

SUPREME COURT OF NOVA SCOTIA

Citation: *Raymond v. Halifax Regional Municipality*, 2020 NSSC 160

Date: 2020 05 22

Docket: Hfx No. 467138

Registry: Halifax

Between:

Michele Hovey Raymond

Appellant

v.

Halifax Regional Municipality

Respondent

Decision

Judge: The Honourable Justice John P. Bodurtha

Heard: September 27, 2019, in Halifax, Nova Scotia

Oral Decision: February 28, 2020,

Written Release: May 22, 2020

Counsel: Michele Hovey Raymond, Appellant
Karen E. MacDonald, for the Respondent

Overview

[1] This is a motion brought by the Respondent, Halifax Regional Municipality (“HRM”), seeking an Order declaring that Access Request 15-263 is not part of the Appeal filed by the Appellant, Michelle Raymond, pursuant to Part XX of the *Municipal Government Act*, SNS 1998, c 18 (“MGA”), identified as Hfx No. 467138-A.

[2] The Appellant filed an appeal pursuant to section 494(1) of the MGA on August 21, 2017. The Respondent submits the appeal is of HRM's Access & Privacy Officer's decision with respect to Access Request (“AR”) 14-298. The Appellant disagrees and submits the Form 10 Appeal is an appeal of the Access & Privacy Officer's decision with respect to Access Requests 14-298 and 15-263.

[3] On April 1, 2015, Nancy Dempsey, the delegated Responsible Officer for HRM, issued her decision with respect to AR 14-298. The Appellant filed a Request for Review of AR 14-298 with the Office of the Information and Privacy Commission for Nova Scotia (“OIPC”). The OIPC assigned file number 15-00085 to the Request for Review.

[4] On November 16, 2015, the Appellant filed a Request for Review of AR 15-263 with the OIPC. The OIPC split the Request for Review of AR 15-263 into two files (OIPC file 15-00276 and 15-00312). The Privacy Commissioner never issued a Review Report because the file never proceeded past the investigation stage and to a formal review.

[5] There was no Review report issued with respect to AR 15-263, therefore there were no further decisions under s. 493 of the MGA from Nancy Dempsey, the delegated Responsible Officer for HRM, which would allow for a right of appeal to the Nova Scotia Supreme Court. This Court does not have jurisdiction in the main Appeal to issue a decision with respect to AR 15-263.

Background

[6] On February 5, 2007, the Chief Administrative Officer (“CAO”) for HRM, delegated all his powers and duties under Part XX of the MGA with respect to records in the care and control of the Municipality to Nancy Dempsey, Access & Privacy Officer for HRM.

AR 14-298

[7] On December 22, 2014, the Appellant submitted an Application for Access to a Record to the HRM Access & Privacy Office. The application was identified as AR 14-298 and requested the following information regarding Planning & Development Concept files #18130 and #17674:

- Full size copy of Concept Plan "Boscobel-on-the-arm" (15 March 2012);
- All communications related to this plan, to/from all HRM Departments and/or elected officials;
- Full text Ekistics letter Development Office;
- All records related to changes between the Concept Plan of 15 March 2012 and Concept Plan of 12 August 2012; and
- Full size Concept Plan of 12 August 2012.

[8] On April 1, 2015, Ms. Dempsey issued her decision with respect to AR 14-298.

Request for Review re: AR 14-298

[9] On August 28, 2015, the Appellant filed a Request for Review of AR 14-298 with the OIPC. The Request for Review was assigned file number 15-00085 and proceeded at the OIPC. On June 12, 2017, the Privacy Commissioner issued Review Report 17-05 regarding OIPC file 15-00085 (AR 14-298). The Review Report did not address OIPC files 15-00276 or 15-00312 (AR 15-263).

[10] Nancy Dempsey issued her decision with respect to the recommendations in Review Report 17-05 on July 26, 2017 in accordance with s. 493(1) of the *MGA*. Her decision was in reference to AR 14-298 only.

