CITATION: Barker v. Ontario (Information and Privacy Commissioner), 2017 ONSC 7564
DIVISIONAL COURT FILE NO.: DC-16-315
DATE: 20171218

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

KITELEY, TZIMAS AND MATHESON JJ.

BETWEEN:	
DR. KIM BARKER Applicant	*Marvin J. Huberman* and *Anita Fineberg*, for the Applicant
– and –	
ONTARIO (INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO) AND ALGOMA PUBLIC HEALTH Respondents	*Christopher Bredt* and *Alannah Fotheringham*, for the Respondent Information and Privacy Commissioner of Ontario *Alexandra V. Mayeski,* for the Respondent Algoma Public Health
	HEARD at Toronto: October 17, 2017

W. MATHESON J.

[1] The applicant seeks judicial review of two decisions of the Information and Privacy Commissioner of Ontario, as follows:

(1) the Commissioner's Order MO-3295, dated March 10, 2016, upholding the decision of the respondent Algoma Public Health (APH) to disclose the entirety of a report arising from KPMG's forensic investigation into certain allegations concerning APH (the Report); and,

(2) the Commissioner's June 8, 2016 decision declining the applicant's request for a reconsideration of Order MO-3295.

[2] The parties agree that the Report contains personal information that would ordinarily be the subject of a mandatory exemption from disclosure under s. 14 of the *Municipal Freedom of*

Information and Protection of Privacy Act, R.S.O. c. M.56 (MFIPPA or the Act). As a result of the mandatory exemption, the personal information would ordinarily be redacted before the Report was disclosed. However, the Commissioner upheld APH's decision to disclose the entire Report based on the public interest override in s. 16 of the Act.

[3] For the reasons set out below, the application is granted and the appeal and reconsideration decisions are quashed.

Brief background

[4] The applicant is the former Medical Officer of Health and Chief Executive Officer of APH. After her departure, APH retained KPMG to do a forensic investigation into a controversy that had arisen during the applicant's time at APH. The controversy related to the engagement of a consultant as an acting senior officer and the actions taken by the acting senior officer during his approximately six months at APH. The resulting KPMG Report is dated March 27, 2015.

[5] Although no longer with APH, the applicant agreed to be interviewed by KPMG as part of its investigation. However, she was not provided with the Report when it was delivered to APH.

[6] In May 2015, APH received a request under MFIPPA for access to the Report. The requester was the Soo Today/Village Media, an online news service.

[7] APH then provided notice of the access request to several potentially affected parties and invited them to make submissions about the request to disclose the Report. Among others, APH gave notice to the applicant.

[8] The applicant and other affected parties requested a copy of the Report in order to respond. A redacted version of the Report was provided to the applicant, removing the portions of the Report that APH concluded were potentially the subject of exemptions in favour of other parties and should therefore not be disclosed at that stage. The applicant asked for and was given extensions of time to respond.

[9] In the applicant's response, she objected to disclosure of the Report relying on a number of exemptions from disclosure in MFIPPA, including the exemption for personal information under s. 14 of the Act. In her response, the applicant also noted that there were inaccuracies in the Report, including with respect to information attributed to her. Inaccuracies in the Report were raised by one of the other affected parties as well.

[10] Less than a day after receiving the applicant's response, APH gave its decision. APH decided to grant access to the Report in its entirety. It relied on s. 16 of MFIPPA. Section 16 provides that exemptions from disclosure under certain sections of the Act, including the exemption for personal information in s. 14, do not apply if a compelling public interest in the disclosure of the record "clearly outweighs the purpose of the exemption."

Appeal to the Commissioner

[11] The applicant appealed APH's decision to the Information and Privacy Commissioner, giving rise to the decisions that are the subject of this application for judicial review.

[12] When an appeal is brought under MFIPPA, the Commissioner may bring in a mediator to try and settle the matter pursuant to s. 40 of the Act. That was not done here. Where there is no mediation or no settlement, the Commissioner may conduct an inquiry under s. 41 of the Act. That approach was taken here.

[13] The Commissioner has broad powers when conducting an inquiry under s. 41 of MFIPPA, including the power to examine records and take evidence under oath. In this case, the Commissioner decided to begin by seeking representations from APH and the original requester, the Soo Daily. As set out in the procedures provided to the parties, the representations could include arguments, documents or other evidence relied upon by the party. The applicant was notified of this first step.

