



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-498

Appeal M-9400500

The Corporation of the Town of Markham



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The Corporation of the Town of Markham (the Town) received a request from a local newspaper reporter for access to records relating to payments made by the Town for the services of an Assistant to one of its Councillors. The request was framed as follows:

The records I would like access to date back to 1989 and the creation of Council's administrative fund. Specifically, I would like to view **original** invoices submitted by [a named individual] to the town for the years 1989, 1990, 1991, 1992, 1993 and 1994 and **original** cancelled cheques which were issued as a result of those invoices [emphasis added].

Initially, the Town responded to this request by indicating access was granted to the responsive records and quoting a fee. Prior to actually disclosing the records, however, the Town decided to notify the named individual, the Councillor's Assistant, that a request had been made for information which related to her. When this individual did not consent to the disclosure of the information, the Town decided to deny access to the records pursuant to the mandatory exemption provided by section 14 of the Act.

The requester appealed the decision to deny access and implicitly raised the public interest provision set forth in section 16 of the Act.

A Notice of Inquiry was sent to the appellant, the Town and the Councillor's Assistant (the affected person). Representations were received from all of the parties to the appeal.

The records at issue consist of copies of nine invoices submitted by the affected person to the Town dated October, 1989 to May, 1993 and copies of the front and back of nine cheques dated November 22, 1989 to June 9, 1993 which correspond to the invoices.

DISCUSSION:

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including,

- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (h) the individual's name if it appears with other personal information relating to the
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individual or where the disclosure of the name would reveal other personal information about the individual;

The records consist of invoices submitted by and cheques payable to the Councillor's Assistant for administrative services which she provided to the Councillor. The information in the invoices consists of her name and home address, a description of the administrative services provided, the total number of hours worked and the total amount of the fee charged. The cheques contain the name of the Councillor's Assistant and the amount paid to her by the Town.

Based on the definition of personal information quoted above and my review of the records, I find that the records contain the personal information of the Councillor's Assistant only.

Section 14(1) of the Act is a mandatory exemption which prohibits the disclosure of personal information to any person other than the individual to whom the information relates. There are a number of exceptions to this rule, one of which is found in section 14(1)(f) of the Act. This section provides that a government institution must refuse to disclose the personal information of other individuals except if the disclosure does not constitute an unjustified invasion of personal privacy. Sections 14(2), (3) and (4) of the Act provide guidance in determining this issue.

Section 14(4) of the Act identifies particular types of information the disclosure of which does not constitute an unjustified invasion of personal privacy. Section 14(4)(b) of the Act specifies that, despite the application of one of the presumptions contained in section 14(3), a disclosure of personal information does not constitute an unjustified invasion of personal privacy if it discloses financial or other details of a contract for personal services between an individual and an institution.

In order to determine whether disclosure of the personal information in the invoices and cheques would reveal financial or other details of a contract for personal services between an individual and an institution, I will first have to make a determination of the employment relationship between the individual and the Town.

In doing so, I must decide whether the Councillor's Assistant was hired as an employee of the Town, or whether she provided her services on a fee-for-service basis as an independent contractor.

In the circumstances of this appeal, there is no written contract between the Councillor's Assistant and the Town to assist in making this determination. However, information provided by the Town confirms that on April 11, 1989, the Town Council adopted a recommendation that administrative assistance be provided for its members, and that the money be advanced to each Council member to enable them to hire "outside" resources to assist them in responding to constituents.

The Town takes the position the Councillor's Assistant is its employee and that "... nothing in section 14(4) mandates the disclosure of exact salary or remuneration paid to an employee". The Town also submits that

the presumption of an unjustified invasion of personal privacy provided by section 14(3)(f) applies to the information contained in the records and that "the disclosure of the records in question would have the effect of revealing the exact specific amounts, rate of pay and total compensation paid to the affected individual".

The appellant submits that the Councillor's Assistant is not a Town employee but rather has been hired on a contract basis. The appellant argues that the services of the Councillor's Assistant "... are supplied to a particular councillor and she is paid after submitting an invoice - a relationship which is not unlike that of a consultant's".

