



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-246

Appeal M-9200469

The Corporation of the Town of Whitby



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ORDER

BACKGROUND:

The Corporation of the Town of Whitby (the Town) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for information respecting any complaints which the Town received about the requester's property. In particular, the requester sought access to the names of those Town Councillors who received verbal complaints about his property and clarification respecting the Town's policy on receiving both verbal and written complaints. The requester also asked for the opportunity to review the log or journal where any such complaints would have been recorded.

The Town did not respond to the requester within the 30 day time period specified in section 19 of the Act and the requester appealed this deemed refusal to provide access under section 22(4) of the Act.

Subsequent to the filing of the appeal, the Town issued a decision letter and identified a number of records which were responsive to the request. With respect to Part 1 of the request (names of Councillors who had received complaints about the requester's property), the Town identified a total of 10 responsive records and released six of these documents to the requester in full. The Town, however, withheld references in the remaining four records to the identity of a Town Councillor who had been the recipient of the relevant property complaints. This decision was based on the exemption contained in section 8(1)(d) of the Act. The Town also refused to disclose portions of the four records which identified the names of certain complainants and a second property owner. I find that this latter information was properly withheld as it is not responsive to the appellant's request.

For Part 2 of the request, the Town provided access to, and clarification of, its policy respecting the receipt of property complaints. With respect to Part 3 of the request (logs or journals of complaints), the Town asserted that responsive records did not exist.

Following receipt of the decision letter, the requester (now the appellant) confirmed that he no longer wished to pursue the part of the appeal relating to the Town's complaint policy. The further mediation of this appeal was not successful and notice that an inquiry was being conducted to review the Town's decision was sent to the appellant and to the Town. Representations were received from both parties.

ISSUES:

The issues to be addressed in this appeal are:

- A. Whether the search undertaken by the Town for records responsive to the third part of the request was reasonable in the circumstances of the appeal.
- B. Whether the discretionary exemption provided by section 8(1)(d) of the Act applies to the information contained in the records.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the search undertaken by the Town for records responsive to the third part of the request was reasonable in the circumstances of the appeal.

In its representations, the Town has stated that records responsive to Part 3 of the appellant's request (a log or journal where property complaints are recorded) do not exist. In support of this position, the Town also submitted a statutory declaration sworn by the Town Clerk. There, the Clerk states that the Town has never kept a log or journal where property standards complaints are recorded. Rather, records involving property standards matters are kept in individual property files to facilitate retrieval. The Clerk also indicates that all records in the custody or under the control of the Town which relate to the request have been disclosed to the appellant and that no further records exist that are responsive to the request.

Where a requester provides sufficient details about the records that he or she is seeking and a municipality indicates that the records do not exist, it is my responsibility to ensure that the municipality has made a reasonable effort to identify records which are responsive to the request. In my view, the Act does not require that a municipality prove to the degree of absolute certainty that the requested records do not exist.

I have carefully reviewed the representations of the Town and its statutory declaration. I am satisfied that the Town has taken all reasonable steps to locate the records which would be responsive to the appellant's request and I find that the Town's search was reasonable in the circumstances of this appeal.

ISSUE B: Whether the discretionary exemption provided by section 8(1)(d) of the Act applies to the information contained in the records.

The Town has relied on section 8(1)(d) of the Act to withhold the name of the Town Councillor who received complaints about the requester's property. This provision states that:

inal signed by:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

In order for a record to qualify for exemption under this section, the matter which generated the record must satisfy the definition of the term "law enforcement" as found in section 2(1) of the Act. This definition reads as follows:

"law enforcement" means,

[IPC Order M-246/January 13,1994]

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b);

In its representations, the Town has provided a description of the by-law enforcement process followed in this case which it claims falls within clause (b) of the "law enforcement" definition. I am satisfied that the Town's by-law enforcement process qualifies as "law enforcement" under the Act (Orders M-4, M-10, M-16 and M-147).

Next, I must determine whether, on the facts of this case, the Town Councillor was a confidential source of information for the purposes of section 8(1)(d) of the Act.

In Order M-147, I expressed the general proposition that a confidential source of information for the purposes of section 8(1)(d) could include a Municipal Councillor. I further determined that, although the Councillor in that case received information from other individuals about a requester's property, he was the actual source of the complaint provided to the Town. Following a consideration of the facts of the present appeal, I have reached the same conclusion.

The final step in this analysis is to determine whether the release of the Councillor's name would disclose the identity of a **confidential source** of information. In order to establish that a source was confidential, a municipality must provide evidence of the circumstances in which the information was given. More particularly, the municipality must demonstrate that there was a reasonable expectation of confidentiality associated with the by-law enforcement process (Order M-147).

In its representations, the Town states that, since 1982, it has had in place a policy which protects the names of complainants in by-law enforcement cases. This policy also specifies that Town Councillors fall within the category of complainants. Based principally on this policy, I find that, when the Councillor provided the information to Town officials, there was a reasonable expectation that the Councillor's identity would be kept confidential. It follows, therefore, that the disclosure of the Councillor's name would reveal a confidential source such that the Town is entitled to rely on section 8(1)(d) of the Act as a basis for not releasing this information.

As section 8(1)(d) is a discretionary exemption, it is my responsibility to ensure that the Town has properly exercised its discretion in deciding not to grant access to the information. I have carefully considered the Town's representations and all of the circumstances of this appeal and I am satisfied that there was nothing improper in the Town's exercise of discretion in this case.

ORDER:

I uphold the decision of the Town.

Original signed by: _____
Irwin Glasberg
Assistant Commissioner

_____ January 13, 1994