



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-82

Appeal M-910344

The Corporation of the City of Hamilton



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ORDER

BACKGROUND:

The Corporation of the City of Hamilton (the City) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to the City's investigation of the requester's complaint of harassment. The City identified 36 responsive records, including information provided by the requester, the two employees named in the complaint, other employees and former employees, and the findings of the investigation. The City granted access to the requester's draft complaint, supporting information provided by the requester, and his final complaint form. The City also granted access to a letter sent to the department head advising of the complaint, a letter sent to the requester during the investigation, a letter sent to the requester following completion of the investigation, and a letter regarding the requester's new position. Access was denied to the remaining records pursuant to sections 10(1)(d), 14, 38(b) and (c) of the Act. The requester appealed the head's decision.

Mediation of the appeal was not successful, and notice that an inquiry was being conducted to review the City's decision was sent to the appellant, the City, the two employees named in the complaint (the affected persons), and six individuals named in the records. Written representations were received from the City, the appellant, the affected persons, and two of the individuals named in the records.

The records at issue in this appeal are identified in Appendix A, attached to this order.

ISSUES:

The issues in this appeal are as follows:

- A. Whether the information contained in the records qualifies as personal information as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the discretionary exemption provided by section 38(b) of the Act applies.
- C. If the answer to Issue A is yes, whether the discretionary exemption provided by section 38(c) of the Act applies.
- D. Whether the records qualify for exemption under section 10(1)(d) of the Act.
- E. If the answer to Issues A and D is yes, whether the discretionary exemption provided by section 38(a) of the Act applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in the records qualifies as "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, ...".

The records consist of notes, letters and memoranda created during the City's investigation of the appellant's complaint that he was being harassed by the affected persons. Primarily, the records contain the personal information of the appellant and the affected persons. Records 2E, 4C, 4E and 4L contain the personal information of the appellant only, and Record 4D does not contain any personal information. A small portion of some of the records contains recorded information about other identifiable individuals namely, other employees or former employees of the work area where the harassment is alleged to have taken place, and qualifies as the personal information of these individuals.

In my view, the records do not contain the personal information of five of the six individuals notified of the inquiry, including the two individuals who provided written representations. The information provided by these individuals consists of recorded information about the appellant and/or the affected persons, not recorded information about themselves.

ISSUE B: If the answer to Issue A is yes, whether the discretionary exemption provided by section 38(b) of the Act applies.

The City submits that section 38(b) applies to all 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 exemptions 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 other individuals' right to the protection of their privacy. If the head determines that the release of the information would constitute an unjustified invasion of the other individuals' personal privacy, then section 38(b) gives the head the discretion to deny the requester access to the personal information (Order 37).

In Issue A, I found that Records 2E, 4C, 4E, and 4L contain the personal information of the appellant only, and Record 4D does not contain any personal information. Accordingly, section 38(b) does not apply to these records.

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 the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. The City claims that sections 14(3)(d) and (g) apply to job evaluations, personnel reports and employee interactions included in the records. These sections state:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

- (d) relates to employment or educational history;
- (g) consists of personal recommendations or evaluations, character references or personnel evaluations;

The records contain information concerning employment related incidents involving the appellant and other individuals. However, in my view, the information which relates to individuals other than the appellant cannot accurately be characterized as the employment history of any of these individuals, and I find that section 14(3)(d) does not apply.

Although, in a broad sense, it could be argued that the comments of the author of the records are "evaluations" of individuals other than the appellant, in my view, it is not possible to characterize the author's comments as "personal evaluations" or "personnel evaluations" of these individuals. The records were created during an investigation to determine whether the actions of the affected persons were in violation of the City's policy on personal harassment. The conclusions reached as a result of the investigation are based on whether this policy has been complied with, and have no "personal" or "personnel" component, as required by section 14(3)(g). Accordingly, in my view, section 14(3)(g) does not apply to the information contained in the records.

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. The City and the affected persons submit that sections 14(2)(f) and (h) are relevant in the circumstances of this appeal, and weigh in favour of privacy protection. The appellant submits that section 14(2)(d) is relevant, and weighs in favour of disclosure of the records. These sections read:

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,

- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence;

In order for section 14(2)(d) to be regarded as a relevant consideration, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as apposed to a non-legal right based solely on moral or ethical grounds; **and**
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; **and**
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; **and**
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

[Order P-312]

The appellant submits that several rights have been violated due to the fact that the information contained in the records has not been disclosed by the City: his right to a fair job evaluation; his right to a complete and unbiased harassment investigation and grievance procedure; his right to a manageable working environment; and his right to be measured against job standards that have not been established in a discriminatory manner. With the exception of the grievance procedure, in my view, these are not **legal** rights drawn from the concepts of common law or statute law, and section 14(2)(d) is not a relevant consideration for them.

