



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

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INVESTIGATION REPORT  
INVESTIGATION I94-012M

A MUNICIPALITY

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September 27, 1994



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# INTRODUCTION

## Background of the Complaint

This investigation was initiated as a result of a complaint concerning a Municipality. The complainants were three part-time firefighters whose employment had been terminated by the Municipality. The complainants were of the view that they had been terminated unjustly. After they were terminated, they each made a Freedom of Information (FOI) request to the Municipality for access to general records and to their respective personnel files. In the process of objecting to their terminations to the Municipality's Council, the complainants were advised by the Mayor that additional records about them were in the possession of the Municipality's Fire Chief (the Chief). According to the complainants, the Mayor had referred to these records as being "a foot-thick file." The complainants later made further FOI requests for access to their personal information in the Chief's "secret" files, and subsequently received additional records contained in these files.

The firefighters were concerned that the information in the Chief's files had been collected and used without their knowledge or consent. They also believed that the information itself was inaccurate and that the Municipality's actions had breached the Municipal Freedom of Information and Protection of Privacy Act (the Act).

## Issues Arising from the Investigation

The following issues were identified as arising from the investigation:

- (A) Did the records in question contain the complainants' "personal information" as defined in section 2(1) of the Act? If yes,
- (B) Was the personal information collected in compliance with section 28(2) of the Act?
- (C) Was the personal information collected in compliance with section 29(1) of the Act?
- (D) Did the Municipality provide notice of collection of the complainants' personal information in compliance with section 29(2) of the Act?
- (E) Did the Municipality use the complainants' personal information, in compliance with section 31 of the Act, to terminate the complainants' employment?

- (F) Did the Municipality take reasonable steps to ensure that the complainants' personal information was accurate and up-to-date, in compliance with section 30(2) of the Act, before using it to terminate the complainants' employment?
- (G) Did the Municipality retain the complainants' personal information, in compliance with section 30(1) of the Act?

## RESULTS OF THE INVESTIGATION

**Issue A: Did the records in question contain the complainants' "personal information" as defined in section 2(1) of the Act?**

Section 2(1) of the Act defines "personal information" as recorded information about an identifiable individual, including,

...

- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (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 records in question were contained in the Chief's files that were the subject of the "secret files" FOI requests. Many of the records consisted of the Chief's memos to file. These memos included minutes of meetings, procedures for a certain fire station, and conditions at that fire station. Other records included response procedures, notes concerning inspections at a certain fire station, and records of fire alarms responded to from that fire station. Attached to the records of alarms were notes indicating that one of the complainants had allegedly responded to the alarms with alcohol on his breath.

Some of the memos to file concerned alleged derogatory remarks made by one of the complainants; others concerned allegations that one of the complainants had failed to place gear in an approved location, and failed to install memo pads, as requested.

Some of the records were correspondence from individuals other than the complainants. The topics of this correspondence were the complainants' terminations, incidents at a certain fire station over the past two years, problems at a certain fire station, and concerns with the platooning system. There was also correspondence between the Municipality and a third party (a professional association) respecting the terminations.

The file included internal correspondence from the Chief to the Municipality's Chief Administrative Officer recommending that the complainants' employment be terminated, and correspondence from the Municipality to the complainants respecting their terminations. There was also correspondence to one of the complainants respecting his demotion, and a memo signed by him indicating that he had read and understood the conditions of the attached letter.

The file included an internal memo regarding the attendance of two of the complainants at fire drills. There were also records about an altercation between firefighters other than the complainants.

Since the Act defines "personal information" as recorded information about an **identifiable individual** [emphasis added], we examined the above records with a view to determining whether they contained information which specifically identified the complainants. We found that in some of the records, the complainants were identified by name. However, in several instances, the records in the Chief's files did not identify the complainants by name; for example, in memos to personnel at a certain fire station, response procedures, minutes of some meetings, records of inspections at a certain fire station, and correspondence from third parties.

