



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-263

Appeal M-9300086

The Corporation of the Town of Markham



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ORDER

BACKGROUND:

The Corporation of the Town of Markham (the Town) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to records concerning the recommendation and approval process relating to the acquisition of a telephone system for the Town's Civic Centre. The requester also sought access to information of the total cost of the system.

The Town located five records responsive to the request but denied access to them in their entirety based on the exemptions provided by sections 8(1)(a) and (b) of the Act. The requester appealed the Town's decision to the Commissioner's office.

During the mediation stage of the appeal, the Appeals Officer identified that section 10 of the Act might be relevant, as the disclosure of the information contained in the records might affect the interests of a third party corporation (the primary affected person). The Town also advised the Commissioner's office that certain matters which were addressed in the records were the subject of an investigation by the Governmental Affairs Unit (the Police), which was formed to investigate alleged criminal improprieties involving elected and non-elected public officials in the Greater Toronto Area. The Commissioner's office, therefore, determined that this group should also be treated as an affected person to the appeal.

Further mediation was not successful and notice that an inquiry was being conducted to review the decision of the Town was sent to the appellant, the Town, the primary affected person and the Police. Representations were received from the Town, the primary affected party and the Police.

The records at issue in this appeal are described as follows:

- (1) Extract from the Thirteenth Capital Works and Property Committee Report adopted by Council on June 26, 1990.
- (2) Report to Capital Works and Special Projects Committee dated May 25, 1990.
- (3) Telecommunications Analysis (Schedule B).
- (4) Telecommunications Co-ordinator's Job Description (Schedule C).
- (5) Letter from Bell Information Systems dated May 30, 1990. (Schedule D).

ISSUES:

The issues arising in this appeal are as follows:

- A. Whether the discretionary exemptions provided by sections 8(1)(a) and (b) of the Act apply to the

records.

- B. Whether the mandatory exemptions provided by sections 10(1)(a), (b) or (c) of the Act apply to the records.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the discretionary exemptions provided by sections 8(1)(a) and (b) of the Act apply to the records.

Sections 8(1)(a) and (b) of the Act state that:

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

- (a) interfere with a law enforcement matter;
- (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

The term "law enforcement" is defined in section 2(1) of the Act as follows:

"law enforcement" means,

- (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);

The purpose of the exemptions contained in sections 8(1)(a) and (b) of the Act is to provide an institution with the discretion to preclude access to records in circumstances where disclosure of the records could reasonably be expected to interfere with an ongoing law enforcement matter or investigation. The Town bears the onus of providing evidence to substantiate that, first, a law enforcement matter or investigation is ongoing and second, that disclosure of the records could reasonably be expected to interfere with the matter or the investigation.

I will first address the application of section 8(1)(b) of the Act to the records.

The Town submits that the Police have undertaken an investigation into certain occurrences which are addressed in the records, and that the Town has determined that disclosure of the records in the circumstances of this appeal would not be appropriate.

The Police submit that the requested records relate to a law enforcement investigation involving the possible commission of offences under The Criminal Code. Based on the representations of the Police, I am satisfied that the investigation undertaken by the Police qualifies as "law enforcement" as defined by the Act and that the investigation is ongoing.

Having met the first requirement of the section 8(1)(b) exemption, I must now determine whether the disclosure of the records could reasonably be expected to **interfere** with the law enforcement investigation.

In my view, the phrase "could reasonably be expected to" in section 8(1) of the Act requires that there exist a reasonable expectation of probable harm. The mere possibility of harm is not sufficient. Previous orders have held that, at a minimum, the Police must establish a clear and direct linkage between the disclosure of the specific information and the harm which is alleged (Orders P-557 and M-202).

The representations of the Police provide details as to how disclosure of the information contained in the records could hamper or impede the effectiveness of the law enforcement investigation. The Police submit generally that release of the information contained in the records could reasonably be expected to result in the destruction of additional evidence relevant to the investigation. The Police also identify a specific concern regarding the prejudicial impact which the release of the records could have on the continuing investigation and particularly on interviews to be undertaken relating to the investigation. The Police further indicate that disclosure of the records will make public the names of potential witnesses, which may result in a lack of co-operation from these individuals.

Based on a review of all of these considerations, I am satisfied that, in the circumstances of this appeal, the disclosure of the information contained in the records would produce a reasonable expectation of probable harm. I have been provided with sufficient evidence to demonstrate a direct linkage between the disclosure of the information contained in the records and the harm alleged. I find, therefore, that the release of the information contained in these documents could reasonably interfere with an investigation undertaken with a view to a law enforcement proceeding under section 8(1)(b) of the Act. The records are, therefore, properly exempt from disclosure.

The Town has provided representations regarding the decision to exercise its discretion under section 8(1)(b) in favour of not disclosing the records. I have reviewed these representations and I find nothing improper in the manner in which the Town exercised its discretion and, accordingly, would not disturb this determination on appeal.

Because of the manner in which I have disposed of Issue A, it is not necessary for me to deal with the application of section 8(1)(a) or with Issue B.

ORDER:

I uphold the decision of the Town.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ February 8, 1994