



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

# **ORDER MO-2568**

**Appeal MA09-13**

**Town of Whitchurch-Stouffville**



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## **NATURE OF THE APPEAL:**

The appellant submitted a detailed, multi-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Town of Whitchurch-Stouffville (the Town) for a number of records relating to:

- (1) complaints about his property;
- (2) “Noxious Weed Law Enforcement”; and
- (3) “Swimming Pool Enclosure Enforcement.”

The Town responded to the request by issuing a decision letter, in which it set out a fee of \$150.00 for the requested records and granted partial access to them. In an attached index of records, the Town indicated that it had removed all personal information from the records and that some of the records requested did not exist. In a subsequent letter to the appellant, the Town clarified that it denied access to the severed information in the records pursuant to the discretionary law enforcement exemption in section 8(1)(d) (confidential source) and the mandatory exemption in section 14(1) (personal privacy) of the *Act*. In support of its section 14(1) claim, the Town cited the application of the presumption in section 14(3)(b).

The appellant appealed the decision of the Town to this office. During the mediation stage of the appeal process, the appellant confirmed he was not interested in the undisclosed information contained in Records 1-3, 5-10 and 12 as described in the Town’s index of records. Accordingly, these records have been removed from the scope of the appeal. The appellant also indicated he was not taking issue with the Town’s fee, but wished to obtain access to certain undisclosed portions of Records 4 and 11 and he provided the mediator with a highlighted version of Records 4 and 11, indicating those portions that are of interest to him.

The appellant also took the position that additional records responsive to his request should exist, specifically complaints regarding the appellant’s property that may have been forwarded to the Mayor, as well as other e-mails relating to another specified individual. The appellant provided the Town with further information to assist in the search for such records. In turn, the Town did a second search for the records based on the additional information provided by the appellant. The Town advised the mediator that both the Information Technology Department and the Mayor’s Administrative Assistant conducted a further search of the Mayor’s e-mail system, and were unable to locate responsive records. However, the Town located additional responsive records in another employee’s e-mail records and they were disclosed to the appellant. The appellant was satisfied with this response and agreed that the adequacy of the Town’s search for responsive records is no longer at issue in this appeal.

Also during the mediation stage, the mediator notified and received the consent of an affected party whose information was contained in one record. As a result, the Town provided the appellant with a copy of the record containing this individual’s information.

No further mediation was possible and the file was transferred to the inquiry stage of the appeals process. The assigned adjudicator began his inquiry by issuing a Notice of Inquiry seeking representations from the Town, which submitted representations in response. A Notice of

Inquiry was then provided to the appellant, along with a complete copy of the representations of the Town. The appellant also provided representations in response to the Notice. The appeal was then transferred to me to complete the inquiry.

## **RECORDS:**

The records at issue consist of the following portions of two records, as highlighted by the appellant and described in the Town's index of records:

Record 4 the undisclosed names, addresses, telephone numbers and email addresses contained in an email dated May 2, 2008 (page 1)

Record 11 the undisclosed names, addresses, telephone numbers and email addresses contained in an email dated Nov 12, 2008 (pages 1, 2, 3 and 6)

## **DISCUSSION:**

### **LAW ENFORCEMENT**

#### **General principles**

The Town claims that the undisclosed information remaining at issue is exempt under section 8(1)(d), which reads:

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

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;

The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

"law enforcement" means,

- (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, or
- (c) the conduct of proceedings referred to in clause (b)

The term "law enforcement" has been found to apply to a municipality's investigation into a possible violation of a municipal by-law [Orders M-16, MO-1245].

Where section 8 uses the words “could reasonably be expected to,” the institution must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm.” Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

In order for section 8(1)(d) to apply, the institution must establish a reasonable expectation that the identity of the source or the information given by the source would remain confidential in the circumstances [Order MO-1416].

The Town submits that the records pertain to a “law enforcement matter” as they describe complaints made to the Town about work allegedly done on the appellant’s property in violation of its Fill By-law. It goes on to indicate that the records form part of the Town’s investigation as they provided the impetus behind the Town’s decision to look into a possible breach of the By-law by the appellant. The Town ultimately decided not to lay a charge under the By-law against the appellant.

The Town relies on section 8(1)(d) as the basis for denying access to the undisclosed portions of the records, which consist only of the names, addresses, telephone numbers and e-mail addresses of the complainants. It argues that the complainants represent confidential sources of information as contemplated by section 8(1)(d) and that the enforcement of municipal by-laws, including its own, is entirely complaints-driven and that investigations are only undertaken once credible complaints are received. It argues that “[T]he confidentiality of complaints regarding by-law breaches is essential to the adequate functioning of the complaints-driven by-law enforcement process.” It goes on to submit that the importance of confidentiality for complainants in the context of municipal by-law enforcement has been recognized in early orders of this office, including Order M-16.

The appellant has provided extensive and detailed representations on this issue. Essentially, his arguments are three-fold:

1. The records do not pertain to a bona fide “law enforcement” matter;
2. The severed party [the complainants] is not a “confidential source of information” in respect of any “law enforcement” matter; and
3. The Town has not provided “detailed and convincing” evidence to establish a “reasonable expectation of harm” as a result of disclosing the name(s) of the severed party(s).

### **Analysis and Findings**

The records containing the remaining undisclosed information relate to certain complaints that followed the completion of a new home and an earthen berm on the appellant’s property. The appellant states that during the construction, no complaints were received by the Town about the manner in which the work was performed and no investigations were undertaken by the Town into whether any violations of any of its by-laws had not been complied with by the appellant.

