



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-132

Appeal M-9200344

Regional Municipality of Waterloo



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ORDER

BACKGROUND:

The Regional Municipality of Waterloo (the Region) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to any personnel records pertaining to the requester's unsuccessful application for a nursing aide position with the Region.

The Region released the entire file to the requester with the exception of two records. One record was withheld in its entirety based on the exemption contained in section 38(c) of the Act. The other record was released with some information withheld, pursuant to section 14(1) of the Act. The requester appealed the Region's decision.

During mediation, the appellant withdrew her appeal relating to the second record. As a result, only the record for which the section 38(c) exemption was claimed, remains at issue. This record is a form entitled "Reference Inquiry". It was used by an employee of the Region to document the collection of a job reference pertaining to the appellant. The form was completed by the employee who contacted a reference (the affected person) provided by the appellant by telephone.

Notice that an inquiry was being conducted to review the Region's decision was sent to the appellant, the Region and to the affected person. Written representations were received from the appellant and the Region only.

ISSUES:

- A. Whether any of the information contained in the record qualifies as personal information as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the record qualifies for exemption pursuant to the discretionary exemption provided by section 38(c) of the Act.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether any of the information contained in the record qualifies as personal information as defined in section 2(1) of the Act.

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

"personal information" means recorded information about an identifiable individual, including,

...

- (e) the personal opinions or views of the individual except if they relate to another individual,

...

- (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;

It is clear that the record at issue contains the views and opinions of the affected person about the appellant in the context of the appellant's past employment and suitability for the new position. By virtue of sections 2(1)(e) and (g) of the Act, therefore, these views and opinions constitute the personal information of the appellant only.

The Region has submitted that the affected person's name alone is the personal information of the affected person. I do not agree. Section 2(1)(h) clearly states that an individual's name can only constitute personal information in limited circumstances which do not apply in the present case.

ISSUE B: If the answer to Issue A is yes, whether the record qualifies for exemption pursuant to the discretionary exemption provided by section 38(c) of the Act.

I have found under Issue A that the information at issue qualifies as "personal information" under the Act. I must now determine if access to this information should be denied on the basis that it falls within the exemption provided by section 38(c) of the Act.

Section 36(1) of the Act gives individuals a general right of access to personal information about themselves, which is in the custody or under the control of an institution. However, the right of access under section 36(1) is not absolute; section 38 provides a number of exemptions to this general right of access to personal information by the individual to whom it relates.

Section 38(c) of the Act reads:

A head may refuse to disclose to the individual to whom the information relates personal

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information,

that is evaluative or opinion material compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of contracts and other benefits by an institution if the disclosure would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence;

Section 38(c) of the Act attempts to address two competing interests. These are: (1) the right of an individual to have access to his or her personal information and (2) the need to protect the flow of frank information to provincial or municipal institutions so that appropriate decisions can be made respecting the awarding of jobs, contracts or other benefits.

In Order 157, former Commissioner Sidney B. Linden established a three-part test for a record to qualify for exemption under section 49(c) of the provincial Freedom of Information and Protection of Privacy Act. Section 49(c) is the equivalent of section 38(c) of the Act. I adopt the general thrust of this test for the purposes of this appeal. This test specifies that, for a record to qualify for exemption under section 38(c) of the Act, an institution must establish that:

1. The personal information is evaluative or opinion material;
2. The personal information was compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of government contracts and other benefits;
3. Disclosure of the personal information would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence.

In my view, in order for the third part of the test to more clearly address the complex wording found in section 49(c), it should be divided into two components. That is to say, an institution must establish that:

- (a) The information was supplied to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence; **and**

- (b) The disclosure of the record would reveal the identity of the source of the information.

In order for the exemption to apply, the institution (and/or any affected person who seeks to resist disclosure of the record) must establish that each element of the three-part test has been satisfied. The failure to satisfy any part of the test means that section 38(c) will not be available to exempt the personal information contained in the record from disclosure.

The "Reference Inquiry" form, which is the subject of this appeal, consists of four parts - an opening paragraph and three questions, with responses provided in some cases.

The opening paragraph sets out the name of the reference and information provided by the prospective employee (in this case the appellant) about her past employment. The paragraph closes with the statement that the prospective employee had signed an authorization to collect the information from the reference and that the answers provided by the reference "will be held in strict confidence."

There are no responses provided to questions 1 and 2 which appear on the form. Question 3 consists of three components. First, the reference is asked whether he or she would re-employ the prospective employee and, if not, to provide the reasons. Second, there is a checklist of various attributes and skills which the reference is asked to complete. Finally, the form requests that the reference provide any further information that is relevant. In each case, the reference responded to these question.

