



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

ORDER M-720

Appeal M_9500648

Town of Fort Erie



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NATURE OF THE APPEAL:

The appellant's son died in a drowning accident in 1995. The Fort Erie Fire Department attempted to rescue him. Subsequently, the appellant submitted a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the Town of Fort Erie (the Town). The request was for "all records dealing with my son's drowning including all records of phone calls made, all reports and correspondence."

Full access was granted to a "Response Report" in connection with the incident. In addition, the Town disclosed another Fire Department Report, except for the names of firefighters, which were withheld. In addition, the Town denied access, in full, to four witness statements completed by firefighters who participated in the rescue attempt.

The appellant filed an appeal of the Town's decision to deny access. The four witness statements are now the only records at issue. The Town denied access to these statements under the following exemption in the Act:

- law enforcement - section 8(2)(a).

This office sent a Notice of Inquiry to the appellant, the Town and the four firefighters who provided statements (the affected persons). In addition to section 8(2)(a), the Notice of Inquiry invited the parties to comment on the application of the mandatory exemption in section 14(1) of the Act (invasion of privacy).

The appellant's representations indicate that she does not require access to the names of any firefighters mentioned in the records. Therefore, this information is not at issue and I will not order its disclosure.

DISCUSSION:

LAW ENFORCEMENT

Section 8(2)(a) of the Act states as follows:

A head may refuse to disclose a record,

that is a report prepared in the course of law enforcement,
inspections or investigations by an agency which has the function
of enforcing and regulating compliance with a law.

In addition, for a record to qualify for exemption under section 8(2)(a) of the Act, the institution must satisfy each part of the following three part test:

1. the record must be a report; **and**

2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

Part 1

In order to satisfy the first part of the test, i.e. to be a report, a record must consist of a **formal statement or account of the results** of the collation and consideration of information. Generally speaking, reports would not include mere observations or recordings of fact. (Order 200).

In my view, the witness statements at issue do not qualify as reports. Rather, they consist of observations or recordings of fact. I find that Part 1 of the test has not been met.

Part 2

The evidence before me does not establish that the witness statements were prepared in the course of law enforcement, inspections or investigations. Rather, they were prepared to record the factual details of a rescue attempt. I find that Part 2 of the test has also not been met.

Part 3

The Town submits that the Fire Department has the function of enforcing compliance with the Fire Code. In my view, however, there is no connection between the Fire Department's mandate to enforce the Fire Code and the attempt to prevent the appellant's son from drowning, as described in the witness statements. Therefore, I find that the Town may not rely on the Fire Department's law enforcement mandate under the Fire Code to meet Part 3 of the test with respect to these statements.

As noted, the Town must establish all three parts of the test in order to rely on section 8(2)(a). I have found that none of these parts have been met, and for this reason, the exemption does not apply.

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 records to determine whether they contain personal information, and if so, to whom the personal information relates.

I find that the records all contain the personal information of the appellant's deceased son. Section 2(2) of the Act provides that personal information does not include information about an individual who has been dead for thirty years or more, but that does not apply in this case.

The records contain the ranks, addresses, telephone numbers and birthdates of the affected persons, and in my view, this constitutes their personal information. The other information about the affected persons in the records pertains to employment-related activities. Generally speaking, such information does not qualify as personal information. However, one exception to this is where there are allegations of improper performance. In this case, the appellant's appeal letter states: "I feel that the rescue was not done properly and I am being denied access to the reports due to this reason ...". Therefore, in my view, the descriptions of the activities of the affected persons qualify as their personal information in the circumstances of this case.

Once it has been determined that a record contains personal information, section 14(1) of the Act prohibits the disclosure of this information unless one of the exceptions in sections 14(1)(a) through (f) applies.

Sections 14(1)(a) and (f) state:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

- (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
- (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

In their representations, the affected persons indicate that they consent to disclosure of the witness statements, as long as their personal information under the heading "Statement of" (consisting of the name, rank, address, telephone numbers and birthdate of the individual making the statement), and their signatures, are removed. The names and signatures are not at issue, as the appellant does not require them.

As a first step, I will analyse whether disclosure of the affected persons' ranks, addresses, telephone numbers and birthdates would constitute an unjustified invasion of their personal privacy. If I decide that such information is exempt, then the condition for the affected persons' consent to disclose the remainder of the statements will have been met. However, as the remaining passages also contain the personal information of the appellant's son, I will still have to determine whether disclosure of those passages would be an unjustified invasion of his personal privacy.

Section 14(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Where one of the presumptions in section 14(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is if the personal information falls under section 14(4) or where a finding is made that section 16 of the Act applies to the personal information.

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

With respect to the ranks, addresses, telephone numbers and birthdates of the affected persons, in my view, no factors favouring disclosure of this information have been established. Therefore, I find that disclosure of this information would constitute an unjustified invasion of personal privacy, and it is exempt under section 14(1) of the Act. As a result, the condition imposed by the affected persons for consenting to disclosure of the rest of their statements has been met.

I must now determine whether disclosure of the remaining portions of the witness statements would constitute an unjustified invasion of the appellant's deceased son's personal privacy. I find that none of the presumptions in section 14(3) apply to that information. I also find that, in the circumstances of this appeal, none of the factors favouring privacy protection in section 14(2) are relevant. In my view, the appellant's desire to understand what occurred with respect to her son's death is a relevant circumstance favouring disclosure.

On this basis, I am satisfied that disclosure of the remaining portions of the witness statements would not constitute an unjustified invasion of the deceased's personal privacy. As noted above, the affected persons have consented to disclosure of this information. Accordingly, I find that it is not exempt under section 14(1) and I will order its disclosure.

In summary, the names of any firefighters mentioned in the records are not at issue and should not be disclosed (including their signatures). In addition, the ranks, addresses, telephone numbers and birthdates of the affected persons are exempt from disclosure under section 14(1). I have highlighted this information on the copies of the records which are being sent to the Town's Freedom of Information and Privacy Co-ordinator with a copy of this order. I will order disclosure of the information in the witness statements which is **not** highlighted.

ORDER:

1. I uphold the Town's decision to deny access to the parts of the witness statements which are highlighted on the copies of these records which are being sent to the Town's Freedom of Information and Privacy Co-ordinator with a copy of this order.
2. I order the Town to disclose the parts of the witness statements which are **not** highlighted on the copies of these records which are being sent to the Town's Freedom of Information and Privacy Co-ordinator with a copy of this order, by sending copies of these records to the appellant on or before **April 2, 1996** but not earlier than **March 28, 1996**.
3. In order to verify compliance with this order, I reserve the right to require the Town to provide me with a copy of the records disclosed pursuant to Provision 2.

Original signed by: _____
John Higgins
Inquiry Officer

_____ February 27, 1996