[11] On August 3, 2017, the Appellant was advised that there were some inconsistencies in the Access & Privacy Office's response to Review Report 17-05. This decision is also in reference to AR 14-298 only and involved releasing further responsive records.

AR 15-263

[12] On August 17, 2015 the Appellant submitted another Application for Access to a Record to the HRM Access & Privacy Office. The application was

identified as AR 15-263 and the Request was for all references in files #18130 and #17674 to:

- "PID 40774127", "40774127";
- "85 Boscobel Road";
- "Boscobel House";
- "Michele Raymond", "Michelle Raymond", "Raymond-MacKinnon";
- "Raymond Property";
- "Existing Household";
- "Existing Households";
- "Right of Way";

Other than occurrences on maps or plans.

[13] On October 7, 2015, the Access & Privacy Coordinator for HRM sent correspondence to the Appellant regarding AR 15-263. The Access & Privacy Coordinator advised the Appellant that following third party notification, a decision had been made and the Appellant's request for access had been partially granted.

[14] On October 27, 2015, Nancy Dempsey issued her decision on AR 15-263. The Appellant was advised that many of the Records that were responsive to the request had already been processed and/or released under AR 14-298, and therefore were not being processed as part of her current request. The Responsive Records not processed as part of AR 14-298 were provided, subject to redactions made pursuant to s. 480(1) of the *MGA*.

Request for Review re: AR 15-263

[15] On November 16, 2015, the Appellant filed a Request for Review of the decision of Nancy Dempsey with the OIPC regarding AR 15-263. The OIPC split the Request for Review of AR 15-263 into two files being OIPC file 15-00276 and 15-00312, respectively.

[16] The issue in file 15-00312 was whether HRM met its duty to assist the Appellant openly, accurately and completely, when HRM did not release records responsive to AR 15-263 that had already been released to the Appellant as part of AR 14-278. The OIPC closed the file in August 2016 and notified the Appellant by correspondence confirming the file was closed.

[17] The issue in the OIPC file 15-00276 was whether HRM properly refused disclosure of certain records under s. 480(1) of the *MGA* regarding AR 15-263.

[18] On December 22, 2015, Nancy Dempsey received a letter from the OIPC advising of the Appellant's Request for Review with respect to AR 15-263/OIPC file 15-00276.

[19] Heather Burchell, a review officer at the OIPC, contacted Nancy Dempsey on August 22, 2016 and advised that she had been assigned to investigate the Request for Review of AR 15-263.

[20] Heather Burchell released her Investigation Report to the Appellant and HRM on November 22, 2016. Heather Burchell noted that the only issue remaining regarding AR 15-263 was whether HRM correctly applied s. 480(1) of the *MGA*. In her opinion, the personal information was correctly withheld under s. 480(1).

[21] Heather Burchell asked the Appellant to advise her if she disagreed with her analysis. If the Appellant disagreed, she would forward the file to the Privacy Commissioner for a formal review. The Appellant made no request for a formal review regarding AR 15-263.

[22] On December 2, 2016, Nancy Dempsey received an email from Heather Burchell advising that OIPC file 15-00276 (AR 15-263) was almost concluded. The remaining issue related to a missing record. The missing record was subsequently located by HRM staff and forwarded to Heather Burchell on December 15, 2016.

[23] On that same date Heather Burchell received permission to provide the missing record to the Appellant, she sent an email to the Appellant and Nancy Dempsey advising that all issues in relation to OIPC file 15-00276 (AR 15-263) had been resolved. A file closing letter was attached indicating that the file had been closed.

[24] With respect to the Appellant's Request for Review of AR 15-263, HRM received no further communications from the OIPC or the Appellant. The matter did not proceed any further because there was no Review Report from the Privacy Commissioner pursuant to s. 492 of the *MGA*. AR 15-263 was closed. The only decision Nancy Dempsey made as the delegated Responsible Officer for HRM was the decision dated October 27, 2015.