[14] In its representations, APH did not resile from its decision to disclose the entire Report, but it did specifically agree that the mandatory exemption for personal information under s. 14 of the Act applied to information in the Report. Both APH and the requester made representations that advocated for the use of the public interest override in the circumstances of this case.

[15] The Commissioner then gave the applicant a formal notice of inquiry along with the representations that he had received from APH and the requester. The applicant was invited to provide the arguments, documents or other evidence relied upon.

[16] The applicant made representations, providing both written submissions and some documents. The applicant challenged APH's conclusion that the requirements of the public interest override in s. 16 were met in this case. In that regard, her submissions raised issues regarding the necessary balancing under s. 16, which requires that the public interest clearly outweigh the applicable exemptions from disclosure under the Act.

[17] In her representations to the Commissioner, the applicant relied, among other things, on assurances of confidentiality that she had received from KPMG, the degree of public disclosure that had already taken place, the nature of the KPMG investigation and the potential consequences of disclosure. The applicant submitted that the exemptions to be considered included ss. 8, 14 and 15. With respect to the s. 14 exemption for personal information, specific subparagraphs were also raised.

[18] After receiving the applicant's representations, the Commissioner gave notice to other potentially affected parties inviting further representations. The decision was then released, dated March 10, 2016.

Commissioner's decision

[19] The Commissioner upheld APH's decision to disclose the entire Report under s. 16 of MFIPPA. With respect to the matters at issue on this judicial review application, the Commissioner found as follows:

(i) that a substantial part of the Report contained personal information of the applicant and another identifiable individual;

(ii) that the disclosure of the personal information would constitute an unjustified invasion of privacy of those two individuals;

(iii) that the requirements for an exemption from disclosure under s. 14 of the Act were therefore met;

(iv) that there was a compelling public interest in the disclosure of the Report and that interest clearly outweighed the purpose of the s. 14 exemption, fulfilling the requirements of the public interest override in s. 16 of the Act; and,

(v) that the entire Report should therefore be disclosed.

[20] In his reasons for decision, the Commissioner indicated that he had found it unnecessary to identify the specific portions of the Report that constituted personal information:

> Due to my finding below in relation to the application of the "public interest override" at section 16 of the Act, it is not necessary to identify exactly which portions of the Report constitute personal information.

[21] With respect to the scope of the public interest override, the Commissioner acknowledged that it did not necessarily require that all of the personal information had to be disclosed. But he found that in this case it did, as follows:

> I have also considered whether any portions of the record ought to be withheld, and find that there is a compelling public interest in disclosure of the Report in its entirety.

[22] The Commissioner found that the applicant's personal information was essential to the determination of whether a conflict of interest existed, concluding that it was "inextricably linked" to the issue that was the focus of the Report. However, nowhere in the decision does the Commissioner indicate what portions of the Report he determined were the personal information for which disclosure was unjustified under s. 14, yet overridden by s. 16.

Request for reconsideration

[23] The applicant sought a reconsideration after retaining new counsel with expertise in privacy law.

[24] Section 18 of the IPC Code of Procedure provided that the Commissioner may reconsider a decision where one of three grounds was established – here, the relevant ground put forward was a "fundamental defect in the adjudication process."

[25] In addition to lengthy submissions and related case authorities, the applicant submitted an affidavit on some specific issues, such as the assurances of confidentiality given to her and the many alleged inaccuracies in the Report. Under s. 18.02 of the Code of Procedure, the Commissioner could reconsider a decision based on new evidence (whether or not that evidence was available at the time of the original decision) but not as the sole basis for the request for reconsideration. One of the three s. 18 grounds still had to be met.

[26] Among other issues, the applicant challenged the Commissioner's failure to identify the portions of the Report that contained personal information that he determined satisfied the requirement of the s. 14 exemption. The applicant submitted that this failure was a fundamental defect in the adjudication process, giving rise to the need for a reconsideration. The applicant submitted that this step was a necessary prerequisite to determining whether each portion of the Report that was exempted under s. 14 ought to be disclosed under s. 16. The applicant put forward authorities for the proposition that the Commissioner could use the reconsideration request to complete this statutory task.

