

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3566

Appeals MA17-236 and MA17-300

Township of Wainfleet

February 26, 2018

Summary: Two appellants appealed the township's decision to partially disclose to a requester a number of email records relating to opposition to wind turbine development in the township. The requester sought records including those naming the appellants or three identified companies. The appellants claimed that the records contain third-party information exempt under section 10(1) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). In this order, the adjudicator finds that the information at issue is not exempt under section 10(1). She also determines that the records do not contain the personal information of the appellants or any of ten affected parties whose information also appears in the records; as a result, the mandatory exemption at section 14(1) (personal privacy) of the *Act* cannot apply. She dismisses the appeals.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2 (definition of "personal information"), 10(1).

OVERVIEW:

[1] This order disposes of the issues arising from a request made to the Township of Wainfleet (the township) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). A requester sought all documents or correspondence relating to the Wainfleet Legal Fund or a named group, and all communications or documents between two named individuals or relating to any of three named companies. The requester specified a date range of June 2012 to the date of the request, February 2017.

[2] After discussions with the township, the requester clarified his request to seek:

Any correspondence between [the township Mayor], [the township Chief Administrative Officer] and [two named individuals].

Records containing key words "Wainfleet Legal Fund," [a named group], and [three named companies].

[3] By way of background, the Wainfleet Legal Fund was a fundraising initiative to assist the township with the costs of defending itself in a legal proceeding relating to its passage of a by-law imposing certain restrictions on wind turbine development in the township.¹ The group named in the request is a group opposed to the development of industrial wind turbine sites in the township and in Ontario.

[4] The township identified 20 pages of email records responsive to the request. Before making its decision on access, the township notified the two individuals who are named in the request under section 21 of the *Act*. After giving these individuals an opportunity to make representations, the township issued a decision granting the requester partial access to the records. It withheld some information appearing in the records—namely, the names and email addresses of members of the public, and two other personal addresses and a telephone number—on the basis of the mandatory personal privacy exemption at section 14(1) of the *Act*.

[5] The requester did not appeal the township's severances to the records. However, each of the two notified individuals appealed the township's decision to disclose the remaining portions of the records to the requester. These individuals are the appellants in Appeals MA17-236 and MA17-300.

[6] Each appellant takes the position that the information the township proposes to disclose qualifies for exemption under section 10(1) (third party information) of the *Act*.

[7] As no mediation was possible, the appeals were transferred to the adjudication stage for a written inquiry under the *Act*.

[8] I began my inquiry by seeking the representations of the appellants. As they are the parties resisting disclosure, the appellants bear the burden of proof of establishing that the section 10(1) exemption applies to the records. I also invited the appellants to address the possible application of section 14(1) of the *Act*. Section 14(1) is a mandatory exemption that prohibits the disclosure of personal information except in specified circumstances. In order to determine whether section 14(1) is engaged, I asked the appellants to first address whether the records contain their personal information within the meaning of the *Act*.

[9] The appellant in Appeal MA17-236 (Appellant A) provided representations, including an affidavit sworn by the appellant in Appeal MA17-300 (Appellant B).

¹ Township council's resolution relating to the fund is documented in the minutes of the February 12, 2013 council meeting.

Appellant B declined to make representations.

[10] I also notified ten additional individuals whose information appears in the records. I invited these individuals (the affected parties) to provide representations on the potential application of section 14(1) to their information in the records. One affected party consented to the disclosure of her information, while a second affected party objected to any disclosure. The others did not respond to my notification.

[11] I decided it was unnecessary to seek representations from the township or the requester.

[12] In this order, I uphold the township's decision to disclose the remaining information to the requester, with the exception of one record that is outside the scope of the request.

RECORDS:

[13] At issue in these appeals are 20 pages of email records.

[14] The township notified Appellant A on eight of these pages in Appeal MA17-236.

[15] The township notified Appellant B on 19 of these pages in Appeal MA17-300.

[16] The pages are duplicated in the appeals, with the exception of one page that is only at issue in Appeal MA17-236 (page 1 in Appeal MA17-236).

[17] That page is an April 7, 2017 email from Appellant A to the township concerning the freedom-of-information request giving rise to these appeals. This record post-dates the request; it also falls outside the scope of the request based on its content. This record is not responsive to the request, and should not be disclosed to the requester.

[18] Below I address the appellants' appeals in relation to the remaining 19 records.

ISSUES:

- A. Does the mandatory exemption at section 10 apply to the records?
- B. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- C. If the records contain personal information within the meaning of the *Act*, does the mandatory exemption at section 14(1) apply to the information at issue?

