



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-287

Appeal M-9300366

City of Scarborough



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ORDER

BACKGROUND:

The City of Scarborough (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of an investigator's report relating to a complaint of harassment involving the requester. The City located two records which were responsive to the request but denied access to both of these documents pursuant to the exemptions provided by sections 7, 12, 14 and 38(a) and (b) of the Act. The requester appealed this decision to the Commissioner's office.

Mediation of the appeal was not successful and notice that an inquiry was being conducted to review the decision of the City was forwarded to the City, the appellant and two individuals whose rights might be affected by the disclosure of the records. Representations were received from the appellant, the City and one of the affected persons, who consented to the disclosure of his own personal information. In its representations, the City indicated that it was no longer relying on the exemption provided by section 12 of the Act.

The records at issue in this appeal consist of two reports (Record 1 and Record 2) prepared as a result of an investigation undertaken with regard to a complaint of harassment made by one of the affected persons to the appeal.

ISSUES:

- A. Whether the records contain "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, and the information relates to the appellant and other individuals, whether the discretionary exemption provided by section 38(b) of the Act applies to the records.
- C. Whether the records qualify for exemption under the discretionary exemptions provided by sections 7 and 38(a) of the Act.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the records contain "personal information" as defined in section 2(1) of the Act.

"Personal information" is defined in section 2(1) of the Act, in part, as "... recorded information about an identifiable individual, ...". I have considered the records at issue and the representations of the parties to this appeal. In my view, the records contain the personal information of the appellant and both affected persons. Although these parties are not mentioned by name in the records, they are readily identifiable by those individuals who are familiar with the circumstances surrounding the creation of the records.

ISSUE B: If the answer to Issue A is yes, and the information relates to the appellant and other individuals, whether the discretionary exemption provided by section 38(b) of the Act applies to the records.

The City submits that section 38(b) applies to both of the records.

Section 36(1) of the Act gives individuals a general right of access to personal information about themselves, which is in the custody or under the control of an institution. However, this right of access is not absolute. Section 38 provides a number of exceptions to this general right of access. One such exemption is found in section 38(b) of the Act, which reads as follows:

A head may refuse to disclose to the individual to whom the information relates personal information,

if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

As has been stated in a number of previous orders, section 38(b) introduces a balancing principle. The head must look at the information and weigh the requester's right of access to his or her own personal information against the rights of other individuals to the protection of their privacy. If the head determines that the release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives the head the discretion to deny the requester access to the personal information (Order 37).

In my discussion of Issue A, I found that the records at issue contain the personal information of the appellant and other identifiable individuals. 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 of the individual to whom the information relates. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. I have considered the application of the presumptions contained in section 14(3) and find that none are applicable to the present appeal.

Section 14(2) of the Act provides some criteria to be considered in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy. In its representations, the City indicates that the consideration described in section 14(2)(h) of the Act is applicable to the present appeal. This section states that:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances,
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including whether,

the personal information has been supplied by the individual to whom the information relates in confidence;

The City submits that:

While we would agree that it may not be possible to guarantee complete confidentiality, confidentiality must be respected insofar as it is reasonably possible and every effort should be made to ensure that this is the case.

In Order M-82, Inquiry Officer Holly Big Canoe addressed the issue of the applicability of section 14(2)(h) of the Act to records relating to an investigation concerning a complaint of harassment. Inquiry Officer Big Canoe held that:

In my view, it is neither practical nor possible to guarantee complete confidentiality to each party during an internal investigation of an allegation of harassment in the workplace. If the parties to the complaint are to have any confidence in the process, respondents in such a complaint must be advised of what they are accused of and by whom to enable them to address the validity of the allegations. Equally, complainants must be given enough information to enable them to ensure that their allegations were adequately investigated. Otherwise, others may be discouraged from advising their employer of possible incidents of harassment and requesting an investigation, which runs counter to a policy the purpose of which is to promote a fair and safe workplace.

I adopt this reasoning for the purposes of this appeal and find that section 14(2)(h) of the Act is not a relevant consideration in the circumstances of this appeal. In making this determination, I note that the appellant has already been provided with a copy of a "summary report" which outlines the substance of the complaint, the findings of the investigator and a summary of her recommendations to City Council.

Based on the representations provided to me and my independent review of the records, I find that there do not exist any factors under section 14(2) of the Act which weigh in favour of protecting the privacy interests of the affected person. On this basis, my conclusion is that disclosure of the personal information contained in these records would not result in an unjustified invasion of the personal privacy of the remaining affected person. Accordingly, the exemption provided under section 38(b) of the Act has no application to the records at issue in this appeal.

**ISSUE C: Whether the records qualify for exemption under the discretionary exemptions
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provided by sections 7 and 38(a) of the Act.

Section 7(1) of the Act provides as follows:

A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

Accordingly, in order to qualify for exemption under section 7(1) of the Act, two requirements must be met:

- (1) the records or parts of records to be exempted must contain advice or recommendations, **and**
- (2) the advice or recommendations must have been given by a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

It has been established in a number of previous orders that advice and recommendations for the purpose of section 7(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process (Orders 118 and M-265).

In its representations, the City submits that "the record(s) in question contain a number of very specific courses of action ...". With the exception of that portion of Record 2 described under the title "Recommendations", the author does not set forth a suggested course of action for the benefit of the person for whom it was intended. Rather, these portions of the records contain various findings of fact and a recitation of the events leading to the harassment investigation. I agree with the City's submission only insofar as that portion of Record 2 entitled "Recommendations" is concerned. Accordingly, I find that the exemption provided by section 7 of the Act has no application to those portions of the records described above.

As I have found that the "Recommendations" section of Record 2 contains the personal information of the appellant and other identifiable individuals, I must consider the application of section 38(a) of the Act, which states:

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]

This provision gives the City the discretion to disclose an individual's own personal information in situations where one of the enumerated exemptions would apply. I have reviewed the representations of the City on the exercise of its discretion and find nothing improper in the manner in which this determination was made, accordingly, I would not alter this determination on appeal.

ORDER:

1. I uphold the decision of the City to withhold the "Recommendations" section of Record 2.
2. I order the City to disclose Record 1 in its entirety and the remaining portions of Record 2 to the appellant within thirty-five (35) days of the date of this order, and not earlier than the thirtieth (30th) day following the date of this order. For greater certainty, I have forwarded a copy of Record 2 to the Freedom of Information and Protection of Privacy Co-ordinator of the City with this order. The highlighted portion of this record indicates the information which is **not** to be disclosed.
3. In order to verify compliance with the provisions of this order, I order the City to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2, **only** upon request.

Original signed by: _____
 Donald Hale
 Inquiry Officer

_____ March 11, 1994