[27] By letter dated June 8, 2016, the Commissioner declined the applicant's reconsideration request. On the issue of identifying the personal information, the Commissioner indicated that his decision not to describe the portions of the Report that contained personal information "should not be confused for a lack of consideration of which portions of the Report contain personal information" saying that "inclusion of such information in [the decision] would have been redundant in light of the application of the public interest override."

[28] Thus, even at the request for reconsideration stage, the Commissioner did not provide information (such as page, paragraph and line numbers) that indicated what portions of the Report he found were the subject of the exemption under s. 14, and therefore were the subject of balancing required to invoke the public interest override in s. 16 of the Act.

[29] This application for judicial review was then commenced. The respondent Commissioner took the primary role in oral argument before us, supported by APH.

Issues regarding the record in this proceeding

[30] For this application, the court has received both a public record and a non-public record that, together, encompass the record of proceedings before the Commissioner. Those materials include an affidavit of the applicant that was put forward on the request for reconsideration. A further affidavit of the applicant has been filed in the application for judicial review.

[31] The Commissioner made submissions before us about the proper approach to the record of these proceedings, focusing on the two affidavits of the applicant that are in the application materials. With respect to the first affidavit, from the reconsideration request, the Commissioner submits that it forms part of the record regarding the decision on reconsideration but not the prior

decision on the appeal. I agree. With respect to the second affidavit, put forward on this application for judicial review, the Commissioner submits that it does not form part of the record of the appeal or the reconsideration by the Commissioner. I agree. Lastly, the Commissioner submits that the second affidavit has a limited role on this application. Again, I agree. In any event, resort to these affidavits is not needed to deal with the dispositive issue on this application.

[32] A detailed account of the facts giving rise to the Report has not been included in these reasons given the outstanding issues about disclosure of the contents of the Report.

Analysis

[33] The applicant submits that the Commissioner made reviewable errors as follows:

(1) the failure to identify the personal information that he found qualified for exemption from disclosure under s. 14 in the Report;

(2) the analysis of s. 14(2)(e) (g) and (i) and 14(3) of MFIPPA; and,

(3) related errors regarding the balancing required under s. 16 of the Act.

[34] There is no issue between the parties about the standard of review. It is reasonableness.

[35] The challenge raised by this application for judicial review arises from the Commissioner's decision not to disclose what personal information he concluded qualified for the s. 14 exemption. It is that information that must be considered in reviewing the Commissioner's balancing under s. 16 of MFIPPA and resulting decision to disclose.

[36] This omission from the reasons for decision must be considered within the context of the reasonableness analysis and the role of the reasons for decision in that regard.

[37] The issue for the court is whether the decision, as a whole, is reasonable. The Supreme Court's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, 1 S.C.R. 190 established the well-known requirement that: "In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law", at para. 47.

[38] A challenge to the sufficiency of reasons forms part of the reasonableness analysis; it is not a freestanding basis to quash a decision. The reasons must be read together with the record and the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, 3 S.C.R. 708, at paras. 14-16 and 18.

[39] Reasons should be read as a whole and not overly dissected or parsed, and need not address all issues raised by the parties. The reasons need only "adequately explain" the basis for decision, allowing the reviewing court "to understand why the tribunal made its decision and permit [the court] to determine whether the conclusion is within the range of reasonable outcomes":

Newfoundland Nurses, at para. 16. In reviewing a decision, the court must first seek to supplement the decision maker's reasons before it seeks to subvert them: *Newfoundland Nurses*, at para. 12. The effort to supplement the reasons includes considering the record and reasons "which could be offered" in support of the decision: *Newfoundland Nurses*, at paras. 11-12; *Dunsmuir*, at para. 48.

[40] The direction that courts are to give respectful attention to the reasons "which could be offered" in support of a decision is not a "carte blanche" to reformulate a tribunal's decision: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, 3 S.C.R. 654 at para. 54.

[41] If the reasons for decision, read together with the decision and record and applying the above principles, do not permit the court to determine whether or not the decision falls within a range of reasonable outcomes, the decision may be found to be unreasonable.

[42] The applicant submits that the Commissioner's failure to identify those portions of the Report that he decided were personal information that were exempted under s. 14 of the Act resulted in an unreasonable decision at both the appeal and the reconsideration stage. This information was not provided to the parties, even after the issue was highlighted in the reconsideration request.

