

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-3140

Appeal MA14-303

The Regional Municipality of Niagara

December 22, 2014

Summary: The requester, a councillor for the region, filed a request for an email sent to the region about his or her conduct. The individual who sent the email to the region appealed the region's decision to provide the requester with a copy of the email. This order upholds the region's decision in part, finding that disclosure of the information which relates to the sender of the email would constitute an unjustified invasion of his or her personal privacy under section 14(1). The region's decision to disclose the remainder of the email, but for the name of another councillor, is upheld.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss.2(1) definition of "personal information", 14(1) and 38(b).

OVERVIEW:

[1] A requester submitted the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Regional Municipality of Niagara (the region):

I am requesting an electronic and/or hard copy of any email(s) to the [Regional Chair] in the month of May, 2014, regarding the Code of Conduct and [myself].

[2] The region located the email referred to in the request. Prior to issuing its access decision, the region notified the individual who sent the email in accordance with the notice provisions in section 21(1) of the *Act*. The individual (affected party) objected to the disclosure of the email. The region subsequently issued a decision granting the requester access to the record, in its entirety.

[3] The affected party (now the appellant) appealed the region's decision to this office.

[4] A mediator was assigned to the appeal file to explore resolution with the parties. The parties did not reach a settlement as the appellant maintains that disclosure of the record would constitute an unjustified invasion of his or her personal privacy under section 14(1) and the requester continues to seek access to the record.

[5] As the issues remaining at issue at the end of mediation were unresolved, the appeal was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. During the inquiry process, the region and appellant were invited to submit written representations, which they did. The original requester was also invited to make representations, however, this individual did not respond to my correspondence.

[6] In this order, I find that portions of the responsive record consist of the personal information of the appellant and that disclosure of this information to the requester would constitute an unjustified invasion of the appellant's personal privacy under section 14(1) of the *Act*. I also find that disclosure of the remaining portions, but for the other councillor's name, would not result in an unjustified invasion of personal privacy.

RECORDS:

[7] The record is a one page email the affected party sent to the region.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1)?
- B. Would disclosure of the "personal information" at issue constitute an unjustified invasion of personal privacy under section 14(1) or 38(b)?

DISCUSSION:

A. Do the records contain “personal information” as defined in section 2(1)?

[8] 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.

[9] The record at issue is an email sent to the Regional Chair by the appellant. In his appeal letter, the appellant describes the record as “an email asking the Regional Chair serious questions [about code of conduct issues] by two councilors”. The region submits that the email contains “questions and statements written by the appellant regarding two members of Regional Council”. The region describes the information contained in the record, in two parts: (1) the email signature; and (2) the content of the email.

a) *Email signature*

[10] The region advises that the appellant maintains a blog on a social networking site and in it indicates that he “works at” the blog. The region takes the position that the appellant’s email signature, which contains his name, email address and job title at the blog, appears in the record solely in a business context.

[11] The appellant submits that all of the information contained in the record relates to him in a personal capacity. The appellant argues that the phrase “works at”, in the context of his blog, does not literally mean that he is employed or acting in a professional or business capacity. In a letter attached to his appeal form, the appellant advises that he publishes a blog, does not get paid and does not receive any revenue from advertising. He indicates that his blog is not registered as a business and is not associated in any way to his professional trade.

[12] 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.¹

[13] In my view, the appellant’s activities in uploading articles, photographs and other content on a social networking site does not amount to professional, official or business activities. I do not agree with the region that the appellant’s name, email address and even the job title he gave himself appears in a professional, official or business context. Accordingly, I find that the appellant’s email signature falls within the ambit of

¹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

paragraph (d) of the definition of "personal information" in section 2(1). I find that the email signature, along with his name, qualifies as his or her personal information as it appears with other personal information relating to him or her [paragraph (h)].

b) Content of the email

[14] The region takes the position that the body of the email does not refer to the appellant in a personal capacity or "reveal personal opinions or other personal information about the appellant". In its representations, the region states:

There is one statement (the first sentence of the email) which refers to the personal nature of a relationship between the two members of Regional Council. The remaining content refers only to the capacity of those individual in their roles as members of Regional Council. However, as the requester is one of the two individuals mentioned, the requester has the right to any personal information about him or herself.

[15] The appellant submits that when he sent his email to the Regional Chair, he did so with an expectation of privacy. In a letter attached to his appeal form, the appellant advises that the email was "sent directly and only to the Regional Chair ... it was a personal communication by a constituent to his head of government. There was no publication of the email and no form of disclosure of its existence".

[16] Paragraph (f) of the definition of "personal information" in section 2(1) states:

"personal information" means recorded information about an identifiable individual, including, 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

[17] In its representations, the region advises that it considered the possible application of paragraph (f) of section 2(1) of the *Act* to the circumstances of this appeal and concluded that "there is no implied confidentiality in the wording of the [appellant's] email, nor is confidentiality explicitly mentioned either in the email, or on the public website where anyone can email the Chair".

