



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

ORDER M-758

Appeal M_9500640

The Corporation of the Town of Ancaster



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NATURE OF THE APPEAL:

The Corporation of the Town of Ancaster (the Town) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to the severance arrangements made between the Town and six former employees. In addition, the appellant sought access to records of "payments for sick pay, vacation pay and any other monies paid consequent upon or precipitated by their resignation". The Town located certain payroll registers which were responsive to the request along with Town By-law 92-50 and a payment voucher relating to one of the employees, which were disclosed to the appellant. Access to the payroll registers was denied on the basis of the following exemption contained in the Act:

- invasion of privacy - section 14(1)

The appellant appealed the decision to deny access to the payroll registers and maintained that additional records responsive to the request should exist.

During the mediation of the appeal, the appellant narrowed the focus of his request to include only records related to special severance packages which he believed had been provided to the six named employees (the affected persons). The appellant agreed, therefore, that the payroll registers were no longer at issue. The Town located an additional four records relating to the severance package provided to one of the affected persons and denied access to them, claiming the application of section 12 of the Act (solicitor-client privilege).

The Town also advised the appellant that, as the severance matter concerning one of the six affected persons is currently in litigation, no documents yet exist with regard to his severance arrangements and no payments have been made to this individual. The Town further advised the appellant that the only records relating to the severance packages provided to three of the affected persons are the payroll registers, which are no longer at issue.

A Notice of Inquiry was provided to the appellant and the Town soliciting their views on the application of section 12 to the records and the issue of the reasonableness of the Town's search. Representations were received from the Town only. As it appeared that the responsive records may contain the personal information of one of the affected persons, a Supplementary Notice of Inquiry was provided to the Town, the appellant and the affected person to whom the records relate, canvassing their views on the application of section 14(1) of the Act. Further representations were received from the Town and from the affected person.

PRELIMINARY ISSUE:

In its representations, the Town makes submissions on the application of the exemptions provided by sections 11(d) and (e) of the Act to the records. In the Confirmation of Appeal forwarded by this office to the Town on October 23, 1995, the Town was advised that it would be permitted to claim discretionary exemptions in addition to those set out in its decision letter only up to November 28, 1995. Additional records were located and a supplementary decision letter sent to the appellant on January 11, 1996 at which time the Town claimed the application

of section 12 to those records. I have not been provided with any explanation from the Town as to why the section 11(d) and (e) exemptions were not claimed prior to the submission of its representations.

In my view, the Town ought not to be allowed to raise the application of the discretionary exemptions provided by sections 11(d) and (e) at this late date. In my view, the Town has had ample time since providing its January 11, 1996 decision letter to the appellant to review the records and determine the exemptions which it wished to put forward. Accordingly, I will not be considering the application of sections 11(d) and (e) to the records.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The Town has claimed the application of section 12 to the four records at issue in this appeal. This section consists of two branches, which provide the Town with the discretion to refuse to disclose:

1. a record which is subject to the common law solicitor-client privilege; (Branch 1) and
2. a record which was prepared by or for counsel employed by or retained by the Town for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

The Town is relying on Branch 1 of the exemption. In order for a record to be subject to the common law solicitor-client privilege, the Town must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, **and**
(b) the communication must be of a confidential nature, **and**
(c) the communication must be between a client (or his agent) and a legal advisor, **and**
(d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. The record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

The Town submits that each of the records is a written communication of a confidential nature which was forwarded to the Town by its solicitor in the course of the negotiations between counsel for the employee and Town. It further submits that the communications are directly

related to the seeking, formulating or giving of legal advice and that they describe the positions taken by the parties to the negotiations regarding the appropriate severance package for this individual.

Record 1 is a letter dated April 15, 1993 from the Town's solicitor to the Town reporting on the final agreement reached between the Town and the employee's counsel. Attached to this document is an executed release form signed by the employee. Record 2 is a letter dated February 16, 1993 from the employee's counsel to the Town's solicitor responding to a series of proposals made on behalf of the Town. Attached to Record 2 is an employment reference letter which the employee's counsel has drafted for execution by the Town's Chief Administrative Officer. Records 3 and 4 are further letters dated January 26, 1993 and November 25, 1992 respectively from the Town's solicitor to the employee's counsel setting out the negotiating position of the Town on the issue of the severance package.

I find that only Record 1 (but not its attachment) satisfies the criteria necessary to establish the application of Branch 1 of section 12. The remaining records are not communications between a solicitor and his or her client but rather represent the written expression of the positions taken by the Town and its former employee in the negotiation of a severance agreement. Similarly, I find that the document which is attached to Record 1 represents the culmination of the negotiations and is not, in the circumstances of this case, a communication between a solicitor and his or her client.

