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

ORDER MO-1305

Appeal MA-990310-1

Town of Milton

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NATURE OF THE APPEAL:

The Town of Milton (the Town) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to all records of complaints received by the Town relating to the requesters between June 10, 1999 and September 14, 1999 (the date of the request).

The Town identified 24 pages of responsive records, consisting of police occurrence reports, a Town by-law enforcement occurrence report, police and other statements, memoranda, correspondence, a court order, a videotape and photographs. The Town denied access to the records in their entirety pursuant to sections 8(1)(a), (b) and (d), 38(a) and 38(b) of the Act. In deciding to claim section 38(b), the Town relied on the "presumed unjustified invasion of personal privacy" in section 14(3)(b) of the Act.

The requesters (now the appellants) appealed the Town's decision.

During mediation, the Town disclosed the court order, so this record is no longer at issue.

I initially provided a Notice of Inquiry to the Town. After reviewing the Town's representations, I sent the Notice to the appellants, together with the non-confidential portions of the Town's representations. The appellants submitted representations in response to the Notice of Inquiry.

RECORDS:

There are 12 records at issue, consisting of photographs, a videotape and 23 pages of documents described above.

DISCUSSION:

PERSONAL INFORMATION

Section 2(1) of the Act states, in part:

> "personal information" means recorded information about an identifiable individual, including,
>
> ...
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> ...
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a privacy or confidential nature, and

> replies to that correspondence that would reveal the contents of the original correspondence,
>
> ...
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The appellants submit:

> The Act defines personal information as "recorded information *about* an identifiable individual" (emphasis added). It is highly unlikely that a letter of complaint or a by-law enforcement officer's records would reveal personal information about the author of the letter or the notes. In fact, they would record personal information about my clients, to which my clients have the right of access.
>
> It is acknowledged that disclosure of these documents will inevitably result in the disclosure of certain persons' names. However, subsection 2(1)(h) of the Act only precludes the disclosure of an individual's name "if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual". Again, it is virtually inconceivable that the documents sought by my clients would disclose any personal information about the authors of the documents themselves.

I do not accept the appellants' position. All of the paper records contain the personal information of one or more of the appellants, including their name, address, date of birth, driver's license number and/or other identifiable information relating to them and activities which took place on their property. All of these records, with the exception of Record 10, also contain the personal information of other identifiable individuals, including their name, telephone number, date of birth and/or address. The fact that these individuals' names and other personal information are linked with their personal statements regarding the appellants use of their property reveals the fact that they made complaints to the Town and/or the police. This information is considered the personal information of those individuals because it is information "about" them. For these reasons, I find that all of the paper records, with the exception of Record 10, contain the personal information of the appellants and other identifiable individuals, and Record 10 contains the personal information of the appellants only.

The videotape consists of recorded activities taking place on the appellants' property, including recorded activities of the appellants and other individuals. I find that this record also contains the personal information of the appellants and other individuals.

There are four photographs of the appellants' property, two taken by the complainants and two by staff of the Town's by-law enforcement unit. I find that all four photographs contain the personal information of the appellants. Although the photographs identify the appellant's property, they also reveal activities taking place on the property that are directly related to the investigations being undertaken by the Town and the Halton Regional Police. As such, I find that the photographs are not only about the property, but are also

about the appellants themselves, and therefore satisfy the definition of personal information. The photographs do not contain personal information of any other individuals.

The Town maintains that Records 1, 2, 3, and 4 also contain the personal information of the authors of these records, who were either police officers or municipal by-law enforcement officers. The Town submits that:

> Information pertaining to individuals in their capacity as professionals or employees that identifies them as potential witnesses for the prosecution in a criminal case constitutes personal information of such individuals.

