Information and Privacy
Commissioner/Ontario

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

ORDER M-135

Appeal M-9100433

City of Brockville

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ORDER

BACKGROUND:

The City of Brockville (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to the results of the physical test and the general knowledge test administered to candidates for the position of firefighter/mechanic, and any "public records" in relation to the job competition. The requester was one of the applicants for the position. In response, the City provided to the requester all "public records" pertaining to the competition, and all personal information relating to him, as well as a record containing a summary of the results of the physical fitness test, with the names of other individuals severed. The City advised the requester that the names of the candidates were severed from the record pursuant to section 14(3)(g) of the Act. The City also advised the requester that the results of the general knowledge test "were not kept".

The requester appealed the City's decision to deny access to the results of the physical test and its response that the results of the general knowledge test were not kept. During mediation, the appellant stated that as far as the physical test results are concerned, he was interested in the scores of the successful candidate only. Further mediation was not successful and notice that an inquiry was being conducted to review the City's decision was sent to the appellant, the City and the successful candidate. Written representations were received from all parties.

The record in issue in this appeal is a one-page summary "report of the fitness and job related strength test results of 11 Brockville Fire Department candidates", including that of the successful candidate. The names of all the individuals, except that of the appellant, were severed from this record.

ISSUES:

The issues in this appeal are as follows:

A. Whether the City's search for the general knowledge testing results was reasonable in the circumstances.

B. Whether the information contained in the record qualifies as personal information as defined in section 2(1) of the Act.

C. If the answer to Issue A is yes, whether the mandatory exemption provided by section 14 of the Act applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the City's search for the general knowledge testing results was reasonable in the circumstances.

The City states that at the outset of the competition process, it had anticipated a large number of applicants for the position, and administered a general knowledge/aptitude test to all applicants as a screening mechanism. However, since only 15 persons applied for the firefighter/mechanic position, it decided to interview all applicants and the test results were no longer necessary for reducing the number of candidates.

The City states that the tests were not marked and were destroyed before the commencement of the interviews. Therefore, a search for the records was not conducted.

The Director of Personnel for the City has sworn an affidavit stating that it was his decision to not utilize the general knowledge test and that on or about June 21, 1991, prior to the commencement of the interview of the candidates, he destroyed the tests by shredding them.

I have reviewed the City's affidavit and I am satisfied that the records were destroyed, and therefore, do not exist. I would like to state that this finding should not be taken to imply that the City's action in destroying the records is either appropriate or in accordance with the provisions of the Act.

Section 30(1) of the Act states:

> Personal information that has been used by an institution shall be retained after use by the institution for the period prescribed by regulation in order to ensure that the individual to whom it relates has a reasonable opportunity to obtain access to the personal information.

Section 5 of Regulation 823, under the Act provides:

> Personal information that has been used by an institution shall be retained by the institution for the shorter of one year after use or the period set out in a by-law or resolution made by the institution or made by another institution affecting the institution, unless the individual to whom the information relates consents to its earlier disposal.

The question of whether the City has complied with the above requirements is not at issue in this appeal, and I have not made any conclusions regarding the circumstances surrounding the destruction of the records; however, I feel it is appropriate for me to emphasize the importance of the above provisions in the scheme of the Act relating to an individual's right to access his/her own personal information.

ISSUE B: Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.

Section 2(1) of the Act states, in part:

> "personal information" means recorded information about an identifiable individual, including,
>
> ...
>
> (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;

Having reviewed the record, I find that the name of the successful candidate, as it appears with the score of the candidate, qualifies as recorded information about an identifiable individual pursuant to the definition of personal information under section 2(1) of the Act, and relates solely to the successful candidate.

ISSUE C: If the answer to Issue A is yes, whether the mandatory exemption provided by section 14 of the Act applies.

Under Issue B, I found that the record contains the personal information of the successful candidate.

Section 14(1) of the Act prohibits the disclosure of personal information to any person other than to the individual to whom the information relates, except in certain circumstances listed under the section.

The successful candidate has objected to the disclosure of the information.

In my view, the only exception to the section 14(1) mandatory exemption which has potential application in the circumstances of this appeal is section 14(1)(f), which reads as follows:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> if the disclosure does not constitute an unjustified invasion of personal privacy.

Because section 14(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 14(1)(f) applies, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy.