In our discussions with the Municipality, the question of whether the records in question actually contained the "personal information" of the complainants was raised. It was the Municipality's view that despite the fact that certain records did not contain the names of the complainants, both the Chief and Deputy Chief were able to identify the individuals to whom the records referred. The Chief explained that his records, which had started out as a single information file, had been divided into three separate files, and that records were subsequently placed in each of the three files according to the identity of the individual.

Therefore, it is our view that in the context in which the records were known to the Chief and Deputy Chief, namely that the complainants were "identifiable" to them, the records in question contained the complainants' "personal information," as defined in sections 2(1)(e), (g), and (h) of the Act.

We are of the view that the records in question also contained the personal information of other individuals (i.e., third parties who corresponded with the Municipality or Chief; firefighters involved in an altercation), as defined in sections 2(1)(e), (f), (g), and (h) of the Act. (Our concerns about the lack of specific identifiers in the records are discussed under "Other Matters".)

**Conclusion:** The records in question contained the complainants' and other individuals' "personal information", as defined in section 2(1) of the Act.

**Issue B: Was the complainants' personal information collected in compliance with section 28(2) of the Act?**

Section 28(2) of the Act sets out the circumstances under which personal information may be collected on behalf of an institution. This section states in part:

No person shall collect personal information on behalf of an institution unless the collection is expressly authorized by statute, used for the purposes of law enforcement or **necessary to the proper administration of a lawfully authorized activity**. [emphasis added]

Neither of the first two conditions of section 28(2) applied in the circumstances of the collection of the complainants' personal information in the Chief's files. In order to show compliance with the Act, the Municipality would have to demonstrate that the collection met the third condition — that the collection was necessary to the proper administration of a lawfully authorized activity.

The first question to be determined is whether the activity in question is a lawfully authorized activity of the Municipality. The Chief explained that the information in his files was originally collected for his own personal use, as a memory aid, during his period of initial assessment of the operation of the Fire Department.

The Chief indicated that the collection was also to serve as an informal documentation file for disciplinary matters. Prior to his being employed by the Municipality, the Chief had been visited by one of the complainants. The Chief stated that at the time of the visit, the complainant had made derogatory remarks about officers of the Fire Department. The same complainant had allegedly made derogatory remarks about the Chief when the Chief was hired. This prompted the Chief to create an informal documentation file.

At the time the information was collected, the Municipality's By-law 1915-85 (the By-law) which provided for the establishment of the Fire Department, was in effect. Section 6 of the By-law states in part, "The Chief of the Department is responsible to the Council and Administrator for the proper administration and operation of the Department, for the discipline of its members ..."

In our view, the activities of assessing the operation of the fire department and documenting disciplinary matters concerning employees are activities that would be encompassed in the Chief's role as administrator of the Fire Department, as set out in the By-law. Accordingly, we are of the view that the above activities are lawfully authorized activities of the Municipality.

The next question is whether the collection of the complainants' personal information was necessary to properly administer these activities. It is our view that the Chief would have needed to collect information in order to assess the conditions at the Fire Department -- that he would not have been able to rely on memory alone to administer this undertaking.

In determining whether the collection of the complainants' personal information was necessary to properly administer the activity of documenting employee disciplinary matters, we considered the Chief's stated intent, which was to informally document disciplinary matters concerning employees. In our view, the collection was necessary in order for the Chief to physically document the matters in question.

Therefore, it is our view that the collection of the complainants' personal information was necessary to properly administer the lawfully authorized activities of assessing the operation of the Fire Department and documenting employee disciplinary matters. Accordingly, we are of the view that the collection was in compliance with section 28(2) of the Act.

**Conclusion:** The complainants' personal information was collected in compliance with section 28(2) of the Act.

**Issue C: Was the complainants' personal information collected in compliance with section 29(1) of the Act?**

Section 29(1) of the Act provides that an institution shall collect personal information only directly from the individual to whom the information relates unless,

- (a) the individual authorizes another manner of collection;
- (b) the personal information may be disclosed to the institution concerned under section 32 or under section 42 of the Freedom of Information and Protection of Privacy Act;
- (c) the Commissioner has authorized the manner of collection under clause 46(c);
- (d) the information is in a report from a reporting agency in accordance with the Consumer Reporting Act;
- (e) the information is collected for the purpose of determining suitability for an honour or award to recognize outstanding achievement or distinguished service;
- (f) the information is collected for the purpose of the conduct of a proceeding or a possible proceeding before a court or judicial or quasi-judicial tribunal;
- (g) the information is collected for the purpose of law enforcement; or
- (h) another manner of collection is authorized by or under a statute.