With the nature of the record now understood, the next step is to determine whether the three-part test established for the section 38(c) exemption applies to the information contained in the reference form.

Part 1

It is clear that the record at issue contains the opinions of the affected person with respect to the appellant in the context of her suitability for new employment. In my view, therefore, the record contains personal information which is evaluative or opinion material with the result that the first part of the test is satisfied.

Part 2

With respect to the second part of the test, the Region submits that:

... the referee was contacted as a result of the appellant's application for a nursing aide position ... Offers of employment for Regional positions are conditional on the receipt of adequate references ... The collection of the reference was for no other purpose than to determine if a full offer of employment should be made.

I accept the Region's submission and I am satisfied that the second part of the test has been met.

Part 3

With respect to the question of whether there existed a reasonable assumption that the identity of the source of the reference would be held in confidence, the Region states:

...it cannot be fully ascertained whether the staff member who collected the reference over six years ago clearly indicated to the third party that the reference would be held in confidence. Nor is there a clear recollection whether the third party asked for confidentiality. However, the Region, both at the time and at present, maintains a policy of non-disclosure concerning job references. Further the form documenting the reference included a guarantee of confidentiality.

In addressing the issue of whether the disclosure of the record would reveal the identity of the source, the Region states that, in the particular circumstances of this appeal, disclosure of the evaluative remarks on the form could identify the source of the information.

In her representations, the appellant submits that she believes that the information contained in the record at issue has hindered a successful search for employment in the past and will continue to do so unless she is able to identify the source of the reference and the contents of the document.

A number of previous orders have dealt with how section 49(c) of the provincial Freedom of Information and Protection of Privacy Act should be interpreted. In particular, there have been three orders (170, P-238 and P-240), which have focused on the interpretation of the third part of the test. The result in each order turned on the specific facts of the case.

Having reviewed the basis upon which these orders were determined along with the wording of the section, I believe that there are a number of factors which are relevant in deciding whether the third part of the test has been satisfied. These factors are:

1. The expectations of the provider of the opinion or evaluative material and the institution regarding the confidentiality of the provider's identity at the time that the information was supplied to the institution.
2. The ordinary practice and/or experience of the individual who provided the

information and of the institution which sought the information with respect to maintaining the confidentiality of the source of the information.

3. The knowledge of the individual about whom the information relates as to the identity of the provider of the specific opinion or evaluative material and the individual's expectation as to whether the identity of the provider would be held in confidence.
4. The nature of the opinion or evaluative material, itself, insofar as it would identify the provider of the information.

I have carefully reviewed the record and the representations provided in this appeal. It is my view that, at the time that the reference was provided, both the affected person and the institution reasonably expected that the identity of the affected person would be held in confidence. This conclusion is also supported by the contents of the record. For these reasons, I have concluded that the reference was provided to the Region in circumstances where it might reasonably have been assumed that the identity of the source would be held in confidence. Therefore, the first element of the third part of the test has been met.

I must now determine whether disclosure of the record would reveal the identity of the source of the information. Having carefully reviewed the record, I find that the following information would, if disclosed, reveal the identity of the source of the information.

- all of the handwritten information in the opening paragraph, with the exception of the appellant's name.
- the handwritten comments which appear in response to part of the question three, which asks whether the reference would re-employ the appellant.
- the one handwritten comment which appears on the checklist.
- the handwritten comments which appear in the "further information" section.

Therefore, these portions of the record have met all three parts of the test and qualify for exemption under section 38(c).

In my view, disclosure of the remaining portions of the record would not reveal the identity of the source of

the information. Therefore, the section 38(c) exemption does not apply to them.

Section 38(c) of the Act provides the head with the discretion to disclose personal information even if it meets the test for exemption. In the circumstances of this appeal, I find nothing improper in the way in which the head of the Region has exercised his discretion.

I have provided a highlighted copy of the record with the copy of this order which has been sent to the Region. Those portions of the record to which the section 38(c) exemption applies have been highlighted in yellow.

ORDER:

1. I order the Region to disclose to the appellant the portions of the record which are **not** highlighted in the copy of the record which is being forwarded to the Region with this order within 35 days following the date of this order and **not** earlier than the thirtieth (30th) day following the date of this order.
2. In order to verify compliance with the order, I order the Region to provide me with a copy of the record which was disclosed to the appellant pursuant to Provision 1, **only** upon request.

Original signed by: _____
Irwin Glasberg
Assistant Commissioner

_____ May 20, 1993