[43] The Commissioner submits that the omission can and should be addressed by our court supplementing the reasons for decision in accordance with the above principles. APH supports the Commissioner's position.

[44] The determination of what portions of the Report fall within the s. 14 exemption is not a simple matter. The statutory regime under MFIPPA requires that the decision-maker apply a series of statutory provisions that serve to include and exclude information at each step, and then balance the information that is exempted against the public interest under s. 16. This must be done for each piece of personal information in the Report. The relevant statutory framework, set out below, is not disputed.

Personal information

[45] Under s. 14(1) of MFIPPA, a head "shall refuse to disclose personal information to any person other than the person to whom it relates…" As a necessary first step to determining whether a record is prohibited from disclosure under s. 14, the decision-maker must decide whether the record contains personal information. "Personal information" is defined in s. 2(1) of the Act, 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.

[46] As shown by the definition itself, a wide variety of information may fall within it.

[47] Where there is information that falls within the above definition, the next step is to consider the exceptions to the exemption in s. 14(1), as follows:

> 14 (1) A head shall refuse to disclose <u>personal information</u> to any person other than the individual to whom the information relates <u>except,</u>
>
> (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
>
> (b) in compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates;
>
> (c) personal information collected and maintained specifically for the purpose of creating a record available to the general public;

(d) under an Act of Ontario or Canada that expressly authorizes the disclosure;

(e) for a research purpose if,

(i) the disclosure is consistent with the conditions or reasonable expectations of disclosure under which the personal information was provided, collected or obtained,

(ii) the research purpose for which the disclosure is to be made cannot be reasonably accomplished unless the information is provided in individually identifiable form, and

(iii) the person who is to receive the record has agreed to comply with the conditions relating to security and confidentiality prescribed by the regulations; or

(f) if the disclosure does not constitute an unjustified invasion of personal privacy. [Emphasis added.]

[48] The last exception, in s. 14(1)(f), gives rise to further steps. Even where there is personal information, it is not exempted from disclosure where "disclosure does not constitute an unjustified invasion of personal privacy." Subsection 14(2) provides statutory guidance in determining whether disclosure of personal information would constitute an unjustified invasion of privacy, as follows:

14(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 institution to public scrutiny;

(b) access to the personal information may promote public health and safety;

(c) access to the personal information will promote informed choice in the purchase of goods and services;

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(f) the personal information is highly sensitive;

(g) the personal information is unlikely to be accurate or reliable;

(h) the personal information has been supplied by the individual to whom the information relates in confidence; and

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[49] Further, s. 14(3) provides presumptions:

> 14(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
>
> (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
>
> (c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels;
>
> (d) relates to employment or educational history;
>
> (e) was obtained on a tax return or gathered for the purpose of collecting a tax;
>
> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
>
> (g) consists of personal recommendations or evaluations, character references or personnel evaluations; or
>
> (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations. [Emphasis added.]

[50] Subsection 14(4) then provides exceptions to the presumptions, as follows:

> (4) Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,
>
> (a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution;
>
> (b) discloses financial or other details of a contract for personal services between an individual and an institution; or
>
> (c) discloses personal information about a deceased individual to the spouse or a close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons.

[51] These very specific provisions demonstrate the need for the decision-maker to consider each piece of personal information and determine if any one of the presumptions or other provisions apply to it.

[52] Thus, once the decision-maker identifies the personal information in a record by applying the definition in s. 2(1), the above exceptions and presumptions must be considered in order to decide if the exemption in s. 14(1) applies. As shown in s. 14(2) through (4), this decision may vary for each piece of personal information. Some personal information may fall within exceptions and others not.

[53] Subject to the public interest override in s. 16, where an exemption has been established the record will be disclosed only after redacting the exempted personal information. Section 4(2) of the Act provides that the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

Section 16

[54] The parties agree that the s. 16 override is rarely used. It requires a balancing of interests, with a high threshold to meet, as follows:

> 16. An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record <u>clearly outweighs</u> the purpose of the exemption. [Emphasis added.]

[55] There must first be an applicable exemption before the s. 16 override becomes available. Further, the specific exemption must be identified in order to determine if there is a "compelling" public interest that "clearly outweighs" the purpose of the exemption. Here, the applicable exemption, as found by the Commissioner, was under s. 14 of the Act – the exemption for personal information.

