



**Information and Privacy
Commissioner/Ontario**
**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-586

Appeal M_9500185

The Corporation of the Town of Whitby



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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 Whitby (the Town) received a request for access to a copy of all correspondence and allegations submitted by employees or former employees of the Town about the requester. There are three records at issue in this appeal: a two-page letter (Record 1), a one-page letter (Record 2) and a one-page "e-mail" (Record 3). The Town relies on the following exemptions in denying access to the records:

- third party information - section 10(1)(b)
- danger to safety or health - section 13
- discretion to refuse requester's own information - section 38(a)
- invasion of privacy - section 38(b)
- evaluative or opinion material - section 38(c)

A Notice of Inquiry was provided to the appellant, the Town and three individuals whose interests may be affected by the outcome of this appeal (the affected persons). Representations were received from the Town, the appellant and one of the affected persons.

DISCUSSION:

THIRD PARTY INFORMATION

The Town submits that the records are exempt from disclosure under section 10(1)(b) of the Act which states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

The introductory wording of section 10(1) requires that the information must have been supplied to the Town, the "institution", by a third party which, by definition, is not part of the institution.

Records 1, 2 and 3 were written by employees or former employees of the Town. The Town's employees are part of the institution, and do not qualify as third parties for the purposes of section 10. Former employees are not part of the institution and it could be argued that they are properly considered third parties for the purposes of section 10. However, in my view, the interests of former employees, in circumstances such as in this appeal, are more appropriately addressed under the privacy protection provisions of the Act.

Accordingly, I find that section 10(1)(b) of the Act does not apply.

DANGER TO SAFETY OR HEALTH

Section 13 of the Act reads as follows:

A head may refuse to disclose a record whose disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

The Town submits that the appellant has threatened employees of the Town and that this has been reported to the police. The Town further submits that, in light of these threats, "it has legitimate concerns about the safety of its employees, and others, if the information sought by [the appellant] is disclosed to him".

Having carefully reviewed the records and the submissions of all parties, it is my view that I have not been provided with sufficient evidence to demonstrate a reasonable expectation that a serious threat to the safety or health of an individual would probably result from disclosure of the records. Therefore, I find that section 13 of the Act does not apply.

Because of the way in which I have decided the first two issues, it is not necessary for me to consider the issue of "discretion to refuse requester's own information" (Section 38(a) of the Act).

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. I have reviewed the information contained in the records, and I find that it satisfies the definition of personal information. In my view, the personal information is that of the appellant and other identifiable individuals.

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(b) of the Act, where a record contains the personal information of both the appellant and another individual and the Town determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Town has the discretion to deny the requester access to that information.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy.

With respect to section 14(3), the Town submits that Record 1 contains information relating to the employment history of one of the affected persons (section 14(3)(d)). The affected person who provided me with representations raises the presumption under section 14(3)(g) of the Act (consists of personal recommendations or evaluations, character references or personnel evaluations).

If none of the presumptions contained in section 14(3) apply, the institution must consider the application of the factors listed in section 14(2), as well as all other considerations that are relevant in the circumstances of the case.

Under section 14(2), the Town and the affected person submit that the records were provided in confidence (section 14(2)(h)). The affected person adds that he will be exposed unfairly to pecuniary or other harm (section 14(2)(e)) should the records be disclosed.

The appellant contends that the records contain false allegations of his conduct as an employee and implies that his employment with the Town was terminated as a result.

Having reviewed the representations and the record, I have made the following findings:

- (1) The records contain information concerning employment-related incidents involving the appellant and other individuals. However, in my view, the information in the records cannot accurately be characterized as the employment history of any of the individuals to whom it relates, and section 14(3)(d) does not apply.
- (2) In a broad sense, it could be argued that some of the comments contained in the records are "evaluations" of the appellant. However, in my view, it is not possible to characterize these comments as "personal evaluations" or "personnel evaluations". Accordingly, in my view, section 14(3)(g) does not apply.
- (3) I have not been provided with any information which supports the assertion that disclosure of the information relating to the affected person in Records 1 and 2 would result in his being exposed unfairly to pecuniary or other harm (section 14(2)(e)).
- (4) While section 14(2)(h) is a relevant consideration in the circumstances of this appeal, in matters such as this it is not reasonable to expect complete confidentiality. Fairness demands that the appellant be made aware of the allegations made against him which appear to have had an impact on his continued employment with the Town.

Having considered all of the circumstances of this appeal and balanced the appellant's right to access his personal information against the interest of the affected persons in protecting their privacy, I find that section 38(b) applies to the personal information which I have highlighted on page 2 of Record 1 and enclosed with the Town's copy of this order and Record 2 in its entirety. Disclosure of the remainder of the records would not constitute an unjustified invasion of personal privacy.

EVALUATIVE OR OPINION MATERIAL

The Town submits that section 38(c) applies to all of the records. This section reads:

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

The Town submits that all three records relate to the suitability of the appellant for employment and, in Records 1 and 2, other employees. While I agree that individuals may have made comments about the appellant which could at some point relate to his suitability for employment, I do not accept that the sole purpose for compiling the information was to determine the appellant's suitability, eligibility or qualifications for employment. Accordingly, I find that section 38(c) does not apply.

ORDER:

1. I order the Town to disclose Record 1, in accordance with the highlighted version of Record 1 which I have enclosed with the Town's copy of this order, and Record 3 in its entirety to the appellant within thirty-five (35) days after the date of this order but not before the thirtieth (30th) day after the date of this order. The highlighted portions of the record should **not** be disclosed.
2. I uphold the Town's decision not to disclose the highlighted portion of Record 1 and Record 2 in its entirety.
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: _____
Holly Big Canoe
Inquiry Officer

August 24, 1995