It is our view that some of the information in the Chief's files was collected directly from the complainants while some of the information was collected indirectly from sources other than the complainants. This information had been supplied by third parties (eg. in correspondence from other individuals).

It is our view that none of the exceptions listed in section 29(1) apply to the indirect collection of the complainants' personal information in the Chief's files. Accordingly, we are of the view that the indirect collection of the complainants' personal information was not in compliance with section 29(1) of the Act.

In response to our draft report, the Municipality submitted that the Chief had not "intentionally solicited collection indirectly from other sources," but that those affected by the actions of the complainants had submitted the information to him. However, once the Chief decided to collect this information (i.e., to record and retain it on file), the Act applied to the collection, whether the information had been solicited or not. We remain of the view that the collection was not in compliance with section 29(1) of the Act.

**Conclusion:** The indirect collection of the complainants' personal information was not in compliance with section 29(1) of the Act.

**Issue D: Did the Municipality provide notice of collection of the complainants' personal information in compliance with section 29(2) of the Act?**

Section 29(2) of the Act states:

If personal information is collected on behalf of an institution, the head shall inform the individual to whom the information relates of,

- (a) the legal authority for the collection;
- (b) the principal purpose or purposes for which the personal information is intended to be used; and
- (c) the title, business address and business telephone number of an officer or employee of the institution who can answer the individual's questions about the collection.

The complainants stated that the Municipality had not provided them with notice of collection regarding their personal information, as required by section 29(2) of the Act. The Municipality acknowledged that it had not provided the required notice to the complainants.

**Conclusion:** The Municipality did not provide notice of collection of the complainants' personal information in compliance with section 29(2) of the Act.

**Issue E: Did the Municipality use the complainants' personal information in compliance with section 31 of the Act, to terminate the complainants' employment?**

Section 31 of the Act sets out the circumstances under which an institution may use personal information. Section 31(b) is relevant to the circumstances of this complaint. It states:

An institution shall not use personal information in its custody or under its control except,

for the purpose for which it was obtained or compiled or for a consistent purpose;

The Municipality strongly maintained that it had not originally collected the complainants' personal information for the purpose of terminating them. In response to our draft report, the Municipality submitted that all the information had been collected for the general assessment of the Fire Department. From our discussions with the Chief, however, it is our understanding that his purposes for collecting the complainants' personal information were: 1) to serve as a personal memory aid during his initial assessment of the operation of the Fire Department, and 2) to informally document disciplinary matters since, in his role as administrator, he was responsible for the discipline of members of the Fire Department. The Municipality made use of this information when it terminated the complainants' employment.

The Municipality provided a list of the records that had been used in these terminations. They included the following: correspondence from third parties concerning incidents at a certain fire station that had occurred in the past two years; records of fire alarms responded to from a certain fire station, including notes about one of the complainants allegedly responding with alcohol on his breath; the Chief's notes to file with respect to one complainant's demotion and the conditions at a certain fire station; correspondence from the Chief to one of the complainants respecting his demotion; the Chief's notes to file respecting one complainant allegedly having made derogatory remarks; another complainant's alleged failure to install memo pads; memos from the Chief to one complainant respecting turnout gear/bunker clothing; procedures for a certain fire station; response procedures; the Chief's notes to file re: minutes of various meetings with staff and officers; records of inspections of a certain fire station; a record of an apology from two firefighters involved in an altercation, and one complainant's report on the altercation.

Since the above information was not used for the purpose for which it was obtained or compiled, the Municipality would have to demonstrate that it had used the complainants' personal information for a consistent purpose, in order to demonstrate compliance with the Act.

Section 33 of the Act states:

The purpose of a use or disclosure of personal information that has been collected directly from the individual to whom the information relates is a consistent purpose under clauses 31(b) and 32(c) only if the individual might reasonably have expected such a use or disclosure.

