



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2313

Appeal MA07-137

County of Wellington



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téloc: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The County of Wellington (the County) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information related to legal proceedings brought by a specific Councillor [Councillor #1] against another Councillor [Councillor #2]. The request specifically stated:

- (1) A copy of all documentation related to the legal proceedings brought by [Councillor #1] against [Councillor #2].
- (2) Copy of all documentation inclusive of financial statement to meet [Councillor #2's] costs as brokered by then Warden Whitcombe, i.e. settlement agreements and cheques issued.

The County located the responsive records but denied access. The County's decision stated:

You requested a copy of all documents related to legal proceedings brought by [Councillor #1] against [Councillor #2]. Your request for access to this documentation is being denied because the [County] is not in possession of any of this documentation.

You also requested a copy of all documentation inclusive of the financial settlement to meet [Councillor #2's] costs as brokered by then Warden Whitcombe i.e. settlement agreements and cheques issued. Your request for access to these records is also being denied in accordance with section 14(1)(a) of the *Act* – namely the individual to whom the information relates has not agreed to consent to the information being released.

The requester, now the appellant, appealed that decision.

During mediation, the mediator contacted the appellant, the County and Councillor #2 (the affected person). The affected person did not provide his consent to release the records.

The appellant advised that he wished to add the issue of reasonable search to the issues on appeal. It is his position that additional documents related to the legal proceedings exist. Mediation was not able to resolve the issues under appeal and the file was transferred to adjudication.

I initially sent a Notice of Inquiry, setting out the facts and issues on appeal, to the County and the affected person. I received representations from the County only. The affected person was contacted by this office to confirm whether he would be submitting representations. The affected person stated that he would be submitting representations but none were received.

I then sent a Notice of Inquiry to the appellant, along with a complete copy of the County's representations. The appellant provided representations in response as well.

RECORDS:

The records at issue consist of a statement of account (1 page) and the covering letter that accompanied this statement of account (1 page). Both records were originally sent to the affected person who passed them along to the County for payment.

DISCUSSION:

PERSONAL INFORMATION

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, 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].

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].

The appellant argues that the financial information related to the affected person is not personal information, but is instead professional information relating to the affected person's activities as a Councillor for the County.

In Order PO-2225, former Assistant Commissioner Tom Mitchinson, set out the following two-step process applicable to a determination of whether information is "about" an individual in a business rather than a personal capacity, and therefore does not constitute personal information:

...the first question to ask in a case such as this is: "*in what context [does the information] of the individuals appear*"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?

...

The analysis does not end here. I must go on to ask: "*is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual*"? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature? [emphasis added]

I will apply the analysis described above in my examination of the personal information/professional information distinction in the present appeal.

The County provided brief submissions on whether the information at issue is personal information. The County's representations suggest that because the information at issue is about the affected person and was discussed in some detail in a local newspaper article, the affected

person is an identifiable individual. As such, the County argues that the information is the named councillor's personal information as the records at issue represent recorded information about an identifiable individual.

The records at issue consist of a statement of account for the provision of legal services to the affected person specified in the request and an accompanying cover letter. Based on my review of the records and the circumstances of this appeal, I find that the information at issue appears in a professional/business context only. The legal services referred to in the records related solely to an issue that arose as a result of the named councillor's statements made during a council meeting. Based on the nature of the legal issue, I am satisfied that the information appears in the context of the Councillor's professional responsibilities as a councillor, and do not relate to him in a personal context.

To answer the second question, I must ask whether there is something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual. In this case, I find that although the affected person's information is found in a business/professional context, disclosure of this information would reveal that he was being sued in his personal capacity by another Councillor for alleged wrongdoing that did not relate to his professional responsibilities as a County Councillor. As stated above, previous decisions of this Office have held that information about an individual in his or her professional or employment capacity does not constitute that individual's personal information where the information relates to the individual's employment responsibilities or position (see Reconsideration Order R-980015 and Order PO-1663). However, where information about the individual involves an evaluation of his or her performance as an employee or an investigation into his or her conduct as an employee, then these references are considered to be the individual's personal information (see Orders P-721, P-939, P-1318 and PO-1772). Accordingly, I find that the disclosure of the statement of account and cover letter would reveal personal information about the affected person, namely, that he was the subject of a legal action undertaken against him in his personal, not professional capacity.

The records also contain the name of the lawyer who provided legal services to the affected person. While the County did not submit that the records contain the personal information of the lawyer, the information at issue contains recorded information about the lawyer, who is an identifiable individual. However, to qualify as "personal information", the information must also be about an individual in a personal capacity. As set out above, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual. The statement of account was sent by the lawyer to the affected person and contains the charge for services rendered. I find that the record relates to the lawyer purely in his professional capacity and there is no personal element attached to it. Thus, I find that the records at issue do not contain the personal information of the lawyer.

As I have found that the records contain the personal information of the affected person, I must go on to consider whether disclosure of this information would constitute an unjustified invasion of the affected person's personal privacy under section 14(1) of the *Act*.

PERSONAL PRIVACY

Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

If the information fits within any of paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure under section 14. As stated above, the affected person did not provide his consent to the disclosure of information relating to him thus section 14(1)(a) does not apply. In the circumstances, it appears that the only exception that could apply is paragraph (f).