Section 494(1) Form 10 Appeal

[25] The Appellant filed a Form 10 Appeal pursuant to subsection 494(1) of the *MGA* on August 21, 2017. The Form 10 Appeal involved AR 14-298 only and specifically states it is an appeal of Nancy Dempsey's decision dated August 3, 2017. The Form 10 Appeal states at paragraphs 7 and 8:

(7) The responsible officer of the municipality made a decision dated the 26th day of July, 2017, supplemented by a second decision dated the 3d (sic) of August, 2017, copies of which decisions are attached as Appendix 7 to this Appeal.

(8) The Appellant appeals the latter decision of the responsible officer of HRM.

Issue

(a) Does this Honourable Court have jurisdiction under Part XX of the *MGA* to hear an appeal with respect to AR 15-263?

Analysis

[26] The *MGA* Part XX - Freedom of Information & Protection of Privacy, governs HRM's Access & Privacy Office. Part XX of the *MGA* applies to all records in the custody or under the control of a municipality (s. 463(1)). Section 462 sets out the purpose of Part XX and reads as follows:

Purpose of Part

462 The purpose of this Part is to

- (a) ensure that municipalities are fully accountable to the public by
 - (i) giving the public a right of access to records,
 - (ii) giving individuals a right of access to, and a right to correction of, personal information about themselves,
 - (iii) specifying limited exceptions to the rights of access,
 - (iv) preventing the unauthorized collection, use or disclosure of personal information by municipalities, and
 - (v) providing for an independent review of decisions made pursuant to this Part;
- (b) provide for the disclosure of all municipal information with necessary exemptions, that are limited and specific, in order to
 - (i) facilitate informed public participation in policy formulation,
 - (ii) ensure fairness in government decision-making, and

- (iii) permit the airing and reconciliation of divergent views; and
- (c) protect the privacy of individuals with respect to personal information about themselves held by municipalities and to provide individuals with a right of access to that information.

[27] The Responsible Officer for a municipality under Part XX is the Chief Administrative Officer (CAO) (s. 461(i)). When a request is made pursuant to Part XX of the *MGA*, the Responsible Officer for the municipality shall make every effort to assist the applicant and to respond, without delay, openly, accurately and completely (s. 467(1)).

[28] Within 30 days after the application for a record is received, if the applicant has met certain requirements set out in Part XX, the Responsible Officer shall issue a decision to the applicant in writing (s. 467(2)).

[29] The CAO may delegate to one or more employees of the municipality powers granted to or vested in the Responsible Officer pursuant to s. 497 of the *MGA*.

[30] The right to access records in the custody and control of a municipality is a statutory right. The process for requesting and obtaining those records is set out in Part XX - Freedom of Information and Protection of Privacy of the *MGA* along with any restrictions to access to a record. If an applicant is not satisfied with the response to a request for access, the legislation sets out the applicant's right to seek a further review by the OIPC or to appeal to the Supreme Court of Nova Scotia.

[31] To determine this Court's jurisdiction to hear an appeal of any decision made by the Responsible Officer in AR 15-263 it is necessary to look at the statutory regime of the *MGA*.

[32] Section 466 of the *MGA* provides the procedure to access a record:

Procedure for obtaining access

466 (1) A person may obtain access to a record by

- (a) making a request in writing to the municipality that has the custody or control of the record;
- (b) specifying the subject matter of the record requested with sufficient particulars to enable an individual familiar with the subject matter to identify the record; and
- (c) paying any fees required pursuant to this Part.

(2) The applicant may ask to examine the record or ask for a copy of the record.

[33] The HRM Access & Privacy Office received an Application for Access to a Record from the Appellant on August 17, 2015. The Access & Privacy Office identified the Request as AR 15-263.

[34] The duties of the Responsible Officer upon receiving an access request are set out in sections 467 and 468 of the *MGA*. The Responsible Officer must consider whether access to a record or part of a record will be refused based on any of the provisions in Part XX that permit the refusal of disclosure (see sections 472 to 481). If access to a record or part of a record is refused, the Responsible Officer must advise the applicant of this in their decision, along with the provision(s) in Part XX on which the refusal is based.