[18] Having regard to the representations of the parties and the record itself, I find that the body of the email does not contain the "personal information" of the appellant. To qualify as personal information, it must be reasonable to expect that the individual may be identified if the information is disclosed.² In my view, the statements and questions set out in the email question the conduct of the two named councillors and

² Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

the Regional Councillor's plans, if any, to respond. I am not satisfied that the content of the email reveals anything of a personal nature of the appellant or that there is anything in the appellant's questions and statements which would reveal his or her identity.

[19] I am also not satisfied that the email amounts to the type of correspondence contemplated in paragraph (f) of the definition of "personal information" in section 2(1). In my view, the email does not contain information that is implicitly or explicitly of a private or confidential nature about the appellant. Accordingly, I find that the body of the email does not contain the appellant's personal information as defined in section 2(1) of the *Act*.

[20] Turning now to the information found in the body of the email about the Regional Councillors. 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.³ 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.⁴

[21] The Regional Councillors are identified by name in the body of the email. Accordingly, I must determine whether the information contained in the email reveals something of a personal nature about them. Following the analysis set forth in Order PO-2225, the first question I must ask is: "*In what context does the name of the individual appear?*" The second question I must ask is: "*Is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about this individual?*"

[22] With respect to the first question, I am satisfied that the information contained in the body of the email relates to the Regional Councillors in a professional, official or business context. With respect to the second question, I have carefully reviewed the records and am satisfied that the portions of the records which refer to allegations of a conflict of interest qualifies as the "personal information" of the identified councillors [paragraph (b) and (g)]. This information consists of their names along with other personal information relating to them [paragraph (h)]. Previous decisions from this office have found that information about an individual in their professional or employment capacity does not constitute the individual's personal information, unless the information about the individual involves an evaluation of his or her performance or an investigation into his or her conduct, as in the present case.⁵

³ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁵ Order MO-2197

Summary of findings

[23] I find that the email signature, identifying the appellant, contained in the record constitutes his or her “personal information” as defined in section 2(1) of the *Act*. As this information is only located on the top and bottom of the email and these portions of the email do not also contain the personal information of other identifiable individuals, I will go on to determine whether disclosure of this information to the requester would constitute an unjustified invasion of the appellant’s personal privacy under section 14(1) of the *Act* below.

[24] I also find that most of the information in the body of the email relates to the named regional councillors in a business, professional or official capacity or simply pose questions to the recipient of the email. As these portions of the email do not contain “personal information”, the mandatory personal privacy exemption cannot apply to it and the region’s decision to disclose this information to the requester is upheld.

[25] However, I find that the portions of the email which specify a conflict of interest issue constitutes the “personal information” of the regional councillors named in the email. As the requester is one of the regional councillors identified in the record, I will go on to determine whether disclosure of this information qualifies for exemption under section 38(b) of the *Act*. Section 38(b) of the *Act* recognizes the special nature of requests for one’s own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.

B. Would disclosure of the “personal information” at issue constitute an unjustified invasion of personal privacy under sections 14(1) or 38(b)?

a) Email signature

[26] In the circumstances of this appeal, I must determine whether disclosing the appellant’s email signature to the requester would constitute an unjustified invasion of his personal privacy under section 14(1).

[27] Section 14(2) provides some criteria for the region to consider in making this determination; section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. The parties have not claimed that any of the exclusions in section 14(4) apply and I am satisfied that none apply.

[28] If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy under section 14(1). Given that the appellant has not consented to the release of his or her information to the

requester, the only exception that could apply to the email signature is 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.

[29] The region's and appellant's representations did not specifically address the issue of whether any of the presumptions in section 14(3) or factors in section 14(2) apply. I have carefully reviewed their representations and have examined the record and am satisfied that the information at issue does not raise the possible application of any of the presumptions in section 14(3). Where neither the 14(3) presumptions nor the exception in section 14(4) apply, 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.⁶ In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring *disclosure* in section 14(2) must be present. In the absence of such a finding, the exception in section 14(1)(f) is not established and the mandatory section 14(1) exemption applies.⁷

[30] 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).⁸

[31] Though the parties did not provide representations addressing whether any of the factors in section 14(2) apply in the circumstance of this appeal, I find that the appellant's general submissions about confidentiality raise the possible application of section 14(2)(h) which 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 the personal information has been supplied by the individual to whom the information relates in confidence

14(2)(h): supplied in confidence

[32] This factor applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and

⁶ Order P-239.

⁷ Orders PO-2267 and PO-2733.

⁸ Order P-99.

that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.⁹

[33] In his appeal letter, the appellant states:

As a private citizen, I have the right to communicate with government officials and not to be placed in a position which I have to fear open and free contact.

[34] Earlier in this order, I found that the body of the email did not meet the definition of "personal information" in paragraph (f) of section 2(1) (correspondence of a private or confidential nature) as it did not contain the appellant's "personal information". However, the representations of the parties on this issue is relevant to a determination of whether the factor at section 14(2)(h) applies to the appellant's electronic signature.

