



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

# **ORDER M-997**

**Appeal M\_9700127**

**The Regional Municipality of Halton**



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## **NATURE OF THE APPEAL:**

The appellant made a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the Regional Municipality of Halton (the Region). The request was for access to a copy of all questions asked and notes taken at a meeting on February 20, 1997 as well as an outline of allegations made, and any supporting documentation. The appellant then expanded on her request by also asking for access to notes taken at interviews held in the workplace wherein allegations were apparently made. The interviews were held on January 9, 1997 and one day at the end of January, 1997.

The Region located records responsive to the request, granted partial access to some records and denied access to other records pursuant to sections 10(1) and 14 of the Act. The appellant appealed the Region's decision.

During mediation, the appellant was advised that the Region had indicated no notes regarding the meeting held February 20 exist. The appellant accepted the position of the Region, and this is not an issue in this appeal. The appellant indicated that with respect to the meeting held January 9, she received notes of her interview only, and believes that additional records should exist.

In addition to the issues raised by the parties in this appeal, the Appeals Officer included the issues of the application of sections 38(a) and (b) and section 52 of the Act in the Notice of Inquiry which was sent to the Region and the appellant. Representations were received from both parties.

## **DISCUSSION:**

### **REASONABLENESS OF SEARCH**

Where a requester provides sufficient details about the records which she is seeking and the Region indicates that further records do not exist, it is my responsibility to ensure that the Region has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Region 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 Region 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.

With respect to the possible existence of additional records, the Region has conducted a second search in this area upon learning of the appellant's belief that additional records should exist. This search revealed additional responsive records, which the Region indicates will be disclosed to the appellant. The Region has provided me with an affidavit from the Region's Freedom of Information and Privacy Coordinator which details the steps taken to locate the records.

Having reviewed the information submitted to me, I am satisfied that the Region's search for records responsive to the appellant's requests was reasonable.

## **JURISDICTION**

The interpretation of sections 52(3) and (4) is a preliminary issue which goes to the jurisdiction of the Commissioner or her delegates to continue an inquiry.

The Region relies on section 52(3)3 of the Act to exclude the records in their entirety. In order to fall within the scope of section 52(3)3, the Region must establish that:

1. the record was collected, prepared, maintained or used by the Region or on its behalf; and
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the Region has an interest.

### **Requirement 1**

The Region states that the records were prepared by two employees of the Region, as part of an internal investigation into allegations of misconduct, and were contained in an employee file held by an employee of the Region. Accordingly, I am satisfied that the records were prepared and maintained by the Region and Requirement 1 has been met.

### **Requirement 2**

The Region submits that the records arose from allegations made regarding the employment related misconduct of the appellant and another employee, and that their creation led to further discussions with the appellant and the other employee. I am satisfied that the preparation and maintenance of the records was in relation to meetings, discussions and communications and Requirement 2 has been met.

### **Requirement 3**

The Region submits that the meetings, discussions or communications were about employment related matters, as the investigations arose out of allegations of misconduct by two of the Region's employees, specifically, that the employees had used their positions with the Region to obtain benefit through fraudulent means. I am satisfied that these meetings, discussions and/or communications were about an employment-related matter, namely, whether or not the allegations of inappropriate behaviour in the workplace could be substantiated.

The remaining component which must be established is whether this matter can be characterized as one "in which the institution has an interest".

In Order P-1242, Assistant Commissioner Tom Mitchinson considered the meaning of this phrase in section 65(6)3 of the provincial Freedom of Information and Protection of Privacy Act. He stated:

[A]n “interest” must be a legal interest in the sense that the matter in which the Ministry has an interest must have the capacity to affect the Ministry’s legal rights or obligations.

I agree with the Assistant Commissioner’s reasoning and approach and adopt it for the purposes of this appeal.

In this regard, the Region submits that one of the implied legal rights contained in the contract of employment between the Region and the appellant was the right to expect the appellant to fulfill their contractual obligations faithfully and honestly. The documents in dispute were created as a result of an internal investigation to determine whether the requesters had breached these obligations.

If proven, the allegations against Region staff in this case could lead to civil liability, including possible vicarious liability for the Region. Clearly, therefore, the matter of whether or not Region staff carried out their responsibilities in an appropriate manner is one which has the capacity to affect the Region’s legal rights or obligations.

Based on the above, I have concluded that the Region “has an interest” in the “employment-related matter” of the investigation of workplace incidents involving the appellant, within the meaning of section 52(3)3.

Therefore, I find that Requirement 3 has been met.

In summary, I find that the records were prepared and maintained by the Region in relation to meetings, discussions or communications about an employment-related matter in which the Region has an interest. None of the exceptions in section 52(4) apply in the circumstances of this appeal. I find, therefore, that the records fall within the parameters of section 52(3)3 and are, therefore, excluded from the scope of the Act.

## **ORDER:**

I uphold the Region’s decision.

Original Signed by: \_\_\_\_\_ September 8, 1997  
Holly Big Canoe  
Inquiry Officer