The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f). If paragraph (a) or (b) of section 14(4) applies, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 14. 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 14. 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].

Once a presumed unjustified invasion of personal privacy is established under section 14(3), it cannot be rebutted by one or more factors or circumstances under section 14(2) [*John Doe*, cited above]. 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 [Order P-239].

The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2) [Order P-99].

Having reviewed the records, I am satisfied that 14(4) does not apply in the circumstances of this appeal. Further, I find that none of the presumptions in section 14(3) apply in the circumstances of this appeal and I will go on to consider any relevant factors listed in section 14(2).

Section 14(2)

The appellant refers to the possible application of section 14(2)(a). I will also review the possible application of sections 14(2)(e) to (i), which favour privacy protection, on my own initiative. Section 14(2) states, in part:

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;
- (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 factor in paragraph (a) generally weighs in favour of disclosure, while those in paragraphs (e) through (i) weigh in favour of privacy protection. Under section 14(2), I must also consider any other “relevant circumstances” in arriving at my decision whether disclosure of personal information would constitute an unjustified invasion of the affected person’s privacy.

Section 14(2)(a)

The appellant submits that disclosure of the affected person’s personal information is desirable for the purpose of subjecting the activities of the County to public scrutiny. In particular, the appellant argues that the payment by the County of the affected person’s legal expenses should be subject to public scrutiny.

I note that this incident has been reported in the County’s local newspaper and is of some interest to the public. I agree with the appellant that section 14(2)(a) is a relevant factor favouring disclosure and should be given significant weight in the circumstances of this appeal.

The records also contain the home address of the affected person. I am unable to find that the disclosure of the affected person’s home address is desirable for the purpose of subjecting the activities of the County to public scrutiny, and I find that section 14(2)(a) does not apply to this specific information.

Sections 14(2)(e) through (i)

While I did not receive representations from either the County or the affected person regarding the application of the factors favouring privacy protection, I carefully considered whether any of these factors would apply. After reviewing the records and considering the circumstances of this appeal, I find that none of the factors favouring privacy protection should be given any weight in

my consideration. I find that the affected person will not be exposed unfairly to pecuniary or other harm and, in fact, has had his legal expenses already paid for by the County. I have no evidence before me to show that the personal information is highly sensitive, was supplied in confidence or may be inaccurate or unreliable. And finally, as the legal issue for which the affected person sought legal advice is now settled, I am unable to find that disclosure would unfairly damage the reputation of the affected person.

From my review of the records and the circumstances of this appeal, I find that the only factor to be considered in the determination of whether disclosure would be an unjustified invasion of the affected person's privacy is section 14(2)(a). As this is a factor favouring disclosure of the personal information, I find that in the circumstances of this appeal, disclosure would not constitute an unjustified invasion of the personal privacy of the affected person. As I have found that section 14(2)(a) should not be considered in regard to the affected person's home address, all of the information except the affected person's home address will be ordered disclosed.

REASONABLE SEARCH

The appellant believes that additional records responsive to his request should exist.

Where an appellant claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although an appellant will rarely be in a position to indicate precisely which records the institution has not identified, the appellant still must provide a reasonable basis for concluding that such records exist.

The County was asked to provide a written summary of all steps taken in response to the request. In particular, the County was asked to respond to the following:

1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.
2. If the institution did not contact the requester to clarify the request, did it:
 - (a) choose to respond literally to the request?

- (b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?
3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.
4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

The County provided no representations on this issue. When a staff person from this office contacted the County by telephone for comment on the search issue, the response from the County was that there were no records.

The appellant's belief that additional records should exist is based on his knowledge that the affected person wrote to other councillors about the legal proceedings which are the subject matter of the records at issue. As any record responsive to this aspect of his request was not included in the County's list of identified records, the appellant submits that further records exist.

As stated above, while the County does not have to prove with absolute certainty that further records do not exist, it must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.

Part one of the appellant's request asks for a copy of all documentation related to the legal proceeding brought by [Councillor #1] against [Councillor #2]. The County provided me with no representations on the search that it undertook for responsive records; nor did it provide me with any detail of the efforts that it made to respond to the appellant's request. The County's decision letter also provides little in the way of explanation except to say that the County is not in possession of any of this documentation relating to part one of the appellant's request. While it may be self evident to the County that no records exist, it is not clear to me whether it actually conducted a search for these records and what the results of such searches might be. Accordingly, I find that the County's search to be unreasonable and I will order the County to conduct a search for records responsive to part one of the appellant's request.

ORDER:

1. I order the County to disclose the records to the appellant after removing the affected person's home address, by July 3, 2008 but not before June 27, 2008.
2. I order the County to conduct a search for records responsive to part one of the appellant's request. The County is to advise the appellant and myself of the outcome of its search, and to make an access decision in relation to any such records that may be located, treating the date of this order as the date of the request, in accordance with provisions of the *Act*.
3. In order to verify compliance with provision 1, I reserve the right to require the County to provide me with a copy of the records which were disclosed to the appellant.

Original signed by: _____
Stephanie Haly
Adjudicator

_____ May 29, 2008