[35] The Review Officer is defined in Part XX as the review officer appointed by the Governor in Council pursuant to the *Freedom of Information and Protection of Privacy Act* (s. 461(j)). The Privacy Commissioner at the OIPC is the Review Officer.

[36] AR 15-263 involved a request for access to a record that contained information of a third party, however for the purposes of this motion nothing turns on this third party information other than it extended the time-frame to address the Request because the third party was entitled to notice (s. 482).

[37] The third party did not seek a review by the OIPC and on October 27, 2015 Nancy Dempsey issued her decision regarding AR 15-263. The Appellant was advised that most of the Records that were responsive to the request had already been processed and/or released under AR 14-298, and as such were not processed as part of her current request. Any Responsive Records not processed as part of AR 14-298 were provided, subject to redactions made pursuant to s. 480(1) of the *MGA*.

[38] After receiving Nancy Dempsey's decision, the Appellant was entitled to request a review of the decision to the Review Officer. Section 487 sets out the right to a review or to file an appeal if there are no third parties:

Request by applicant for review

487 (1) A person who makes any request for access or for correction of personal information may ask for a review of any decision, act or failure to act of the responsible officer that relates to the request.

(2) A third party notified of a request for access may ask for a review of any decision made about the request by the responsible officer.

(3) A person who makes a request pursuant to this Part for access to a record or for correction of personal information may, within thirty days after the person is notified of the decision or within thirty days after the date of the act or failure to act, appeal directly to the Supreme Court of Nova Scotia as provided in this Part, if no third party has been notified or if a third party who has been notified consents to that appeal.

[39] A Request for Review must be filed within 60 days after the applicant is notified of the decision of the Responsible Officer (s. 488).

[40] The Appellant filed a Request for Review of AR-15-263 with the OIPC on November 16, 2015. The OIPC split the Request for Review into two files.

[41] The OIPC assigned file 15-00312 to the first file where the issue was whether HRM met its duty to assist the Appellant openly, accurately and completely, when HRM did not release records responsive to AR 15-263 that had already been released to the Appellant as part of AR 14-278. This file was closed by the OIPC in August 2016 and correspondence confirming the file closure was sent to the Appellant.

[42] The OIPC assigned file 15-00276 to the second file where the issue was whether HRM properly refused to disclose certain records in accordance with s. 480(1) of the *MGA*.

[43] The OIPC assigns Requests for Review to an investigator, who reviews the request and the records in question, and issues an Investigation Report. If the applicant is not satisfied following receipt of the Investigation Report, the applicant may request that the matter proceed to a formal review by the Privacy Commissioner. If the matter proceeds to a formal review by the Privacy Commissioner, both the applicant and the Responsible Officer are entitled to make submissions.

[44] Section 492 of the *MGA* sets out the duties of the Privacy Commissioner upon completing a review:

Duties of review officer on completing review

492 (1) On completing a review, a review officer shall

(a) prepare a written report setting out the review officer's recommendations with respect to the matter and the reasons for those recommendations; and

(b) send a copy of the report to the responsible officer, and where the matter was referred to the review officer by

(i) an applicant, to the applicant and to any third party notified pursuant to this Part, or

(ii) a third party, to the third party and to the applicant.

(2) In the report, the review officer may make any recommendations with respect to the matter under review that the review officer considers appropriate.

[45] It is clear from the language of s. 492(1) that upon completing a review, the Privacy Commissioner must prepare a written report setting out the Commissioner's recommendations with respect to the matter and the reasons for those recommendations. The Privacy Commissioner cannot be silent on a matter before the Commissioner on review.

[46] In this case, the Privacy Commissioner in Review Report 17-05 set out seven issues that were under review in AR 14-298. The Commissioner then addressed and made a finding on each issue.

[47] The Responsible officer shall within 30 days after receiving a review report decide to follow the recommendation of the Responsible Officer or make any other decision that they consider appropriate. The Responsible Officer's duties after receiving a review report are set out in s. 493:

Duties of responsible officer on receipt of report

493 (1) Within thirty days after receiving a report of a review officer, the responsible officer shall

(a) make a decision to follow the recommendation of the review officer or any other decision that the responsible officer considers appropriate; and

(b) give written notice of the decision to the review officer and the persons who were sent a copy of the report.