[56] The determination under s. 16 involves a two-step process. First, there must be a compelling public interest in the disclosure of the record. For the purpose of this application, I assume that there is a compelling public interest. Second, that public interest must "clearly outweigh" the purpose of the exemption. This requires a balancing between the public interest and the purpose of the exemption.

[57] Where the relevant exemption is s. 14, as is the case here, the s. 16 analysis invokes both purposes of the Act, which are at odds with one another. MFIPPA has dual purposes, as set out in s.1 of the Act:

> (1) to provide a right of access to information under the control of institutions in accordance with the principle that information should be available to the public; and,
>
> (2) to protect the privacy of individuals with respect to personal information about themselves held by institutions.

[58] Counsel to the Commissioner acknowledged before us that the s. 16 balancing requires the decision-maker to consider the specific personal information exempted under s. 14 as against the applicable public interest. It is not necessary that all the personal information be disclosed. Only that portion of the personal information that meets the high s. 16 threshold would be disclosed under the public interest override. If the "clearly outweighs" threshold is not met for some of the personal information, that information would still be redacted before the Report was disclosed. The Commissioner acknowledged this in his decision, indicating that he had considered whether any portions of the Report should be withheld.

[59] The Commissioner did address aspects of the above analysis in his reasons for decision. The question therefore becomes: what is the significance of his refusal to disclose what personal information he determined was protected under s. 14 of the Act?

Commissioner's reasons for the challenged decisions

[60] In the Commissioner's appeal decision, he acknowledged the need to decide whether the Report contained "personal information" as defined in s. 2(1), and after a general discussion of that provision he found as follows:

> I have reviewed the [Report] and find that portions of the information contained in it consist of the personal information of the [applicant] and another named individual.
>
> A substantial portion of the [Report] contains the author's opinion on the [applicant] and another named individual, as contemplated by paragraph (g) of the section 2(1) of the Act. I also find that a large portion of the [Report] includes the names of the appellant and the other individual alongside other personal information about both individuals, falling within the meaning of paragraph (h) of section 2(1). Additionally, certain portions of the [Report] contain

> information falling within paragraphs (a) and (b) of section 2(1) relating to the [applicant] and the named individual.
>
> Therefore, I find that <u>a substantial portion of the [Report]</u> contains the personal information of the [applicant] and another identifiable individual. [Emphasis added.]

[61] Having found that a "substantial portion" of the Report was personal information, the Commissioner went on to say that it was not necessary to identify exactly which portions of the Report constituted personal information.

[62] The Commissioner discussed s. 14 in his reasons for decision. He found that the disclosure of the personal information contained in the [Report] "would constitute an unjustified invasion of privacy" because the "majority" of the personal information was "highly sensitive" under s. 14(2)(f) and because he was satisfied that "some of the information" was supplied with the reasonable expectation that it would be treated confidentially, under s. 14(2)(h). He did not mention s. 14(2)(e) (g) or (i), which the applicant submits ought to have been considered as well. The appeal addressed a third party report that did not just include factual information. It included inferences and opinions from the third-party – a category of personal information that ought to have been given more attention than that shown in the reasons.

[63] The Commissioner did conclude that given the "highly sensitive nature of the personal information in the [Report], and the confidential manner in which it was supplied," disclosure of the information would constitute an unjustified invasion of privacy of the two individuals named.

[64] The Report is twenty-six pages long. Nowhere in the Commissioner's decision does he indicate which portions of it he decided were personal information, nor which parts fell under the various subsections of s. 14 that he considered in reaching his conclusion that disclosure of that information would constitute an unjustified invasion of privacy of the two individuals named.

[65] In the Commissioner's factum, he submitted that the pertinent "personal information" was not difficult to ascertain and gave certain paragraphs of the Report as examples. In oral argument, the Commissioner's counsel identified a more extensive five parts of the Report (ranging from one sentence to longer sections), which he submitted contained the relevant personal information of the applicant. He then submitted that the personal information of the applicant that the Commissioner decided was covered by the s. 14(1) exemption was obviously those portions of the Report.