As previously stated, it is our view that some of the complainants' personal information in the Chief's files was collected directly from the complainants. Therefore, whether the complainants might have reasonably expected the information to have been used for the purpose of terminating



their employment would be a factor in determining whether the information was used for a consistent purpose, in compliance with section 31(b) of the Act.

It is our view that the complainants would not have reasonably expected the information in the Chief's files to be used for the purpose of terminating their employment since they were simply **unaware** of the existence of those files until they received the records in response to their "secret files" FOI request. Fair information practices are predicated on individuals having full knowledge of the collection of their personal information. The principle of openness and access to one's files is of the utmost importance. The complainants were not aware of the existence of the Chief's files containing their personal information. Thus, they could not have reasonably expected its use. Therefore, we are of the view that the complainants' personal information was **not** used in compliance with section 31 of the Act.

Some of the complainants' personal information in the Chief's files had been collected indirectly. Where personal information has been collected indirectly, a consistent purpose is one that is reasonably compatible with the purpose for which the personal information has been collected. The Chief clearly stated that his intent was to use his notes as a memory aid for himself in assessing the operation of the Fire Department. In our view, the Chief's use of the complainants' personal information for the purpose of terminating their employment was not reasonably compatible with the purpose for which the personal information was originally collected (i.e. as a memory aid in assessing the operation of the Fire Department). Since these purposes were not reasonably compatible, it is our view that the personal information was not used for a consistent purpose. Therefore, it is our view that the complainants' personal information was not used in compliance with section 31 of the Act, when it was in fact used to terminate the complainants' employment.

The Chief's second purpose for collecting the complainants' personal information was to serve as an informal documentation file for disciplinary matters. However, the Municipality has an established policy (HR-05-2) for disciplinary matters, based on the practice of progressive discipline (warning, suspension, dismissal). The Chief indicated that he had been provided with all Municipal policies when he began his employment with the City. There is nothing in the policy to indicate that it does not apply to part-time firefighters. The policy states that a "notice of warning or disciplinary action form" must be completed each and every time a warning is given or a disciplinary action taken.

The policy does not include "informal" documentation as an option. Had the Chief decided to move to a formal documentation process, this was readily available to him.

In our view, the Chief's use of the complainants' personal information for the purpose of terminating the complainants' employment was not reasonably compatible with the second purpose for which the information was originally collected (i.e. to informally document disciplinary matters). Since these purposes were not reasonably compatible, it is our view that the personal information was not used for a consistent purpose. Therefore, the complainants' personal information was not used in compliance with section 31 of the Act.

**Conclusion:** The complainants' personal information was not used in compliance with section 31 of the Act when it was used to terminate the complainants' employment.

**Issue F: Did the Municipality take reasonable steps to ensure that the complainants' personal information was accurate and up-to-date, in compliance with section 30(2) of the Act, before using it to terminate the complainants' employment?**

Section 30(2) of the Act states:

The head of an institution shall take reasonable steps to ensure that personal information on the records of the institution is not used unless it is accurate and up to date.

The complainants made numerous assertions that the information in the Chief's files was inaccurate. The complainants were advised of their right to correction of their personal information provided in section 36(2) of the Act. Therefore, whether the information itself was accurate or not is **not** an issue in this report. The following discussion is limited to the question of whether the Municipality took reasonable steps to ensure that the complainants' personal information was accurate and up to date before using that information to terminate their employment.

The determination of whether reasonable steps have been taken hinges on the meaning of "reasonable" in section 30(2) of the Act. Black's Law Dictionary defines reasonable as:

"Fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view ... Not immoderate or excessive, being synonymous with rational, honest, equitable, fair, suitable, moderate, tolerable."

Thus, for reasonable steps to have been taken would not have required a standard so high as to necessitate that every possible step be pursued to ensure accuracy.

We understand that there was no formal clerical assistance available to the Fire Department after regular working hours when meetings were usually held with the part-time firefighters. Therefore, the Chief's notes were the only notes kept.

