



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2745

Appeal PA07-400

Ministry of Municipal Affairs and Housing



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NATURE OF THE APPEAL:

The Ministry of Municipal Affairs and Housing (the Ministry) received the following request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for:

The letter, and any other information, that was sent to the [Ministry] last year (2006) by [a named person] when he asked the Ministry to undertake a review of the [City of Windsor's] decision, and the process used in making the decision, to build a new arena. This request would have been made in late October/early November 2006.

The Ministry identified one record, a 22 page letter, as responsive to the request and issued a decision denying access to it pursuant to section 21(1) (personal privacy) of the *Act*. The requester (now the appellant) appealed the Ministry's decision to this office.

A mediator was appointed to try to resolve the issues between the parties. During mediation, the appellant asked the mediator to seek consent from the individual (affected party) who had written the letter to the Ministry for the release of the record to the appellant. The appellant chose not to disclose its identity to the affected party, and the affected party declined to provide consent to the release of the record when contacted by this office.

Mediated resolution of this appeal was not possible, and it was transferred to the adjudication stage of the appeal process, where it was assigned to me to conduct an inquiry.

I sent a Notice of Inquiry, outlining the facts and issues, to the Ministry and to the affected party initially, to seek representations on the issues, which I received. I then sent a modified Notice of Inquiry to the appellant, along with a complete copy of the Ministry's representations. I also summarized the non-confidential portions of the affected party's representations in the Notice. The appellant submitted representations for my consideration.

DISCUSSION:

PERSONAL INFORMATION

For the purpose of deciding whether or not the disclosure of the record would constitute an unjustified invasion of personal privacy under the mandatory exemption in section 21(1), it is necessary to decide first whether the record contains "personal information" and, if so, to whom it relates. Only personal information can be exempt under the personal privacy exemption at section 21(1).

The definition of personal information is found in section 2(1) of the *Act* and reads, in its entirety, 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. 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. 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.)].

Representations

The Ministry submits that the record contains the personal information of the affected party, as described in paragraphs (b), (d), (e), (f) and (h) of the definition of the term in section 2(1) of the *Act*. The Ministry states that the letter written by the affected party is implicitly confidential in nature, and contains identifying information, as well as the opinions of the affected party.

The Ministry maintains that the personal information in the record is not about the affected party in a professional capacity, as it reveals something of a personal nature about the individual [Order P-1409]. The Ministry adds that non-disclosure of the affected party's contact information is consistent with section 2(3) of the *Act*, as that information was provided in the affected party's personal capacity.

The affected party submits that the letter constitutes "correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature," and that it clearly fits within paragraph (f) of the definition of "personal information" in section 2(1).

In its representations, the appellant seeks to refute the submissions of the Ministry and the affected party that the record contains the "personal information" of the latter, as contemplated by paragraphs (b), (f) and (h). The appellant's argument is premised on its stated awareness of the content of the affected party's Internet blog. The appellant also argues that the description of the record on the affected party's Internet blog renders the correspondence non-confidential and, therefore, not "personal information" under paragraph (f) of the definition of the term in section 2(1).

Analysis and Findings

I have reviewed the record to determine whether it contains personal information and, if so, to whom the information relates. Having done so, I find that the record contains the personal information of the affected party, acting in a personal capacity, within the meaning ascribed to that term by the definition in paragraphs (d), (e), (f) and (h) of section 2(1) of the *Act*.

In making this finding, I reject the suggestion that the affected party's Internet blog postings on the subject matter of the record effectively render some or all of the information in the record itself non-confidential through a surrender of confidentiality. I would also observe that, although confidentiality is mentioned in paragraph (f) of the definition, it is not mentioned in the preamble or the other paragraphs. Therefore, even if the information were not confidential (a contention I do not accept for the reasons stated below), that would not prevent it from being personal information under the preamble or the other parts of the definition.

I will now review the application of section 21(1) to the record.

PERSONAL PRIVACY

The Ministry denies access to the record under the mandatory exemption in section 21(1). A mandatory exemption is one an institution is obliged to apply to information that fits within the parameters of the exemption. Accordingly, where a requester seeks the personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section

21. In the circumstances of this appeal, it appears that the only exception that could apply is paragraph (f). Section 21(1)(f) reads:

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 factors and presumptions in sections 21(2), (3) and (4) assist in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 21(1)(f).

If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21, and it cannot be rebutted by one or more factors or circumstances under section 21(2). Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the “public interest override” at section 23 applies [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. The parties do not raise the public interest override or the exception in section 21(4), and in the circumstances of this appeal, I find that they do not apply.

If no section 21(3) presumption applies, section 21(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 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2) [Order P-99].

In this appeal, the relevant sections of section 21 state:

(2) 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 Government of Ontario and its agencies to public scrutiny; ...

(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; ...

(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.

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

(h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

Representations

The Ministry submits that the presumption against disclosure in section 21(3)(h) applies because portions of the letter written to the Ministry by the affected party convey his political beliefs. The Ministry adds:

The general position of the Ministry with respect to municipalities is that they are locally accountable and responsible governments.

In the circumstances, the Ministry view is that a major purpose of the record identified as responsive to this request is to seek political action at the provincial level. [The] record contains information supporting the position of the individual, and accordingly disclosing it would disclose political beliefs or views.