However, on May 1, 2008 and again on August 12, 2008, the Town received complaints alleging that the appellant had contravened the requirements of the Fill By-law. As a result of those complaints, the Town made certain inquiries in order to determine whether those allegations had any validity and whether it would be necessary to charge the appellant for any violation uncovered in the course of its investigation. Ultimately, the Town decided that there had been no contravention of the Fill By-law and that there would be no charges laid against the appellant. This was communicated to the complainants by the Town on August 19, 2008.

In my view, the records themselves clearly indicate that the Town determined that it was necessary to investigate whether the allegations contained in the May 1 and August 12 complaints had any validity. The records also confirm that the Town undertook those inquiries necessary for it to determine whether a breach of the Fill By-law had in fact occurred during the construction of the berm or the home on the appellant's property. Following the completion of that investigation, employees of the Town determined that no such violation had taken place and no charges were laid against the appellant under the By-law.

Previous orders of this office have determined that investigations undertaken by municipalities into possible violations of its by-laws satisfy the definition of "law enforcement" for the purposes of section 8(1)(d) [Orders M-16 and MO-1245]. I have reviewed the contents of the records at issue and am satisfied that they relate directly to the Town's receipt and subsequent inquiries into whether its Fill By-law had been breached by the appellant in the course of the construction of his home and the berm on his property.

The undisclosed information consists of the name of the individuals who initiated the complaints which gave rise to the investigation. The appellant argues that because the complainants copied his or her complaints to several other individuals outside the Town's by-law enforcement staff, the source of the complaint is not entitled to be treated as a "confidential source" for the purposes of section 8(1)(d). I disagree with this contention. Simply copying the substance of the complaint to other individuals does not transform it into a public complaint which does not merit confidential treatment.

Examining the context and manner in which the complaints were made, I conclude that there existed a reasonably-held expectation of confidentiality on the part of the complainants that their identities would not be made public. This is reinforced by the manner in which the Town treated the identity of the complainants throughout its investigation and during the course of this request and appeal process. Accordingly, I find that the release of this information would disclose the identity of a confidential source of information in respect of a law enforcement matter - the investigation of a possible violation of a municipal by-law, as contemplated by section 8(1)(d).

Having found that the disclosure of the information at issue would reveal the identity of a confidential source of information in respect of a law enforcement matter, I find that it qualifies for exemption under section 8(1)(d). Because I have determined that the information is exempt under section 8(1)(d), it is not necessary for me to also consider whether it is exempt from disclosure under the mandatory section 14(1) exemption as well.

### *Exercise of discretion*

As noted, section 8 is a discretionary exemption. When a discretionary exemption has been claimed, an institution must exercise its discretion in deciding whether or not to disclose the records. On appeal, the Commissioner may determine whether the institution failed to do so.

The Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In such a case this office may send the matter back to the institution for an exercise of discretion based on proper considerations (Order MO-1573). This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

The appellant has provided me with extensive and detailed background information outlining what he considers to be “unique and special attention” paid to him since the construction of his home began in September 2006. Essentially, he argues that this evidence demonstrates animus against him on the part of the Town which has resulted in an arbitrary and unfair exercise of discretion in denying him access to the requested information. He goes on to state that “the Town has elected to exercise non-disclosure for the purpose of keeping in confidence information that would reveal a pattern of malfeasance on the part of public officials.”

The appellant’s views on this question are sincerely held and based on a litany of what he perceives to be several other false allegations made by anonymous sources of information which were acted upon by the Town, regardless of their veracity, credibility or even whether they are within the Town’s jurisdictional mandate. He argues that by giving credence to each of these complaints, the Town has “inadvertently encouraged and reinforced” the improper expectation of confidentiality on the part of the complainants.

The Town’s submissions focus on the need to “protect the expectation of confidentiality which complainants have regarding alleged breaches of by-laws.” It goes on to submit that:

Refusal to disclose the severed portions of the records is important to the adequate operation of the by-law enforcement process. The severed portions of the records do not contain personal information about the requester, nor does the requester have a sympathetic or compelling need to receive the information. To the contrary, it is possible that the requester could misuse the severed portions of the records in order to attempt to prevail upon the complainants to withdraw their complaints. This would have a chilling effect upon the Town’s by-law enforcement operations both generally and in this particular case.

In addition to the foregoing, it is noted that the historic practice of the Town is to carefully and strictly protect the confidentiality of complainants unless and until a complainant is required to give evidence at the trial of a by-law prosecution.

Regardless of the validity of the appellant's complaints about the manner in which he has been treated by the Town, it is my responsibility to oversee the exercise of the Town's discretion with respect to the facts of this appeal only. I am charged only with ensuring that the Town exercised its discretion appropriately, in good faith and without relying on improper or irrelevant considerations.

Based on the representations which the Town has provided to me setting out the basis for its decision to exercise its discretion not to disclose the complainant's information to the appellant, I find that it has taken into account only relevant considerations and has not acted in bad faith. I find that the Town's interest in protecting its confidential sources of information in this case outweighs the appellant's interest in determining the source of the complaints made against him with respect to his property. As a result, I uphold the Town's exercise of discretion in this case.

**ORDER:**

I uphold the Town's decision and dismiss the appeal.

Original signed by: \_\_\_\_\_

Donald Hale  
Adjudicator

\_\_\_\_\_ November 16, 2010