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. I have reviewed the records and find that each of them contain the personal information of one of the affected persons. The information does not relate to the appellants.

Once it has been determined that a record contains personal information, section 14(1) of the Act prohibits its disclosure unless one of the exceptions listed in the section applies. The only exception which might apply in the circumstances of this appeal is section 14(1)(f), which permits disclosure if it "... does not constitute an unjustified invasion of personal privacy".

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would result in an unjustified invasion of personal privacy. Where one of the presumptions in section 14(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is if the personal information falls under section 14(4) or where a finding is made that section 16 of the Act applies to it.

If none of the presumptions listed in section 14(3) apply, the Town must consider the application of the factors listed in section 14(2) of the Act, as well as all other circumstances which are relevant in the circumstances of the case.

The Town submits that the presumptions in sections 14(3)(d) (the records relate to employment history) and 14(3)(f) (the records describe an individual's financial history) apply to the information contained in the records. It further submits that the records contain information

which is highly sensitive (section 14(2)(f)) and which was supplied to the Town in confidence (section 14(2)(h)).

The affected person submits that the presumptions in sections 14(3)(d), (f) and (g) (the records consist of character references or personnel evaluations) apply to the information contained in the records. He further argues that sections 14(2)(e) (the disclosure of the records would unfairly expose an individual to harm), 14(2)(f), (h) and (i) (the disclosure may unfairly damage an individual's reputation) are applicable in the circumstances of this appeal.

The appellant has not made any representations on this, or any other, issue. In his letter of appeal, however, he makes reference to Order M-23, a decision of Commissioner Tom Wright dated July 2, 1992 in which the Commissioner held that certain information relating to the benefits paid to a current employee by a municipality fell within section 14(4)(a) and ought, accordingly, to be disclosed.

I have reviewed the records and make the following findings:

1. None of the records contain information which relates to the affected person's employment history within the meaning of section 14(3)(d). Similarly, the records do not contain information describing the affected person's financial history (section 14(3)(f)). The employment reference which forms the attachment to Record 2 was drafted by the affected person's counsel. I have not been provided with any evidence that it was executed by an official of the Town in this or some other format. Accordingly, I am unable to find that this information falls within the presumption in section 14(3)(g) of the Act.
2. I find that the records include information which was supplied in confidence by the affected person's counsel to the Town and that portions of it may be considered to be "highly sensitive" within the meaning of the Act. These are considerations weighing in favour of the protection of the privacy of the affected person.
3. I cannot agree that the disclosure of the records would unfairly expose the affected person to any pecuniary or other harm. Similarly, I find that the disclosure of this information would not unfairly damage the reputation of the affected person.
4. The appellant has not provided me with any factors or considerations weighing in favour of the disclosure of the personal information contained in the records.
5. The principles set forth by Commissioner Wright in Order M-23 are not applicable in the present situation. The records at issue do not describe the classification, salary range, **benefits** or employment responsibilities of a current or a former employee of the Town. Rather, the information contained in the records relates to the severance package which was negotiated at the termination of the affected person's employment with the Town. The entitlements reflected in the records were not received by the affected person as a result of being employed, instead, they were negotiated in exchange for acceptance of the

agreement. These entitlements do not, therefore, constitute "benefits" within the meaning of section 14(4)(a) of the Act (Orders M-173, M-204 and M-278).

6. The disclosure of the personal information contained in the records would result in an unjustified invasion of the personal privacy of the affected person. This information is, therefore, exempt from disclosure under section 14(1) of the Act.

REASONABLENESS OF SEARCH

Where an appellant provides sufficient details about the records which he is seeking and the Town indicates that further records do not exist, it is my responsibility to ensure that the Town has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Town to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Town must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

The appellant has not provided any representations as to the reasons for his belief that additional records responsive to his request, particularly with regard to four of the affected persons, exist.

The Town has provided affidavits from its Clerk Treasurer and Freedom of Information and Protection of Privacy Co-ordinator, Bookkeeper/Payroll Administrator and Human Resources Co-ordinator setting out in detail the searches undertaken for records responsive to the appellant's request.

I find that the Town's search for records was reasonable in the circumstances of this appeal.

ORDER:

1. I uphold the Town's decision to deny access to the responsive records.
2. I find that the Town's search for responsive records was reasonable in the circumstances and dismiss this aspect of the appeal.

Original signed by: _____
Donald Hale
Inquiry Officer

April 24, 1996