[35] The region advises that its website contains an "Email the Regional Chair" link which leads to a web form requesting the sender's contact name, phone number, email address and city/town along with the subject and content of their email message. The region also advises that the bottom of the form contains a link entitled "Disclaimer/Privacy" which contains "Niagara Region Web Site and Social Media Disclaimer Statement", which states:

Senders of messages should be aware that personal and other information contained in electronic correspondence (or printed versions thereof) which are directed to Niagara Region are subject to the [Act] and may be deemed releasable under this legislation, and that the anonymity or confidentiality of the sender and any information contained within the correspondence cannot be guaranteed. Electronic messages resident on systems outside those of domain names owned by Niagara Region, but deemed to be in the custody and control of Niagara Region, may also be releasable under this legislation.

...

Information submitted through online forms or other formats (e.g. emails, letters, petitions, etc.) may be placed in a public agenda and become part of the public record.

Your personal information will be collected and maintained for the purpose of creating a record and may be available to the general public pursuant to the Municipal Act 2001, the Municipal Freedom of Information and Protection of Privacy Act (MFIPPA), and any other relevant Acts.

⁹ Order PO-1670.

[36] As stated above, for the factor in section 14(2)(h) to apply, there has to be an expectation that the appellant's name and email address would be treated confidential, and that the expectation is reasonable in the circumstances.

[37] The region takes the position that there is "no implied confidentiality in the wording of the [appellant's] email, nor is confidentiality explicitly mentioned either in the email, or on the public website where anyone can email the Chair". In support of its position the region refers to its disclaimer statement which states that the "anonymity or confidentiality" of individuals who send emails using their web form "cannot be guaranteed".

[38] In my view, the personal nature of the information in question and the context in which it was provided to the region determines whether there is a reasonable expectation that the information would be treated confidential.

[39] I find that the appellant's email amounts to a written complaint to the Regional Chair about two councillors. I am satisfied that the appellant supplied his name and email address along with his complaint, in confidence and had a reasonable expectation that the region would keep that information private from the individuals he complained about. There is no evidence that the appellant made public the fact that he wrote to the Regional Chair to make a complaint. The region claims it made no assurances of confidentiality, but I find that it did. The region's disclaimer statement refers to the *Act* which both protects the personal information of identifiable individuals from being disclosed to other individuals and enables requesters to obtain access to records not subject to an exemption or exclusion under the *Act*.

[40] Having regard to the above, I find that the factor favouring privacy protection in section 14(2)(h) applies to the appellant's electronic signature. Given the application of this factor and the fact that no factors in favour of disclosure were claimed or otherwise established, I am satisfied that the disclosure of the appellant's electronic signature to the requester would constitute an unjustified invasion of personal privacy under section 14(1) of the *Act*.

[41] I find that the appellant's email signature is exempt from disclosure under section 14(1) of the *Act* and will order the region to withhold this information to the requester.

b) Content of the email

[42] Section 38(b) of the *Act* is the discretionary personal privacy exemption under Part II of the *Act*. Section 38(b) states:

A head may refuse to disclose to the individual to whom the information relates personal information if the disclosure would constitute an unjustified invasion of another individual's personal privacy

[43] Under section 38(b), where a record contains the personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[44] The portions of the email I found constitutes the personal information of two individuals contains information about the requester and another councillor. The region takes the position that "the requester has the right to any personal information about him or herself". I agree, and find that disclosure of the personal information which relates solely to the requester would not constitute an unjustified invasion of personal privacy under section 38(b). Accordingly, I uphold the region's decision to provide this information to the requester.

[45] However, I do not agree with the region's position that information identifying the other councillor is also the personal information of the requester and should be disclosed to him or her without a determination of whether or not disclosure of this information would constitute an unjustified invasion of personal privacy under section 38(b).

[46] As previously mentioned in this order, I contacted the requester during the inquiry process to solicit his or her representations. At the time, I also asked the requester to confirm whether he or she sought access to the information contained in the records about the other councillor. I did not receive a response and thus am unable to ascertain whether the requester seeks access to this information. Similarly, I do not know whether the requester has any objections about this office contacting the other councillor to inquire whether he or she consents to the release of his or her information to the requester. Accordingly, I have decided that if the requester wishes to obtain access to the personal information of the other councillor, the requester should file a new access request under the *Act* to the region specifically requesting this information.

[47] In my view, until the requester makes a specific request for the information relating to the other councillor and the region has an opportunity to determine whether disclosure of this information would constitute an unjustified invasion of personal privacy under section 38(b), this information should not be disclosed to the requester.

ORDER:

1. I order the region to **not** disclose the information I found constitutes the appellant's personal information to the requester (the appellant's email signature).
2. The region is **not** to disclose the name of the other councillor contained in the record to the requester unless the requester has made a new request for this information under the *Act* and the region makes an access decision.
3. I order the region to disclose the portions of the record which contains the requester's personal information to the requester by **January 30, 2015** but not before **January 23, 2015**.
4. I order the region to disclose the portions of the records which do not contain personal information to the requester by **January 30, 2015** but not before **January 23, 2015**.
5. For the sake of clarity, in the copy of the record enclosed with the region's order, I have highlighted the portions of the record which **should not** be disclosed to the appellant.
6. In order to verify compliance with order provision 3 and 4, I reserve the right to require a copy of the record disclosed by the region to be provided to me.

Original Signed by: _____
Jennifer James
Adjudicator

_____ December 22, 2014