The Ministry also submits that the factor in section 21(2)(h) (supplied in confidence) weighs heavily in favour of protecting the privacy of the affected party. In explaining the context of the record's receipt from the affected party, the Ministry indicates that the general practice is not to disclose copies of such correspondence upon request, even when it does not contain "personal information." The Ministry notes that correspondence of this type can be disclosed if an exception in the *Act* applies, including obtaining the consent of the writer. However, the Ministry argues that consent to disclosure of a record cannot be imputed or implied simply because ideas from it are published in some form. The Ministry maintains that the record "should be treated as confidential personal information in its entirety, particularly as the appellant named the individual [affected party] in the request."

The Ministry's representations also address the possible application of the factors in paragraphs (a) (public scrutiny) and (d) (fair determination of rights) of section 21(2), by suggesting that any reliance on these factors would be premature, given that there has not been any intervention by the province into the City of Windsor's affairs. The Ministry also points out that the relevance of the factors would more appropriately be raised respecting records related to such an intervention, not the record at issue in this appeal.

The Ministry states that it considered the principle of severance under section 10(2) of the *Act* but concluded that the record could not reasonably be severed. The Ministry maintains that it would not be possible to sever “direct identification information” and disclose the record in part because the request named the affected party, and that individual’s opinions and other personal information would remain even with that approach to severance.

The affected party submits that the factor in section 21(2)(h) is relevant, and states:

Clearly this was ‘correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature.’ There were a number of sections in the letter that could have justified, depending on the facts, an [Ontario Municipal Board] investigation or one by a judge or perhaps law enforcement. On that basis alone, this letter ought not to be disclosed. Otherwise, no one would ever send a letter to the Government that could give rise to an investigation for fear of it being disclosed and possibly jeopardizing that person.

The last sentence of the paragraph above appears to allude to the factor in section 21(2)(e) (unfair exposure to harm), which is supported by other portions of the affected party’s submissions that may not be reproduced in this order for reasons of confidentiality. The affected party also submits, without elaboration, that the factors in section 21(2)(f) (highly sensitive) and (i) (unfair damage to reputation) are relevant.

In response to the representations of the Ministry and the affected party, the appellant disputes the possible application of the presumption against disclosure in section 21(3)(h). The appellant states:

The Ministry concludes that because the individual has expressed views in combination with those views being in regard to a municipal government that the information must relate to an individual’s political beliefs. The [appellant] disagrees with the Ministry’s logic. Simply expressing views in regard to the activities of a municipal government does not equate to a political belief. ... The term “political belief” should refer to an individual’s allegiance to a set of values or to a political party and not merely to an individual’s views in regard to a narrow issue.

With respect to the factors in section 21(2), the appellant appears to suggest, on the one hand, that none are relevant in the circumstances of this appeal. However, in responding to the other parties’ submissions on the factor in paragraph (h) of section 21(2), the appellant submits that the information was not supplied in confidence because the affected party has “publicly and explicitly reported in his public blog specific information related to his letter,” which “substantially weakens any assertion” that the record was of a confidential nature. The appellant suggests that the affected party’s act of blogging about the issue means that consent to disclosure

can reasonably be implied. Furthermore, in the appellant's view, no harm could come to the affected party with disclosure of the record.

Finally, the appellant submits that any "confidential" (or exempt) personal information in the record can be severed to fulfil the privacy protective purpose of the *Act*. However, this argument appears to be based on the premise that the only "properly exempt" personal information is the affected party's address.

Analysis and Findings

For the reasons that follow, I find that the record is exempt in its entirety under section 21(1) of the *Act*.

In reviewing the possible application of the presumption against disclosure in section 21(3)(h) of the *Act*, I considered the differing interpretations of the term "political beliefs" put forth by the parties. Having carefully considered the issue, I reject the narrow interpretation proposed by the appellant. In my view, limiting the interpretation of "political beliefs" in section 21(3)(h) to "an individual's allegiance to a set of values or to a political party" is unduly restrictive. While I accept that the term may include holding particular political beliefs, or being a member of a political party, I find that it may also include participating in political action.

In the circumstances of this appeal, I am satisfied that the affected party's correspondence to the Ministry is a manifestation of his "political beliefs", since it entails action taken as a consequence of holding a belief about what is happening, or should be happening, with respect to an issue of municipal governance. Accordingly, in the circumstances of this appeal, I find that the affected party's views respecting the municipal issue in question, as they are contained in the correspondence to the Ministry, fall within the presumption against disclosure in section 21(3)(h) of the *Act* because they "[indicate] the individual's ... political beliefs" for the purposes of the section.

In addition, I also find that there is a relevant factor in favour of protecting the privacy of the affected party with regard to the record at issue. I am satisfied that the affected party who authored the letter sent it to the Ministry with an expectation that it was being submitted in confidence. I find, therefore, that the factor in section 21(2)(h) is relevant and that it carries significant weight.

Although I have considered the appellant's representations on the factors in paragraphs (a) (public scrutiny) and (d) (fair determination of rights) of section 21(2), I find that I have not been provided with sufficient evidence to support a conclusion that those two, or any of the other factors favouring disclosure, are relevant in the circumstances of this appeal.

In summary, I find that the presumption in section 21(3)(h) applies to portions of the record. I also find that the factor favouring privacy protection in section 21(2)(h) is relevant and weighs against disclosure while none of the factors weighing in favour of disclosure are relevant. I find that disclosure of the personal information in the record would constitute an unjustified invasion

of personal privacy under section 21(1), and that the record cannot reasonably be severed without disclosing the information that is exempt under section 21(1). Accordingly, I find that the exception in section 21(1)(f) does not apply, and the record in its entirety is exempt under section 21(1).

ORDER:

I uphold the Ministry's decision to deny access to the record.

Original Signed By:
Daphne Loukidelis
Adjudicator

December 15, 2008