



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

ORDER M-686

Appeal M_9500434

The Corporation of the Town of Kapuskasing



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NATURE OF THE APPEAL:

The appellant submitted a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to his former employer, the Corporation of the Town of Kapuskasing (the Town). The appellant was dismissed from his position with the Town in January 1992. In his request, the appellant sought access to six categories of records pertaining to his dismissal, which may be summarized as follows:

1. notes, memoranda and other records prepared by members of the Town council, or by Town staff, at meetings on March 20, 1995 and May 1, 1995;
2. notes, memoranda and other records prepared by the Town Manager at two meetings with the appellant;
3. notes, memoranda and other records relating to the appellant prepared by members of the Town council, or by Town staff, during the term of the previous council up to the date of the appellant's dismissal;
4. notes, memoranda and other records in relation to the appellant's dismissal and his objections to it;
5. the appellant's employment records and termination slips; and
6. the amounts paid to the appellant on termination in the form of termination and severance pay as well as vacation pay.

In its response to the request, the Town indicated that it had located a number of responsive records. With the exception of records previously disclosed to the appellant, full access was granted to all responsive records which were located. The Town also advised the appellant that no records exist with respect to parts 1 and 2 of the request, as summarized above.

The appellant filed an appeal of this decision, indicating that he believes some records which should have been located were not included in the Town's response.

The Commissioner's office sent a Notice of Inquiry to the appellant and the Town. Representations were submitted by both parties. With respect to part 1 of the request, the Town's representations indicate that the Town has no responsive records in its custody, and that if any notes were made by councillors, they would not be under the control of the Town, and are outside the scope of the Act.

By making the latter argument, the Town has raised the issue of custody and control at the representation stage. Because it was not raised at an earlier stage in the appeal, it was not dealt with in the original Notice of Inquiry. In the interest of fairness, the Commissioner's office sent a Supplementary Notice of Inquiry to the Town, the councillors (including the Mayor) and the

appellant, in order to give them an opportunity to submit representations on this issue. In response to the Supplementary Notice of Inquiry, representations were received from the Town, the appellant and all of the seven councillors including the Mayor.

DISCUSSION:

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he is seeking and the Town indicates that further records do not exist, it my responsibility to ensure that the Town has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Town to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Town must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

Submissions by the Appellant

In his letter of appeal, the appellant provided copies of four letters he had sent to the Town which were not included in the response to his request. Three of the letters appear to relate to the appellant's termination and therefore, in my view, they would be responsive to part 4 of the request. The fourth letter, which pertains to the appellant's municipal tax bill, has no discernible connection with any part of the request.

In a letter to the Appeals Officer, referred to in the appellant's representations, the appellant alleges that a statement that no records exist with respect to the meeting of March 20, 1995 (see part 1 of the request) is false because he "... personally witnessed otherwise".

In addition, with regard to part 2 of the request, the appellant's letter indicates that notes were taken and referred to during the meetings with the Town Manager.

In his representations in response to the Supplementary Notice of Inquiry, the appellant makes reference to records in the offices of the Town's lawyers. In my view, if the appellant intended his request to cover such records, he ought to have referred to them explicitly in his request. I am not prepared to consider them in this appeal. If the appellant wishes to obtain access to such records (some of which may, arguably, be under the Town's control and, therefore, subject to the Act) he will have to submit a new request for them.

Submissions by the Town

The Town's representations indicate that the appellant's file was searched for responsive records in all requested categories, and that access was granted to all responsive records which were located. This statement is supported by an affidavit sworn by the Town's Clerk-Treasurer.

In addition, the Town Manager provided an affidavit which indicates, with respect to part 2 of the request, that the only notes he took during the meetings in question have been destroyed.

Submissions by the Councillors

The councillors are unanimous in stating that they did not take notes at the meetings referred to in part 1 of the request.

Conclusions

I accept the Councillors' evidence, with respect to part 1 of the request, that they did not take notes during the specified meetings. I also accept the Town Manager's evidence that he destroyed the notes he took at the two meetings mentioned in part 2 of the request. I am satisfied that the Town's search for records responsive to these parts of the request was reasonable in the circumstances.

The only evidence provided by the appellant which, in my view, points to the existence of additional records, consists of the three letters referred to above which he enclosed with his letter of appeal. These relate to part 4 of the request. On this basis, I am not satisfied that the Town's search for records responsive to part 4 of the request was reasonable in the circumstances and I will order the Town to conduct another search in that regard.

With respect to parts 3, 5 and 6 of the request, I am not persuaded that the appellant has provided sufficient evidence to establish a reasonable basis for concluding that additional records may exist. I am satisfied, based on the evidence provided, that the Town's search for records was reasonable with respect to those parts of the request.

CUSTODY AND CONTROL

This issue relates to councillors' notes. Above, I accepted the evidence of the councillors that they did not make notes at the meetings referred to in the request.

In these circumstances, a decision regarding custody and/or control over responsive records in the hands of the councillors would serve no practical purpose. Therefore, in my view, it is not necessary for me to address this issue in order to decide this case.

ORDER:

1. The Town's search for records responsive to parts 1, 2, 3, 5 and 6 was reasonable in the circumstances and this appeal is denied with respect to those parts.
2. I order the Town to conduct a further search for records responsive to part 4 of the request (namely, notes, memoranda and other records in relation to the appellant's dismissal and his objections to it), to communicate the results of this search to the appellant in writing, and to send an access decision to the appellant with respect to any previously undisclosed responsive records located as a result of this search, in the form

contemplated by sections 19, 22 and 23 of the Act, on or before **February 12, 1996**, without recourse to a time extension.

2. In order to verify compliance with Provision 1 of this order, I order the Town to send me a copy of the correspondence referred to in that provision on or before **February 12, 1996**. This should be sent to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: _____ January 12, 1996
John Higgins
Inquiry Officer

POSTSCRIPT

Above, I noted that the Town Manager states, in his affidavit, that he destroyed notes taken during two meetings with the appellant. These meetings took place on March 20, 1995 and May 1, 1995. The appellant's request was submitted on June 16, 1995. Given that the meetings related to the appellant's termination and his attempts to reach a settlement with the Town in that regard, it is likely that such notes contained the appellant's personal information.

Section 5 of R.R.O. 1990, Regulation 823 (made under the Act) states as follows:

Personal information that has been used by an institution shall be retained by the institution for the shorter of one year after use or the period set out in a by-law or resolution made by the institution or made by another institution affecting the institution, unless the individual to whom the information relates consents to its earlier disposal.

If the appellant believes that the destruction of the Town Manager's notes may represent a contravention of this provision, he may refer the matter to the Compliance Department of this office, by writing to:

Compliance Department
Information and Privacy Commissioner/Ontario
80 Bloor Street West
Toronto, Ontario
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