Previous orders of this Office have drawn a distinction between an individual's personal, and professional or official government capacity, and found that in some circumstances, information associated with a person in his or her professional or official governmental capacity will not be considered to be "about the individual" within the meaning of the section 2(1) definition of "personal information" [see Orders P-257, P-427, P-1412 and P-1621]. In Reconsideration Order R-980015, Adjudicator Donald Hale stated the following in the context of an argument that letters authored by officials of various organizations constituted personal information of those officials under the definition of "personal information" in section 2(1) of the Freedom of Information and Protection of Privacy Act:

> ... the information associated with the names of the affected persons which is contained in the records at issue relates to them only in their capacities as officials with the organizations which employ them. Their involvement in the issues addressed in the correspondence with the Ministry is not personal to them but, rather, relates to their employment or association with the organizations whose interests they are representing. This information is not personal in nature but may be more appropriately described as being related to the employment or professional responsibilities of each of the individuals who are identified therein. Essentially, the information is not about these individuals and, therefore, does not qualify as their "personal information" within the meaning of the opening words of the definition.
>
> In order for an organization, public or private, to give voice to its views on a subject of interest to it, individuals must be given responsibility for speaking on its behalf. I find that the views which these individuals express take place in the context of their employment responsibilities and are not, accordingly, their personal opinions within the definition of personal information contained in section 2(1)(e) of the Act. Nor is the information "about" the individual, for the reasons described above. In my view, the individuals expressing the position of an organization, in the context of a public or private organization, act simply as a conduit between the intended recipient of the communication and the organization which they represent. The voice is that of the organization, expressed through its spokesperson, rather than that of the individual delivering the message [emphasis in original].
>
> In the present situation, I find that the records do not contain the personal opinions of the affected persons. Rather, as evidenced by the contents of the records themselves, each of these individuals is giving voice to the views of the organization which he/she represents. In my view, it cannot be said that the affected persons are communicating their personal

> opinions on the subjects addressed in the records. Accordingly, I find that this information cannot properly be characterized as falling within the ambit of the term "personal opinions or views" within the meaning of section 2(1)(e).

The analysis provided by Adjudicator Hale is applicable to Records 1, 2, 3 and 4, and I find that these records do not contain the personal information of the police officers or the municipal by-law enforcement officers who created them in the context of discharging their professional responsibilities.

In summary, I find that all of the paper records contain the personal information of the appellants; all paper records, with the exception of Record 10, also all contain the personal information of other identifiable individuals (other than the police officers and by-law enforcement officers); the videotape contains the personal information of the appellants and other individuals; and the photographs contain the personal information of the appellants only.

INVASION OF PRIVACY

Because all of the paper records, the photographs and the videotape contain the personal information of the appellants, the provisions in Part II of the Act apply.

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 an appellant and other individuals and the institution determines that disclosure would constitute an unjustified invasion of another individual's personal privacy, the institution has discretion to deny the requester access to that information. Sections 14(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy. Section 14(2) provides some criteria for the head to consider in making this determination, and section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of factors set out in section 14(2) [John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 OR (3d) 767]. A section 14(3) presumption can be overcome if the personal information at issue falls under section 14(4) of the Act or where a finding is made under section 16 of the Act that a compelling public interest exists in the disclosure of the record in which the personal information is contained, which clearly outweighs the purpose of the section 14 exemption.

The Town claims that the requirements of section 14(3)(b) are present. This section provides that disclosure of personal information which was compiled and is identifiable as part of an investigation into a possible violation of law is presumed to constitute an unjustified invasion of personal privacy.
After outlining events which took place in 1998-99 involving the appellants' property, the Town states in its representations:

> Accordingly, the appropriate charges were laid and subsequent to guilty pleas, convictions were secured by her Worship L. Sclisizzi on June 3rd, 1999 against [one of the appellants] on both charges (illegal landscape contracting use and retail firewood operation, as well as

> a Prohibition Cord (copy previously provided to the Commission). The Order prohibited the continuation or repetition of the offence of operating a landscaping contracting business and the offence of operating a retail firewood sales business, contrary to the Town's Zoning By-law, on lands located at [the appellants' address].