DISCUSSION:

A. Does the mandatory exemption at section 10 apply to the records?

[19] At the intake and mediation stages of their appeals, each appellant claimed that the records contain third-party information protected under the *Act*. The appellants refer to the mandatory exemption for third-party information at section 10(1). This section states:

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

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[20] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.² Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.³

[21] For section 10(1) to apply, the appellants must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

² *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

³ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

[22] I asked each appellant to identify the specific paragraph(s) of section 10(1) on which he relies, and to provide evidence to show how the three-part test is met.

[23] Appellant B declined to provide representations.

[24] Appellant A provided a brief letter denying that he has ever entered into any agreement with the township, or that Appellant B has any involvement with any corporations associated with Appellant A. Appellant A also provided an affidavit sworn by Appellant B, which appears to have been entered as an exhibit in a civil proceeding involving Appellant A.

[25] In the affidavit, Appellant B disclaims any involvement in certain activities or with certain businesses, including the three companies named in the request. Appellant B states that he initially approached Appellant A to provide marketing and administrative support for a proposal to create a legal fund for the benefit of the township, but that ultimately Appellant A and Appellant A's company were not engaged for this work and were not involved with the legal fund.

[26] Appellant A does not explain the relevance of the affidavit. He merely asserts that "releasing inaccurate information is likely to unfairly damage" Appellant A and the companies in which Appellant A is the sole shareholder, director and officer.

[27] The records at issue in these appeals are emails that are responsive to the request because they pass between the township Mayor, the township Chief Administrative Officer and Appellant A or Appellant B, or because they refer to the Wainfleet Legal Fund, a named group, or any of three named companies. Many of the records are email strings that include senders or recipients in addition to those named in the request. Neither appellant has explained how the records meet any part of the three-part test for exemption under section 10(1), and it is not evident on the face of the records how they would.

[28] The records do not appear to reveal any of the types of information protected by section 10(1). In particular, although some of the records set out administrative details relating to the establishment of the legal fund, and the proposed involvement of a named company, they do not appear to contain commercial or financial information of third parties as those terms have been defined by this office.⁴

[29] Without evidence from the appellants, I also find no basis for concluding that the records were supplied to the township in confidence, or that their disclosure could reasonably be expected to give rise to any of the harms in section 10(1).

⁴ See, for example, Orders P-1621 and PO-2010.

[30] The requirement that the information be "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.⁵ Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.⁶

[31] In addition, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.⁷

[32] While some of the emails originate from Appellant B, several of these have a wide distribution extending beyond members of township council or township staff, and appear to include members of the public (pages 1, 4, 5-6, 13-14 and 16 in Appeal MA17-300). Another email is from a township councillor to other members of council and township staff, with neither appellant being a sender or a recipient (page 17 in Appeal MA17-300). These circumstances do not suggest an intention to supply third-party information to the township in confidence; neither do the records' contents.

[33] In other email records, Appellant B is the sender or a recipient, and the email distribution is limited to members of township council or township staff (pages 2-3, 7, 8-10, 11-12, 15, 18 and 19 in Appeal MA17-300). In these emails, there is no indication that Appellant B intended the contents to be confidential, or that any portions constitute third-party information.

[34] Even if I were to assume that the records contain confidential third-party information, it is not evident how their disclosure could be expected to yield the harms contemplated by section 10(1). The only evidence provided by the appellants on this topic is Appellant A's assertion that disclosure of inaccurate information is likely to unfairly damage companies with which he is associated. Appellant A has not explained the connection between the records and any potential harms from disclosure. He has not explained, for example, why he believes the records contain inaccurate information, or how their disclosure might damage his companies. The accompanying affidavit of Appellant B does not assist. While the failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption, this is not a case where harm can be inferred from the surrounding circumstances.

[35] I conclude that section 10(1) does not apply to the records.

B. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[36] I invited the appellants and the affected parties to address whether the information relating to them in the records qualifies for the mandatory personal privacy

⁵ Order MO-1706.

⁶ Orders PO-2020 and PO-2043.

⁷ Order PO-2020.

exemption at section 14(1) of the *Act*. In order for section 14(1) to apply, it is first necessary to establish that the records contain "personal information" within the meaning of the *Act*, and determine to whom the personal information 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 if 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[.]

[37] 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.⁸

[38] Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information. These sections state:

⁸ Order 11.