[66] This position is unsatisfactory. To begin with, the portions pointed to by counsel, taken together, total less than four pages of this twenty-six page Report. The reasons for decision suggest a larger portion of the Report comprised personal information, in the view of the Commissioner. More importantly, there are numerous other references to the applicant in the Report that are not included in the five portions referred to by counsel. This is not a case where, for example, there is one isolated paragraph about the applicant that could reasonably be pointed to as the "obvious" personal information that falls under the s. 14 exemption. There is no single implicit decision, as was the case in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association.*

[67] The Commissioner is essentially asking this court to undertake the detailed analysis of the information in the Report described above, decide what portions of the Report fall within the s. 14 personal information exemption, and then assess the reasonableness of the Commissioner's application of the s. 16 test based on that conclusion. That is not the role of this court. That complex analysis goes beyond supplementing the reasons. It amounts to asking this court to review the reasonableness of the Commissioner's decision based on our own assessment of what was exempted under s. 14 rather than based on what the Commissioner decided was exempted.

[68] Given the acknowledged need to disclose only that portion of the exempted information that meets the s. 16 "clearly outweighs" balancing test, each piece of personal information that is exempted under s. 14 must form part of the analysis that the section requires. In this case, we do not know what the Commissioner was weighing as against the public interest. This is not a matter of considering what reasons could be offered in support of the decision; it is a matter of not knowing what his decision was on that complex issue, which is prerequisite to the application of s. 16. This is especially important in regard to the application of s.16 because the public interest override, which is rarely used, can have a major impact on individuals whose personal information would normally be protected by a statutory exemption.

[69] The Commissioner submitted, by way of explanation, that he was not free to disclose the actual personal information in his decision. But there was no need to do so in order to identify it – identification can be done by page and line numbers, which was the approach used by counsel in argument before us. The Commissioner further submitted that APH and the applicant had not gone through and identified each portion of the Report that they submitted should be exempted in their submissions on the appeal to the Commissioner. APH conceded that s. 14 applied and there were, therefore, no detailed submissions made in that regard. However, the Commissioner was nonetheless required to go through the mandatory statutory decision-making process, and he specifically indicated that he had done so in his reasons refusing a reconsideration. At that juncture he ought to have provided his decision about what fell within the s. 14 exemption, if not before.

[70] There is also the matter of the personal information of the other individual referred to by the Commissioner. That person did not appeal, but also expressly did not waive any rights or consent to disclosure. The Commissioner's decision to confirm the use of the s. 16 override was based in part on the other person's personal information that the Commissioner also decided was within the exemption under s. 14. That information was not identified either. Although I would have reached the same decision if that person's information was not relevant, it appears more likely, from the Commissioner's reasons, that it may be relevant to a reasonableness analysis.

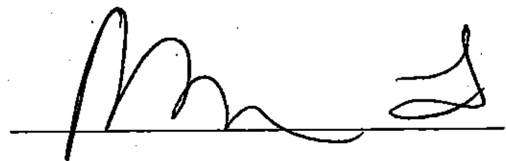
[71] I conclude that even taking an appropriately respectful and generous approach to the reasons for decision, they do not permit the court to conclude that the Commissioner's decisions fall within a range of reasonable outcomes.

[72] The Commissioner's decisions are unreasonable on this basis alone. It is therefore not necessary to address the other grounds raised by the applicant.

Orders

[73] The application is therefore granted and the Commissioner's decisions are quashed. In accordance with the submission of the Commissioner regarding this potential outcome, the applicant's appeal is sent back to Commissioner to undertake the appeal process afresh in response to the original notice of appeal. As a fresh appeal, it will proceed as if there had not yet been an inquiry under s. 41 of the Act. The applicant may deliver an amended notice of appeal and the parties may deliver fresh material or amended material within the appeal process. The Commissioner confirms that the interim stay arising from commencement of appeal will subsist.

[74] The applicant, as the successful party, shall have costs fixed at $7,500 all inclusive, from the respondent Commissioner. There shall be no other order as to costs.



Justice W. Matheson

I agree

Justice F. Kiteley

I agree

Justice R. Tzimas

Released: Dec 18, 2017

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KITELEY, TZIMAS AND MATHESON JJ.

BETWEEN:

DR. KIM BARKER

Applicant

– and –

ONTARIO (INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO) AND ALGOMA PUBLIC HEALTH

Respondents

REASONS FOR JUDGMENT

Released: December 18, 2017