The Town goes on to state that:

> Notwithstanding the Prohibition Order, numerous complaints have been received by the Town of Milton, Clerk's Office (Enforcement Unit) and Halton Regional Police, in regard to the subject property.

The records at issue consist of various documents created during the investigation of these subsequent complaints by the Town and the Halton Regional Police. The Town states that no specific action has yet been taken as a result of these investigations, but confirms that the investigations remain active and ongoing.

All of the records were created in the context of investigations into alleged infractions of the Town's by-laws and/or the Criminal Code. These investigations were being led by both municipal by-law enforcement officers and the Halton Regional Police. As such, I find that the records were compiled as part of an investigation into a possible violation of law, and that the requirements of section 14(3)(b) have been established.

The information at issue does not fall within the types of information listed in section 14(4), and the appellants have not raised the possible application of section 16.

I find nothing improper in the exercise of discretion by the Town in favour of denying the appellants access to records which contain their personal information on the basis that disclosure would constitute an unjustified invasion of the privacy of other individuals. Therefore, I find that all of the paper records, with the exception of Record 10, as well as the videotape and the photographs, qualify for exemption under section 38(b) of the Act.

LAW ENFORCEMENT/DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Section 38(a) of the Act is another exception to the general right of access provided in section 36(1). Section 38(a) reads as follows:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 6, 7, **8**, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information; [emphasis added]

The Town submits that the requirements of sections 8(1)(a), (b), and (d) are present in the circumstances of this appeal. These sections state:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,

> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

Section 2(1) of the Act defines "law enforcement" to mean (a) policing, (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and (c) the conduct of proceedings referred to in clause (b).

Previous orders of this Office have determined that a municipality's by-law enforcement process qualifies as a "law enforcement" matter for the purposes of section 2(1) of the Act (see, for example, Orders M-16 and M-582). Activities of the Halton Regional Police in investigating possible breaches of the Criminal Code also clearly fall under the definition of "law enforcement".

Sections 8(1)(a) and (b)

The Town claims that sections 8(1)(a) or (b) apply to exempt Record 10 from disclosure. The purpose of these exemptions are to provide the Town with discretion to deny access to records in circumstances where disclosure could reasonably be expected to interfere with an ongoing law enforcement matter or investigation.

The words "could reasonably be expected to" appear in the preamble of section 8(1), as well as in several other exemptions under the Act, dealing with a variety of anticipated "harms". Previous orders of this Office have found that in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of the record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373 and Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 and 40 (Div. Ct.)].

The appellants submit that disclosure of the record would not interfere with any ongoing law enforcement matter. They state in their representations:

> It has been eight months since September 14 (the end of the period for which my clients' request was made) which is certainly longer than the period of any investigation of a by-law infraction ever recorded. More to the point, the Provincial Offences Act does not allow the laying of charges more than six months after the date of the offence alleged, so there could

> be no possible interference with a law enforcement matter which would, in any event, be statute barred.

The appellants also provide correspondence from the Town's zoning and municipal by-law enforcement officers in support of their position that there is no ongoing law enforcement proceeding or matter.

As noted earlier, a Prohibition Order was issued on June 3, 1999, concerning activities that had taken place on the appellants' property during 1998-99. Following the issuance of the Prohibition Order, the Town and the Halton Regional Police received complaints concerning ongoing activities on the property, and the records at issue in this appeal reflect investigation activity undertaken in response. In its representations, the Town has provided the necessary detailed and convincing evidence necessary to establish that these investigation activities remain ongoing, and that disclosure of Record 10 at this time could reasonably be expected to interfere with these investigations. Accordingly, the requirements of section 8(1)(b) have been established, and I find that Record 10 qualifies for exemption under section 38(a) of the Act.

ORDER:

I uphold the decision of the Town.

Original signed by: May 19, 2000
Tom Mitchinson
Assistant Commissioner