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[39] 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.⁹

[40] 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.¹⁰

[41] Only one of the affected parties claimed that his personal information is at issue in these appeals. This affected party objected to disclosure of any information about him in the records.

[42] The appellants and the other affected party, who consented to disclosure of her information in the records, did not comment on whether the records contain their personal information.

[43] For the reasons that follow, I conclude that the records (severed by the township as described above) do not contain any personal information.

The records do not contain the personal information of Appellant A or the affected parties

[44] While Appellant A is not named in any of the records, some of the records contain references to a company with which Appellant A is associated. The township notified Appellant A on these records. The township also notified Appellant A on records containing the term "Wainfleet Legal Fund," with which Appellant A's company is connected in a public resolution passed by township council.¹¹

[45] In order to qualify as "personal information" within the meaning of the *Act*, the information must be about an "identifiable individual." This office has interpreted the term "individual" as it appears in the *Act* to mean a natural person, with the result that

⁹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

¹⁰ Orders P-1409, R-980015, PO-2225 and MO-2344.

¹¹ See footnote 1.

the personal privacy protections in the *Act* can only apply to natural persons, and not to other entities, such as corporations, associations and business organizations.¹² This office has also recognized that, in some circumstances, information about a business entity may be so closely related to an individual so as to qualify as that individual's personal information.¹³ In either case, the question is whether the information is "about" the individual, or about something other than the individual.

[46] I am satisfied in this case that the information in the records is about Appellant A's company, and is not about Appellant A. This is so even though Appellant A may be the sole shareholder, director and officer of the company. The company is a legal entity that exists independently of Appellant A, and has rights and obligations separate from Appellant A's. The references in the records are to activities undertaken by the company in its own name, and not in the name of Appellant A. There is nothing in the records to suggest that the business activities of the company are so closely connected to Appellant A so as to reveal something of a personal nature about him, or otherwise qualify as his personal information. Appellant A himself does not make any such claim.

[47] I conclude that there is no personal information of Appellant A in the records.

[48] I also notified ten affected parties whose names and other information appears in the records.¹⁴ These affected parties are members of township council or township staff. The affected parties appear in the records as senders of emails or, more commonly, as email recipients.

[49] One affected party, a township staff member, consented to the disclosure of her information in the records. Another affected party, a member of township council, claimed that the email containing his information is personal in nature. I disagree.

[50] This office has established a contextual approach to the definition of personal information when individuals are engaged in professional or business activities. In Order PO-2225, former Assistant Commissioner Tom Mitchinson set out the following two-part test for determining whether information associated with an individual in a professional or official capacity is "about" the individual within the meaning of the definition of personal information:

1. In what context do the names 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?
2. 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

¹² Order 16.

¹³ Order 113.

¹⁴ As noted above, the requester did not appeal the township's decision to sever from the records the names and other information of members of the public, as well as two personal email addresses and a telephone number. That information is not at issue in these appeals.

information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

[51] The records document discussions between various parties on matters of township business relating to council's position on wind turbine development in the township. For example, several of the records document discussions between township staff about the establishment of a legal defence fund for the benefit of the township. In other records, members of township council are recipients of comments from the public or from Appellant B on the wind turbine issue. (I will address records containing Appellant B's information under the next heading.) I am satisfied that in all these records, the affected parties' names and other information appear in a professional context. They are senders or recipients of the information in the records in their roles as members of township council or township staff.¹⁵

[52] I am also satisfied that the records do not reveal anything of a personal nature about the affected parties. In reaching this conclusion, I have considered whether any information in the records could be characterized as council members' opinions that would reveal personal information about them. In particular, one record (page 17 in Appeal MA17-300) is an email from one member of council to some council members and township staff on the wind turbine issue. The email sets out developments relating to wind turbine projects in the township, and actions taken by township council in response. The record relates directly to township business. To the extent it reveals any opinions of the affected party council members, I am satisfied that these are the views of the affected parties in their capacity as council members, rather than as ordinary citizens. Among other considerations, I have taken into account the public facts of township council's opposition to wind turbine development in the township, and council members' support of a particular motion relating to this topic.¹⁶

[53] I also have particularly considered the record containing the non-consenting affected party's name (page 18 in Appeal MA17-300), as he described this record as being personal in nature. The record is an email from Appellant B to several members of township council, including the affected party, addressing events at the prior evening's meeting of township council. This record is clearly addressed to the affected party in his capacity as township councillor, and concerns a matter of township business. I find no support for the claim that the affected party's name appears in a personal context in this record.

[54] I conclude that the records do not contain any personal information of the affected parties.

