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

FINAL ORDER M-825

Appeal M_9500660

City of Orillia

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NATURE OF THE APPEAL:

This is the final order regarding the appeal which gave rise to Interim Orders M-775 and M-806.

The appellant requested a copy of a letter of complaint from the City of Orillia (the City) under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The record was identified in the request as: "The letter of complaint from the fire department employee which may have led to the fire chief's departure."

The City refused to confirm or deny the existence of such a record under section 8(3) of the Act. The appellant appealed this decision, and a Notice of Inquiry was sent to the City, the appellant and the former fire chief. Representations were received from all parties.

During the Inquiry, the City indicated that it was relying on section 14(5) of the Act, not section 8(3) which it had erroneously claimed, as the basis for refusing to confirm or deny the existence of such a record. A supplemental Notice of Inquiry was sent to all parties. Additional representations were received from the City and the former fire chief.

DISCUSSION:

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF A RECORD

Section 14(5) of the Act provides the City with the discretion to refuse to confirm or deny the existence of a record responsive to the appellant's request. This section states that:

> A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

An appellant in a section 14(5) situation is in a very different position than other appellants who have been denied access under the Act. By invoking section 14(5), the City is denying the appellant the right to know whether a record exists, even if one does not.

For this reason, in relying on section 14(5) the City must do more than merely indicate that the disclosure of a record would constitute an unjustified invasion of personal privacy. The City must establish that disclosure of the mere existence or non-existence of the requested record would convey information to the appellant, and that the disclosure of this information would constitute an unjustified invasion of personal privacy (Order M-328). The Ontario Court (General Division) endorsed this interpretation in the context of its review of Order P-808 in Ontario Hydro v. Ontario/Information and Privacy Commissioner, [1996] O.J. No. 1669 (Div. Ct.).

Accordingly, I will begin by considering whether disclosure of a record of the type requested, if it exists, would constitute an unjustified invasion of personal privacy. If the answer to this question is yes, I will then consider whether disclosure of the existence or non-existence of a record of the type requested would constitute an unjustified invasion of personal privacy.

An unjustified invasion of personal privacy can only result from disclosure of personal information. Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

As I indicated above, the portion of the request which is at issue in this appeal pertains to a complaint made against the former fire chief.

Previous orders have held that information about an employee does not constitute personal information where the information relates to that individual's employment or professional responsibilities or position. Where, however, the information involves an examination of the employee's performance or an investigation into his or her conduct, these references are considered to be the individual's personal information.

A record of the nature requested, if it exists, would reveal that a complaint had been made against the former fire chief, which, in my view, would relate to an examination of his performance or an investigation into his conduct. I find that such information, if it exists, would qualify as the personal information of the former fire chief as defined by section 2(1) of the Act. As well, if such a record exists, it would likely contain information about the employee who complained, which would qualify as that individual's personal information.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether 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 the personal information.

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

Neither the appellant nor the City has not submitted representations regarding the application of sections 14(2), (3) or (4).

The former fire chief submits that a record of the nature requested, if it exists, would contain information which would fall within the presumptions found in sections 14(3)(a), (d), (f) and (g) of the Act. These sections state:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
>
> (d) relates to employment or educational history;

> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
>
> (g) consists of personal recommendations or evaluations, character references or personnel evaluations.

The former fire chief also indicates that, if a record of the nature requested exists, the considerations found in sections 14(2)(e), (f), (g) and (i) are relevant, and weigh in favour of privacy protection in the circumstances of this appeal. These sections state:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;
>
> (g) the personal information is unlikely to be accurate or reliable;
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

In my view, a record of the nature requested, if it exists, would contain information which would properly be considered highly sensitive (section 14(2)(f)). This factor weighs in favour of privacy protection.

Though no representations have been made which identify factors weighing in favour of disclosure of this kind of record, I have considered whether disclosure of the personal information, if it exists, would be desirable for the purposes of subjecting the activities of the City to public scrutiny (section 14(2)(a)). A letter of complaint on its own, in these circumstances, would contain only allegations -- it would not contain information regarding the City's action or inaction regarding the complaint and would not indicate whether the allegations were found to be truthful. I am not convinced that disclosure of such a record, if it exists, would be desirable for the purposes of subjecting the activities of the City to public scrutiny, and this factor would not outweigh the factor favouring privacy protection.

Records of this type are not among those listed in section 14(4). Accordingly, I find that disclosure of such a record, if it exists, would constitute an unjustified invasion of personal privacy.

In regard to the second part of the analysis under section 14(5), the City argues that disclosure of the mere existence or non-existence of responsive records would constitute an unjustified invasion of personal privacy.

I find that such disclosure would reveal personal information about the former fire chief, namely, whether one of his employees had made a written complaint about him. In the circumstances of this case, I find that disclosing the existence or non-existence of responsive records would constitute an unjustified invasion of personal privacy.

Therefore, I find that the requirements for the application of section 14(5) of the Act have been established in the circumstances of this appeal.

PUBLIC INTEREST IN DISCLOSURE

The appellant submits that there exists a compelling public interest in the disclosure of information related to the departure of the fire chief under section 16 of the Act. The appellant stresses that city residents have no idea why they were left without a fire chief. He indicates that any information which can shed light on the management of the City and its difficulty with an employee is eagerly awaited by residents.

There are two requirements contained in section 16 which must be satisfied in order to invoke the application of the so-called "public interest override": there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

I agree with the appellant that the degree of disclosure provided by the City of information relating to the circumstances surrounding the departure of the fire chief has not been sufficient to satisfy public interest concerns. However, this does not leads me to conclude that there is a public interest in the disclosure of a record of the nature requested, or even whether it actually exists.

The information which would be contained in the record at issue, if it exists, would say nothing about the City's management of the fire chief's departure, or even of the City's management of the complaint, if it exists. It wouldn't indicate whether such a record was even related to the departure of the fire chief; and neither would knowing whether such a record exists. Further, the exemption which I have found to apply is a mandatory one which reflects one of the primary tenets of the Act. The arguments presented by the appellant are not, in my view, sufficiently compelling to outweigh the purpose of this exemption in these particular circumstances.

In the circumstances of this appeal, I find that there is not a sufficient compelling public interest in disclosure which would clearly outweigh the purpose of the personal privacy exemption, and section 16 of the Act does not apply.

ORDER:

I uphold the City's decision.

Original signed by: August 27, 1996
Holly Big Canoe
Inquiry Officer