In determining whether section 14(1)(f) applies, consideration should be given to sections 14(2) and (3) of the Act which provide guidance in determining whether or not disclosure of personal information would constitute an unjustified invasion of personal privacy, and section 14(4), which lists a number of specific types of information the disclosure of which does not constitute an unjustified invasion of personal privacy.

The information at issue in this appeal is not one of the types of information listed under section 14(4); therefore, I find that this section is not applicable in the circumstances of this appeal.

Section 14(2) provides a non-exhaustive list of criteria for the City to consider in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy, while section 14(3) identifies specific types of personal information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

The City claims that section 14(3)(g) is applicable in the circumstances of this case. This section states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > consists of personal recommendations or evaluations, character references or personnel evaluations.

Having reviewed the contents of the record, the conditions under which the test was administered and the method employed for assessing the results, it is my view that the information contained in the record consists of "personal evaluations" and satisfies the requirements of the presumption contained in section 14(3)(g) of the Act (Orders 20, 196 and P-447).

Once it has been determined that the requirements for a presumed unjustified invasion of personal privacy under section 14(3) have been established, I must consider whether any other provisions of the Act come into play to rebut this presumption.

Section 14(2) of the Act provides some criteria to be considered in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy. A combination of listed and/or unlisted factors weighing in favour of disclosure might be so compelling as to outweigh a presumption under section 14(3), however, such a case would be extremely unusual (Orders 20 and M-28).

The appellant makes extensive representations on the relevance of each of the circumstances listed under section 14(2), with the exception of section 14(2)(c), and submits that sections 14(2)(a) (b) and (d) are particularly relevant as they weigh in favour of disclosure of the information.

I have considered both the enumerated circumstances under section 14(2) and all the other concerns raised by the appellant, and I find that only sections 14(2)(a) and (d) are potentially relevant considerations in the circumstances of this appeal. These sections provide as follows:

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

Sections 14(2)(a) and (d), and 14(3)(g) of the Act are similar to sections 21(2)(a) and (d) and 21(3)(g) of the provincial Freedom of Information and Protection of Privacy Act, respectively.

In Order P-273, former Assistant Commissioner Tom Mitchinson stated:

> In considering whether the factors listed in sections 21(2)(a) and (d) are sufficient to rebut a presumed unjustified invasion of personal privacy, the Commissioner's considerations are restricted to the contents of the records themselves, and any evidence elicited during the course of the appeal which ties the records to a particular section of the Act.
>
> Records relating to job competitions frequently contain personal information of affected persons, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy under section 21(3). In attempting to rebut this presumption using sections 21(2)(a) and (d), the appellant must demonstrate that the contents of the records themselves, when considered in conjunction with all relevant evidence, satisfy the requirements of these sections. If the requirements are not satisfied, the presumption is not rebutted.

I agree.

With regard to section 14(2)(a), the appellant states that the ground rules for the competition were changed

at least twice in a material fashion after the applications had been received, and submits that it is necessary to have access to the information requested in order to scrutinize the activities of the City.

As far as section 14(2)(d) is concerned, the appellant states that he believes his rights were detrimentally affected by "the unfair selection process", and that he requires the information to determine if, in fact, his "strong suspicions are correct".

I note that in response to his request, the appellant was provided with access to a considerable amount of information which is in the custody or under the control of the City, relating to the competition. He received access to all of his personal information, as well as all of the records relative to the competition which do not contain the personal information of other individuals. He has been given access to the actual test scores of all of the other candidates, with the exception of the names of the candidates to which the scores correspond. He was informed of the name of the successful candidate and during mediation of the appeal, he was also advised that the successful candidate had passed the physical test. (The scores in the record range from 0 to 10, and an explanatory letter given to each individual who took the test specifies that 3.5 points out of 10 must be achieved in the total fitness score to pass the fitness test).

I have reviewed the record at issue in this appeal and the representations of the parties, and in my view, the argument and evidence provided by the appellant in support of the application of sections 14(2)(a) and (d) to the circumstances of this appeal are not sufficient to outweigh the presumption under section 14(3)(g). Accordingly, I find that the disclosure of the score of the successful candidate in the physical test would constitute an unjustified invasion of his personal privacy. Therefore, the mandatory exemption under section 14 applies.

ORDER:

I uphold the decision of the City.

Original signed by: May 28, 1993

Asfaw Seife
Inquiry Officer