The requested Record is highly unlikely to be accurate or reliable.

The section 14(2)(g) factor is intended to weigh against disclosure where the information is unlikely be accurate or reliable, leading to potential negative consequences for the subject (Order PO-2271).

It is difficult for me to assess whether the comments that other individuals have made about the Mayor in the Supplementary Report are unlikely to be accurate or reliable. Although some of these comments make specific allegations against the Mayor that have a factual underpinning, the majority of the comments are simply critical opinions about the Mayor's leadership abilities. However, it is not credible that all of these personal opinions, which are expressed by various unnamed individuals, are accurate and reliable. Consequently, I accept the possibility that some of the comments are unlikely to be accurate or reliable.

In short, I find that the section 14(2)(g) factor has some relevance in determining whether disclosure of the Mayor's personal information in the Supplementary Report would constitute an unjustified invasion of her personal privacy.

*14(2)(i): unfair damage to reputation*

The Mayor's legal counsel submits that disclosure of the contents of the Supplementary Report will unfairly damage the Mayor's reputation:

The Record is based entirely on unsubstantiated opinion which is likely be inaccurate and unreliable. It cannot be tested but its public distribution would create for it an undeserved impression of credibility.

It is a consistent and repetitive attack on [the Mayor's] integrity, credibility and character.

It is or should be an internal management document (assuming it is based on fact, which is not agreed) addressing real or perceived employment-related matters.

The public release of these materials can serve no appropriate public good while causing substantial and unfair damage to the reputation of [the Mayor].

In the circumstances of this appeal, it is difficult for me to assess whether the comments that other individuals have made about the Mayor in the Supplementary Report may “unfairly” damage her reputation, because such a finding is contingent on the accuracy and reliability of these comments. However, given that I have accepted the possibility that some of the comments are unlikely to be accurate or reliable, I also accept the possibility that they may also unfairly damage her reputation.

In short, I find that the section 14(2)(i) factor has some relevance in determining whether disclosure of the Mayor’s personal information in the Supplementary Report would constitute an unjustified invasion of her personal privacy.

In summary, I have found that the two factors favouring privacy protection in sections 14(2)(g) and (i) of the *Act* have some relevance in determining whether disclosure of the Mayor’s personal information in the Supplementary Report would constitute an unjustified invasion of her personal privacy.

***Factors weighing in favour of disclosure***

I will now consider whether any of the section 14(2) factors favouring disclosure are relevant in the circumstances of this appeal.

The Mayor’s legal counsel submits that none of the other factors in section 14(2) are relevant in this matter.

*14(2)(a): public scrutiny*

The factor in section 14(2)(a) is intended to weigh in favour of disclosure if doing so is desirable for the purpose of subjecting the activities of the institution to public scrutiny.

In the circumstances of this appeal, the County used public funds to pay the Burke Group to prepare the Supplementary Report, which is the record at issue in this appeal.

The Mayor’s legal counsel submits that the Supplementary Report is “inherently flawed” and based on poor methodology and unsubstantiated statements from unidentified sources. He further submits that the Burke Group, which is the human resources firm that prepared the Supplementary Report, placed itself in a substantial conflict of interest, because it also supplies staffing services to the County.

In my view, disclosure of the personal information in the Supplementary Report is clearly desirable for the purpose of subjecting the activities of the County to public scrutiny. Given that public funds were expended on commissioning a report that the Mayor believes is “inherently flawed,” the County’s taxpayers should be able to review the report for themselves in order to assess whether the County Council’s decision to commission the report was a good use of public funds.

In short, I find that the factor in section 14(2)(a) has significant relevance in determining whether disclosure of the Mayor’s personal information in the Supplementary Report would constitute an unjustified invasion of her personal privacy.

### ***Weighing of factors***

In my view, the factor in section 14(2)(a) (public scrutiny) that favours disclosure significantly outweighs the two factors in sections 14(2)(g) (highly sensitive) and 14(2)(i) (unfair damage to reputation) that favour privacy protection.

In *Dagg v. Canada (Minister of Finance)* [1997], 2 S.C.R. 403, former Justice La Forest of the Supreme Court of Canada considered the purpose of the federal *Access to Information Act* (the *ATIA*) but also commented on the important role that freedom-of-information legislation plays more generally in Canada:

The overarching purpose of access to information legislation ... is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process and *secondly, that politicians and bureaucrats remain accountable to the citizenry* ...

Parliament and the public cannot hope to call the government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view. Access laws operate on the premise that politically relevant information should be distributed as widely as possible ...

Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable. Consequently, while the *ATIA* recognizes a broad right of access ... it is important to have regard to the overarching purposes of the Act in determining whether an exemption to that general right should be granted.

(Emphasis added.)

In my view, the principles expressed by former Supreme Court Justice La Forest in *Dagg* apply in the circumstances of this appeal. The taxpayers of Haldimand County cannot hold their municipal politicians and bureaucrats to account unless they have the opportunity to scrutinize the Supplementary Report and decide for themselves whether it is fair to the Mayor and whether the County Council's decision to commission the report was a good use of public funds.

I recognize that the Mayor believes that the Supplementary Report is unfair to her, was not prepared in accordance with basic principles of natural justice, and that its content violates her privacy. However, the Mayor is an elected official. In a democracy, elected officials must face scrutiny and criticism, some of it unfair, on a regular basis. On occasion, their privacy interests must yield to the public's right to scrutinize the activities of government.

I find, therefore, that the factor in section 14(2)(a) (public scrutiny) that favours disclosure significantly outweighs the two factors in sections 14(2)(g) (highly sensitive) and 14(2)(i) (unfair damage to reputation) that favour privacy protection.

### **Conclusion**

Subject to my discussion below as to whether the County properly exercised its discretion, I conclude that the disclosure of the personal information in the Supplementary Report would not constitute an unjustified invasion of personal privacy under section 38(b) of the *Act*.

### **EXERCISE OF DISCRETION**

#### **General principles**

The section 38(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
  - information should be available to the public
  - individuals should have a right of access to their own personal information
  - exemptions from the right of access should be limited and specific
  - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

On the issue of exercise of discretion, the Mayor's legal counsel simply submits that pursuant to section 38(b) of the *Act*, the County should not exercise its discretion to release the Supplementary Report, because such disclosure would constitute an unjustified invasion of the Mayor's privacy.

In the brief representations that it submitted to this office, the County states:



The County's decision to disclose the "Haldimand County Supplementary Report" was based in conjunction with a review by, and on evidence received from its legal counsel in this regard. It is the position of Haldimand County that the underlying premise for disclosure rests with the fact that the subject document was commissioned by a public body, paid for by public funds and centers around the performance of a public figure (the Mayor) in her official capacity. On that basis, Haldimand County cannot find grounds to withhold the [Supplementary Report] and therefore this subject record must be disclosed.

In my view, the County considered relevant factors in exercising its discretion to disclose the personal information in the Supplementary Report pursuant to section 38(b) of the *Act*. There is no evidence before me to suggest that the County considered irrelevant factors or acted in bad faith in exercising its discretion. Consequently, I find that the County's exercise of discretion was proper.

**ORDER:**

1. I uphold the County's decision to disclose the Supplementary Report to the requester. The Mayor's appeal of the County's decision is dismissed.
2. The County must disclose the Supplementary Report to the requester by June 4, 2007 but not before May 30, 2007.

Original signed by: \_\_\_\_\_  
Colin Bhattacharjee  
Adjudicator

April 30, 2007 \_\_\_\_\_