The Chief was asked what steps he had taken to ensure that the information he collected about the complainants was accurate and up to date. The Chief stated that he had paid specific attention to dates and times, and that he had written his notes by noon of the next day after an event had occurred. The Chief further stated that his records were as up to date and accurate as he saw fit, and that they were not "formal" files.

In determining whether reasonable steps had been taken, we also considered the fact that some of the information had not been collected directly from the complainants, but had been collected from third parties. Despite the fact that the circumstances were serious -- involving disciplinary matters, no one, including the individuals to whom the records related, had had the opportunity

to review the Chief's records to alert him in the event of any errors or omissions in the information he had compiled.

Taking all of the above into account, it is our view that the steps identified above are not consistent with Black's definition of reasonable -- appearing to be fair and suitable under the circumstances. Therefore, in our view, the Municipality did not take reasonable steps to ensure that the complainants' personal information was accurate and up to date, in compliance with section 30(2) of the Act, before using it to terminate their employment.

**Conclusion:** The Municipality did not take reasonable steps to ensure the complainants' personal information was accurate and up to date, in compliance with section 30(2) of the Act, before using it to terminate the complainants' employment.

**Issue G: Did the Municipality retain the complainants' personal information, in compliance with section 30(1) of the Act?**

Section 30(1) of the Act provides that personal information that has been used by an institution shall be retained after use for the period prescribed by regulation, to ensure that the individual to whom it relates has a reasonable opportunity to obtain access to it. The minimum period set out in the regulations is the shorter of one year or the period set out in an institution's by-laws.

The complainants made various assertions that the Municipality had not retained their personal information in accordance with the Act. Some of the records in question were eventually provided to the complainants through the FOI process. In other cases, there appeared to be a discrepancy between the records the complainants believed the Municipality should have retained and the types of records which were actually retained by the Municipality.

One of the complainants had submitted a five-page handwritten report to the Chief, giving the details of an altercation that had occurred between two firefighters and the complainant's role in settling the matter. The complainant believed that only two pages of his report (a memo dated August 27, 1993, and an apology from the two firefighters dated August 28, 1993) had been retained by the Municipality, and that the remainder had been disposed of, contrary to the Act.

The Municipality submitted that it had in fact retained the records in question, but that they had been placed in the files of the firefighters involved in the altercation. Accordingly, we are of the view that these records were retained in compliance with section 30(1) of the Act.

**Conclusion:** The Municipality retained the personal information in the altercation report in compliance with section 30(1) of the Act.

**Other Matters**

**The "Secret" Files**

The Municipality stated that it had not maintained "secret" files about the complainants. We acknowledge that management may sometimes maintain records relating to employees, even when a central human resources filing system exists. However, in the circumstances of this case, the Chief indicated that only he, his Deputy, and his secretary knew about his files. When the complainants made their requests for access to their personnel files, the Human Resources Department was not aware of the existence of the Chief's additional records.

While the Municipality may not have intended to be secretive, the above practices were not in keeping with the spirit of the Act, which is based on the principle that individuals have a right of access with respect to personal information about themselves held by institutions. The openness and transparency of records containing personal information are fundamental principles underlying fair information practices. Without the knowledge that these records existed, the complainants were not in a position to exercise their right of access, and the Municipality was not in a position to fulfill its obligations to provide such access. During the course of our investigation, the Municipality advised that it had taken steps to address this problem by transferring the Chief's records to the Human Resources Department.

In response to our draft report, the Municipality submitted that at all the meetings with the complainants, the information files had been present and often referred to; the complainants had never requested that they be allowed to review the material.

It is our view that while the records in question may have been present at meetings with the complainants, this in itself would not be sufficient to fully apprise the complainants of the actual content of the records. The Municipality characterized the Chief's records as "an information or administration file;" no information was provided to indicate that the complainants had been specifically told that the records contained in these files referred to themselves, or that they had a right to access the personal information contained in their files.

### **Disclosure of Third Party Personal Information**

The Municipality (which was relatively inexperienced at processing FOI requests), acknowledged that it had inadvertently disclosed third party personal information when it processed the complainants' FOI requests. It is our view that none of the provisions of section 32 of the Act (which permit the disclosure of personal information) applied to these disclosures.