In Order M-373, Assistant Commissioner Irwin Glasberg considered the terms employee and independent contractor in the context of the Act. He quoted with approval the definitions of employee and independent contractor contained in Black's Law Dictionary (Sixth Edition) and held that:

The question of whether an individual may be characterized as an employee or an independent contractor has been the subject of many decisions made by the courts and various administrative tribunals. Among the factors which are judged to be significant in making this determination are the following:

- (1) The level of control and supervision exercised by the employer with respect to (a) how the work is performed, (b) where the work is performed, (c) the hours of work and (d) what is produced.
- (2) The ownership and provision of the equipment used for the job.
- (3) The economic dependence of the worker on the employer.
- (4) Whether the worker is entitled to undertake alternative work while engaged by the employer.
- (5) Whether the worker is obliged to follow the employer's organizational policies.
- (6) Whether the worker bears any risk of loss by entering into the agreement.
- (7) Whether the work which the individual performs is a necessary and integral component of the employer's operations.

I adopt the approach taken by Assistant Commissioner Glasberg and have used the considerations listed above to determine whether the Councillor's Assistant is an employee or an independent contractor.

The Town has not provided me with any information which would favour a finding that the Councillor's

Assistant was hired as an employee of the Town, other than the fact that she was paid by the Town. The following factors support the conclusion that the Councillor's Assistant was engaged as an independent contractor:

- She was paid the total amounts submitted on her invoices. In other words, she was **not** paid a salary from which income tax, C.P.P. and U.I.C. deductions were made.
- She did not receive either vacation credits or sick leave benefits.
- The administrative position was part-time, and she was entitled to undertake alternative work.
- She undertook alternative employment at the Councillor's private firm.
- She did not use the offices or office equipment of the Town performing her work for the Councillor.

In my view, the fact that the Councillor hired the individual of his choice and that this individual reported directly to him indicates that the Town did not exercise any control or supervision over the manner in which the Councillor's Assistant undertook her work. I also find, based on a review of the records and the evidence before me, that the work which the Assistant performed was directed to constituency matters on behalf of the Councillor.

Having carefully considered the representations of the parties, I conclude that the relationship of the Councillor's Assistant to the Town was that of an independent contractor and not that of an employee. Accordingly, I find that the agreement by which the Councillor's Assistant was engaged, although an oral one, represents a contract for personal services and that the invoices were submitted on a fee-for-service basis.

I find, therefore, that with the exception of the Councillor's Assistant's home address, disclosure of the information contained in the invoices would reveal the financial or other details of a contract for personal services within the meaning of section 14(4)(b). Its disclosure would **not**, therefore, constitute an unjustified invasion of personal privacy. Accordingly, this information should be disclosed to the appellant.

The only information remaining at issue is the Councillor's Assistant's home address, which appears at the top of the invoices. 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 the section 14(1)(f) exception applies, I must find that disclosure of the appellant's home address would **not** constitute an unjustified invasion of personal privacy.

The appellant has not identified any considerations which would weigh in favour of the disclosure of the Councillor's Assistant's home address. In the absence of any factors weighing in favour of finding that disclosure of the personal information would not constitute an unjustified invasion of personal privacy, I find that the exception contained in section 14(1)(f) does not apply, and that the address is properly exempt from disclosure under the Act.

The appellant submits that the public interest consideration expressed in section 16 of the Act applies in the circumstances of this case. In order for section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the record. Second, this interest must clearly outweigh the purpose of the exemption which otherwise applies to the record.

As a result of this order, all of the information in the records will be disclosed to the appellant with the exception of the home address of the Councillor's Assistant. In my view, the extent of this disclosure will provide the appellant with sufficient information to adequately address the public interest concerns. On this basis, I find that there does not exist a compelling public interest in the disclosure of the Councillor's Assistant's home address which clearly outweighs the purpose of the section 14 exemption. Therefore, section 16 does not apply in the circumstances of this appeal.

ORDER:

1. I order the Town to disclose to the appellant all of the records with the exception of the Councillor's Assistant's home address within thirty-five (35) days of the date of this order, but not earlier than the thirtieth (30th) day after the date of this order.
2. I uphold the decision of the Town not to disclose the home address of the Councillor's Assistant.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Town to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Donald Hale

March 27, 1995

Inquiry Officer