(2) The responsible officer shall give notice, in writing, to the persons who were sent a copy of the report and the decision of the responsible officer, of their right to appeal the decision of the responsible officer to the Supreme Court of Nova Scotia within thirty days of the date of making the decision.

(3) Where the responsible officer does not give notice within the time required, the responsible officer is deemed to have refused to follow the recommendation of the review officer. 1998, c. 18, s. 493; 2005, c. 55, s. 8.

[48] Within 30 days of receiving a decision of the Responsible Officer an applicant or a third party may appeal that decision to the Supreme Court of Nova Scotia pursuant to s. 494 of the *MGA*. Section 494 reads as follows:

Appeal to Supreme Court

494 (1) Within thirty days after receiving a decision of the responsible officer, an applicant or a third party may appeal that decision to the Supreme Court of Nova Scotia.

...

[49] In the Appellant's case, with respect to AR 15-263 (OIPC file 15-00276), the file never proceeded past the investigation stage and to a formal review, therefore, the Privacy Commissioner never issued a Review Report. On December 15, 2016, Heather Burchell sent an email to the Appellant and Nancy Dempsey advising that every issue in relation to OIPC file 15-00276 (AR 15-263) had been resolved and attached a file closing letter indicating that the file had been closed.

[50] OIPC file 15-00276 was closed. The Appellant did not request a formal review to the Privacy Commissioner. With there being no formal review, there was no Review Report issued by the Privacy Commissioner pursuant to s. 492 of the *MGA*. Nancy Dempsey made no further decision pursuant to s. 493 from which the Appellant could appeal. This Court does not have jurisdiction to hear an appeal with respect to AR 15-263.

[51] If the Appellant believes the Privacy Commissioner was silent on an issue regarding AR 15-263 that the Appellant understood would be addressed in a formal review of AR 14-298, then the Appellant should have addressed this with the OIPC. Upon receipt of Review Report 17-05, the Appellant could have filed an application for judicial review of the OIPC's decision, on the basis that it did not address OIPC file 15-00276. There is no evidence before me that the Appellant did file an application for judicial review of OIPC Review Report 17-05.

[52] Finally, the Appellant filed a Form 10 Appeal pursuant to subsection 494(1) of the *MGA* on August 21, 2017. The Form 10 Appeal is an appeal of the decision of Nancy Dempsey with respect to AR 14-298 only. The Form 10 Appeal states at paragraphs 7 and 8:

(7) The responsible officer of the municipality made a decision dated the 26th day of July, 2017, supplemented by a second decision dated the 3d (sic) of August, 2017, copies of which decisions are attached as Appendix 7 to this Appeal.

(8) The Appellant appeals the latter decision of the responsible officer of HRM.

[53] Nancy Dempsey's decision of August 3, 2017 was made in accordance with s. 493 of the *MGA* in response to Review Report 17-05. It was a decision that dealt only with AR 14-298. There is no decision of Nancy Dempsey in response to a Review Report with respect to AR 15-263 from which the Appellant could appeal to this Court.

Conclusion

[54] This Court does not have jurisdiction under Part XX of the *MGA* to hear an appeal with respect to AR 15-263. All outstanding issues raised in the Appellant's Request for Review were resolved and the file was closed by the OIPC in December 2016. The Appellant never requested the matter proceed to the Privacy Commissioner for a formal review; therefore, the Commissioner never issued a Review Report with respect to AR 15-263. With no Review Report, there was no decision under s. 493 of the *MGA* from the delegated Responsible Officer for HRM which would allow for a right of appeal to the Nova Scotia Supreme Court.

[55] The Respondent's motion is granted with costs. If the Parties are unable to agree to costs, within 30 days of today's date, I will receive submissions from the parties. The submissions will be no more than 10 pages double-spaced.

[56] I would ask that the Respondent draft the Order.

Bodurtha, J.