



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

ORDER M-1009

Appeal M-9700125

The Regional Municipality of Halton



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Regional Municipality of Halton (the Region) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The request was for access to copies of the requester's human resource files, questions asked and notes taken during interviews conducted with the requester and his co-workers, including records of meetings with four named individuals in relation to allegations made against him. The Region granted partial access to 137 pages of the responsive records. The Region denied access to the remaining records pursuant to sections 10(1)(third party information) and 14(1) (invasion of privacy) of the Act. The requester appealed the decision to deny access to the records and indicated that he believes more responsive records exist.

During mediation, the appellant advised that he was not seeking access to duplicates of records, non-responsive records and records which have been partially severed (with the exception of page 105). The appellant clarified that he was specifically seeking access to:

- 1) Notes taken at a meeting attended by the appellant and his co-workers regarding team playing conducted by a named individual in December, 1996;
- 2) Notes of a meeting between three named individuals regarding the appellant and
- 3) Records in the appellant's supervisor's file including his "Core Competency Paid Performance Review" conducted by his supervisor in January, 1996.

In response to the above clarification, the Region conducted a subsequent search and located records responsive to item 1). The Region granted access to these records. With respect to items 2) and 3), the Region stated that records did not exist as no notes had been taken in relation to item 2) and that records responsive to item 3) had been destroyed prior to receipt of the request. The appellant continues to believe that these records should exist.

The records to which access has been denied consist of the severed portion of the appellant's interview notes (page 105) and notes of interviews with co-workers (pages 114-135).

This office provided a Notice of Inquiry to the appellant, the Region and twelve individuals referred to in the records (the affected persons). Due to the nature of the records, the parties were also asked to comment on the application of section 52 of the Act. Representations were received from the appellant, the Region and six of the affected persons.

DISCUSSION:

REASONABLENESS OF SEARCH

Where a requester provides sufficient detail about the records which he 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.

In the present case, the appellant has described the specific records that he believes should exist.

In its representations, the Region points out that a second search was conducted and that further records were located which were disclosed to the appellant. The Region has provided me with an affidavit which details the steps taken to locate the records. The affidavit also indicates that no notes were taken during the meeting referred to as item 2) above and therefore, no records exist. Finally, the Region reiterates that the appellant's Core Competency Paid Performance Review was destroyed by the supervisor before she became aware of the request.

I have carefully reviewed the representations of the parties and I am satisfied that the Region's search for records responsive to the appellant's request 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 were created as a result of 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 were a direct result of the allegations of misconduct by the appellant and another employee, specifically that these two 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 to determine 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 his contractual obligations faithfully and honestly. The documents in dispute were created as a result of an internal investigation to determine whether the appellant 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 conclude 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: _____

Mumtaz Jiwan

Inquiry Officer

September 29, 1997