¹⁵ There was no suggestion that any of the records were held by individual council members outside the scope of the *Act*, and I confirm that all the records are subject to the *Act*. In all the records sent to or from one or more council members, the recipients include the township Mayor (who is an officer of the township) and/or one or more members of township staff (who are employees of the township). (I also find, in the next paragraphs, that the contents of the records relate to township business, which would be relevant to a determination of custody or control if the township did not otherwise hold the records: Order M-813. See also Order MO-3281 for a recent application of this test.)

¹⁶ See footnote 1. Also see the comments of the court in 2013 ONSC 2194 (CanLII).

The records do not contain the personal information of Appellant B

[55] Appellant B is a sender or recipient of many of the emails in the records. The emails to and from Appellant B are associated with a personal email address (which has been severed by the township, and is not at issue in these appeals). In many of the records, Appellant B's role in relation to the township is not identified, and Appellant B himself has not provided any evidence in these appeals. However, from my review of all the records and publicly-available materials, I conclude that Appellant B was at the time of the records' creation a member of council for the regional municipality of which the township is a part. Based on the totality of the evidence, I am satisfied that the information about Appellant B in the records arises in relation to his role as a regional councillor, and not as a private citizen.¹⁷ I also find that this information does not reveal anything of a personal nature about Appellant B.

[56] In some of the records, Appellant B is directly or indirectly addressed as a member of regional council (pages 4, 5-6 and 13-14 in Appeal MA17-300). I am satisfied that in these records, Appellant B is the sender or the recipient of information in his capacity as regional councillor. The fact that Appellant B chose to send and receive emails about regional council business using a personal email address does not change the character of the information, which is plainly connected to his role as a member of regional council.¹⁸

[57] In the remaining records, Appellant B is not explicitly identified as a member of regional council. Some of these records concern the establishment of the legal defence fund for the benefit of the township (pages 2-3, 7, 8-10, 11-12 and 15 in Appeal MA17-300). Other records are emails drafted by Appellant B and sent to various recipients, including township council and staff members, on issues relating to wind turbine development (pages 1, 16, 18 and 19 in Appeal MA17-300). One record is an email from one member of township council to some other council members and township staff on the wind turbine issue (page 17 in Appeal MA17-300), in which the author refers to Appellant B in passing. I found, above, that this record relates directly to township business.

[58] In all these records, I am satisfied that, although he is not identified as such, Appellant B's information appears in the records in the context of his role as a regional councillor. He is the sender or recipient of information (and, in one record, he is named

¹⁷ And there is no dispute that the records are in the custody and under the control of the township. See footnote 15.

¹⁸ The IPC has cautioned against the use of personal email accounts to conduct business, including because it may interfere with an institution's compliance with the requirements of access-to-information legislation: see IPC's "Instant Messaging and Personal Email Accounts: Meeting Your Access and Privacy Obligations" (June 2016).

This office applies a contextual approach in considering the impact of the use of personal or professional email accounts on the right of access to records under access-to-information legislation. The contents of the record is a key consideration. See *City of Ottawa v. Ontario*, 2010 ONSC 6835 (CanLII) and, among others, Orders PO-3666, MO-3031 and MO-3281 (in the context of determining whether records are in the custody or under the control of an institution).

in discussions) about wind turbine development, which is known to be a matter of regional council business. This is clear from my review of publicly-available materials, including agendas and minutes of meetings of regional council. Appellant B's position on this issue as a regional councillor is also a matter of public record, including through public statements on this issue made in his official capacity.

[59] Taking all this into account, I am satisfied that Appellant B's activities and opinions on the wind turbine issue, as documented in the records, are connected to Appellant B in his capacity as a regional councillor, even where Appellant B is not explicitly identified as acting in this role. The activities and opinions captured in the records are consistent with the position that Appellant B has taken publicly on this issue as a member of regional council. There is no suggestion in the records that Appellant B is acting as a private citizen, and Appellant B has not himself made that claim. There is also no basis on which to conclude that disclosure of the records would reveal anything of an inherently personal nature about him.

[60] I conclude that there is no personal information of Appellant B in the records.

[61] As none of the information in the records relating to Appellant A's company, the affected parties or Appellant B qualifies as personal information, the mandatory exemption at section 14(1) cannot apply.

[62] As no exemption applies, I uphold the township's decision to disclose the remaining information to the requester.

ORDER:

I uphold the township's decision. I dismiss the appeals.

Original Signed By: _____
Jenny Ryu
Adjudicator

February 26, 2018 _____