### **Personal Information Bank Index/Directory of General Records**

The Municipality further acknowledged that it had not complied with section 34(1) of the Act which provides that the head shall make available for public inspection an index of all personal information banks in the custody or under the control of the institution (commonly referred to as a personal information bank index). Section 25(1) of the Act requires that the head shall cause to be made available for inspection and copying by the public, information which includes the general classes or types of records in the custody or control of the institution (i.e. a directory of general records). The Municipality had not complied with the requirements of section 25(1).

### **Complaints About Specific Documents**

The complainants were concerned that certain documents were dated improperly and thus, questioned their accuracy. We reviewed the documents in question (i.e., minutes of certain meetings), and found that there was some confusion over the dates. The Municipality agreed that there was a discrepancy with these dates and advised that it had taken steps to rectify the problem by providing the Chief with a pre-printed calendar, rather than a calendar which required manual insertion of dates.

The complainants were also concerned that a covering memo signed by one of the complainants had been attached to a different letter from the letter originally provided to the complainant. The Municipality explained that the different letter was a draft of the letter in question and that the draft had been retained in the Chief's files. When the Chief's files were being copied in response to the complainant's FOI request, a copy of the draft letter was attached to the covering memo. It is our view that the above incident was an inadvertent clerical error, which resulted from a draft document not being clearly marked as such.

### **Lack of Identifying Information in Employee Records**

Given the seriousness of the termination process for both employees and employers, we have concerns about the lack of information in the Chief's files identifying the complainants, and the lack of information regarding the specific reasons for their terminations. As stated previously, the Chief indicated that both he and his Deputy were able to identify the complainants and the nature of the disciplinary matter to which a certain record referred.

In our view, however, the lack of detail and identifying information in the records could, in several cases, prevent anyone else reading the documents from forming a clear picture of exactly whom the records pertained to, and what breach of discipline that individual had allegedly committed.

The complainants repeatedly stated that they had not been apprised of the specific reasons for their terminations, nor which documents in the files supported the Municipality's view that they should be terminated. We have made recommendations below with respect to the inclusion of proper identifying information in employee records.

In its final submissions, the Municipality stated that it recognized that there may have been some administrative deficiencies, which will be addressed in the near future. Specific policies and procedures regarding this matter will be put into place, as well as proper training for staff responsible for the keeping of records [of personal information].

## **SUMMARY OF CONCLUSIONS**

- The records in question contained the complainants' and other individuals' "personal information", as defined in section 2(1) of the Act.
- The complainants' personal information was collected in compliance with section 28(2) of the Act.

- The indirect collection of the complainants' personal information was not in compliance with section 29(1) of the Act.
- The Municipality did not provide notice of collection of the complainants' personal information in compliance with section 29(2) of the Act.
- The complainants' personal information was not used in compliance with section 31 of the Act, when it was used to terminate the complainants' employment.
- The Municipality did not take reasonable steps to ensure the complainants' personal information was accurate and up to date, in compliance with section 30(2) of the Act, before using it to terminate the complainants' employment.
- The Municipality retained the personal information in the altercation report in compliance with section 30(1) of the Act.

## **RECOMMENDATIONS**

The Municipality should incorporate the following recommendations into its procedures:

1. The Municipality should develop a policy with respect to access to employee personal information, and upon completion, the policy should be clearly communicated to all staff;
2. All documents placed in employee files should be dated and should clearly identify the employee to whom the information relates;
3. The Municipality should provide notice of collection to its employees in compliance with section 29(2) of the Act when it collects their personal information, including information to be used for disciplinary matters;
4. The Municipality should develop and make available for public inspection an index of personal information banks and general records, in compliance with sections 25(1) and 34(1) of the Act;
5. The Municipality should develop written procedures with respect to the appropriate disclosure of personal information in the context of FOI requests.

Within six months of receiving this report, the Municipality should provide the Office of the Information and Privacy Commissioner with proof of compliance with the above recommendations.

Original Signed by:  
Ann Cavoukian, Ph.D.  
Assistant Commissioner

September 27, 1994  
Date