



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER M-147**

## **Appeal M-9200360**

### **The Corporation of the Town of Whitby**



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# ORDER

## BACKGROUND:

The Corporation of the Town of Whitby (the Town) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for information relating to complaints received by the Town about the requester's property.

In its initial decision letter, the Town advised the requester that an unidentified member of town council had received three verbal complaints about the requester's property and passed the information on to Town officials. The Town stated, however, that it had no information respecting the names or addresses of the original complainants. On this basis, the Town indicated that it could not grant access to the information requested because responsive records did not exist. The requester appealed this decision based on his belief that the Town had further records in its possession that were responsive to his request.

During the course of mediation, the Town prepared an amended decision letter which identified a number of records which were responsive to the general ambit of the request. The Town granted access to these records in full except for one record, which was released with some information withheld, pursuant to section 8(1)(d) of the Act. The requester appealed the Town's decision to withhold information from him and reiterated his assertion that the Town had further information about his case.

Further mediation was not possible and notice that an inquiry was being conducted to review the Town's decision was sent to the appellant and to the Town. Representations were received from both parties.

The record at issue in this appeal is a one-page handwritten internal memorandum dated June 10, 1992. The portion of the record which was withheld contains the name of the member of Council who received complaints about the appellant's property.

## ISSUES:

The issues in this appeal are:

- A. Whether the Town's search for additional records was reasonable in the circumstances.
- B. Whether the discretionary exemption provided by section 8(1)(d) of the Act applies to the name of the Councillor which was withheld by the Town.

## SUBMISSIONS/CONCLUSIONS:

**ISSUE A: Whether the Town's search for additional records was reasonable in the circumstances.**

In his representations, the appellant outlines his reasons for believing that additional records exist. In addition to its representations, the Town submitted a statutory declaration sworn by the Town's Clerk. The Clerk states that he conducted two separate searches for records both in response to the original access request and to the Notice of Inquiry. The Clerk then outlines the steps which the Town took to locate responsive records including the three written complaints referred to by the appellant. The Clerk concludes that all records in the custody or under the control of the Town which relate to the request have been disclosed to the appellant and that no other records exist that are responsive to the request.

Where a requester provides sufficient details about the records that he or she is seeking and a municipality indicates that the records do not exist, it is my responsibility to ensure that the municipality has made a reasonable effort to identify records which are responsive to the request. In my view, the Act does not require that a municipality prove to the degree of absolute certainty that the requested records do not exist.

I have carefully reviewed the representations of both parties and the statutory declaration submitted by the Town. I am satisfied that the Town has taken all reasonable steps to locate additional records which would be responsive to the appellant's request and I find that the Town's search was reasonable in the circumstances of this appeal.

**ISSUE B: Whether the discretionary exemption provided by section 8(1)(d) of the Act applies to the name of the Councillor which was withheld by the Town.**

The Town has relied on section 8(1)(d) of the Act to withhold the name of the Councillor. This provision states that:

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;

In order for any portion of the requested record to qualify for exemption under this section, the matter which generated the record must satisfy the definition of the term "law enforcement" as found in section 2(1) of the Act. This definition reads 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, and
- (c) the conduct of proceedings referred to in clause (b);

In its representations, the Town has provided a description of the by-law enforcement process followed in this case, which it claims falls within clause (b) of the "law enforcement" definition. I am satisfied that the Town's by-law enforcement process qualifies as "law enforcement" under the Act.

I must next determine whether a municipal councillor may be considered a confidential source of information for the purposes of section 8(1)(d) of the Act. In its representations, the Town deals with this issue in the following fashion:

[It is important to provide] both members of Council and their constituents with some measure of confidentiality to enable Councillors to effectively perform their representative role. Almost every Councillor has a case load of citizen inquiries which require investigation and, where possible, resolution. Such inquiries can be screened and redirected to appropriate agencies, but most citizens want the personal attention of their elected representative and in many cases do not want their identity disclosed. To deal effectively with such inquiries, members of Council must be able to act with the knowledge and assurance that they are not leaving themselves open to personal attack, criticism and complaint each and every time they act in good faith and [in] the public interest on behalf of a constituent ...

Based on the wording of section 8(1)(d) of the Act, I accept that a confidential source of information could include a municipal councillor. Furthermore, on the facts of this case, I find that the Councillor, although he received information from other individuals about the requester's property, was the actual source of the complaint provided to the Town.

The final step in this analysis is to determine whether the release of the Councillor's name would disclose the identity of a **confidential source** of information. In order to establish that a source was confidential, a

municipality must provide evidence of the circumstances in which the information was given. More particularly, the municipality must demonstrate that there was a reasonable expectation of confidentiality associated with the by-law enforcement process (Order M-4).

In its representations, the Town has indicated that, since 1982, it has maintained a consistent policy of keeping the names of complainants, including members of Council, confidential with respect to by-law enforcement matters.

I have carefully reviewed the record and the representations provided by the parties. Based principally on the Town's stated policy of protecting the names of complainants in by-law enforcement cases, I find that, when the Councillor provided the information to Town officials, there was a reasonable expectation that the Councillor's identity would be kept confidential. It follows, therefore, that the disclosure of the Councillor's name would reveal a confidential source such that the Town is entitled to rely on section 8(1)(d) of the Act as a basis for not releasing this information.

As section 8(1)(d) is a discretionary exemption, it is my responsibility to ensure that the Town has properly exercised its discretion in deciding not to grant access to the information. I have carefully considered the Town's representations and all of the circumstances of this appeal and I am satisfied that there was nothing improper in the Town's exercise of discretion in this case.

**ORDER:**

I uphold the decision of the Town.

Original signed by: \_\_\_\_\_  
Irwin Glasberg  
Assistant Commissioner

\_\_\_\_\_  
June 17, 1993