Regarding the grievance procedure, it is not clear whether the subject matter of the appellant's grievance is the same as that involved in his harassment complaint. Having examined the records, in my view, section 14(2)(d) may be a relevant consideration for the grievance procedure in the circumstances of this appeal.

The City submits that all information that pertains to working relationships and workplace conduct is highly sensitive. The affected persons submit that some of their comments could, in another individual's perception, "... form the basis for a personal injury claim ...", and would adversely affect working relationships.

In my opinion, information that pertains to normal, everyday working relationships and workplace conduct is not highly sensitive. However, when an allegation of harassment is made and investigated, it is reasonable for the parties involved to restrict discussion of workplace relationships and conduct and to find such information distressing in nature, as the affected persons have indicated here. Nevertheless, in my view, it is not possible for such an investigation to proceed if the complaint is not made known to the respondents and the direct response to the allegations made in the complaint is not made known to the complainant. Accordingly, I find that section 14(2)(f) is a relevant consideration in the circumstances of this appeal, but only in respect of the information provided by individuals other than the appellant, and not in respect of the information provided by the affected persons in direct response to the appellant's complaint.

The City and the affected persons submit that all of the information was supplied under verbal assurances of confidentiality by the City. The City has also provided a copy of its personal harassment policy, which provides that all information concerning such complaints is to be kept confidential. Some of the records are marked as private and confidential, and the affected person indicated in one record that certain parts of it were confidential.

The appellant submits that at the outset of the investigation, he was informed that the affected persons would be asked to respond to his complaint, and he would have the opportunity to view the responses in order to enable him to respond. During the investigation of the appellant's complaint, the affected persons were given a copy of the complaint and the opportunity to respond. The appellant submits that the responses were not disclosed to him, and he had no opportunity to respond to them. Following interviews with the complainant, the affected persons and witnesses, the appellant's allegations were determined by the City to be unfounded.

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. Accordingly, in my view, section 14(2)(h) is a relevant consideration, but only in respect of the information provided by individuals other than the appellant, and not in respect of information provided by the affected persons in direct response to the appellant's complaint.

In summary, I have found that section 14(2)(d) may be relevant, and sections 14(2)(f) and (h) are relevant considerations in the circumstances of this appeal, but only in respect of the information provided by individuals other than the appellant, and not in respect of information provided by the affected persons in direct response to the appellant's complaint. Sections 14(2)(f) and (h) weigh in favour of privacy protection, and in my view, disclosure of the information provided by individuals other than the appellant and by the affected persons other than in direct response to the appellant's complaint would constitute an unjustified invasion of another individual's

personal privacy, and section 38(b) applies. I have highlighted these portions of the records on the copy of the records which is being forwarded with the City's copy of this order.

In respect of the information provided by the appellant and the information provided by the affected persons in direct response to the appellant's complaint, I have found that section 14(2)(d) may be relevant and this factor would weigh in favour of disclosure of the records. In balancing the interests of the appellant in disclosure of the personal information and the interests of the affected persons and other named individuals in the protection of their privacy, I find that disclosure of the information provided by the appellant and the information provided by the affected persons in direct response to the appellant's complaint would not constitute an unjustified invasion of the personal privacy of another individual, and section 38(b) does not apply.

In reviewing the City's exercise of discretion in favour of refusing to disclose the records and parts of records for which I have found section 38(b) to apply, I have found nothing to indicate that the exercise of discretion was improper, and will not alter it on appeal.

ISSUE C: If the answer to Issue A is yes, whether the discretionary exemption provided by section 38(c) of the Act applies.

The City submits that section 38(c) applies to all of the records. This section reads:

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

that is evaluative or opinion material compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of contracts and other benefits by an institution if the disclosure would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence;

In Issue A, I found that Record 4D does not contain any personal information. Accordingly, section 38(c) does not apply to this record.

To qualify for exemption under section 38(c), the personal information contained in a record must satisfy each part of a three-part test:

1. the personal information must be evaluative or opinion material;
and

2. the personal information must be compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of government contracts and other benefits; **and**
3. disclosure of the personal information would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence.

[Order 157]

The City submits that the records consists of evaluative material about the appellant and opinion material about the appellant, co-workers, management, witnesses and the union. Having reviewed the records, I am satisfied that parts of some of the records do contain evaluative and opinion material about the appellant, and the requirements of the first part of the test have been met.

The City submits that the evaluations and opinions were performed during the internal harassment investigation, and that "the information was not compiled for any other purpose than to investigate the allegations [of personal harassment] put forth by [the appellant]." While individuals may have made comments about the appellant's suitability for employment during the investigation, I do not accept that the sole purpose for compiling the information was to determine the appellant's suitability, eligibility or qualifications for employment. Further, the City indicates that the only purpose for compiling the information was something else entirely. In my view, the requirements of the second part of the test have not been satisfied.

Failure to satisfy a single part of the test means that the appellant's personal information contained in the records cannot be exempted pursuant to section 38(c). Accordingly, I find that section 38(c) does not apply.

ISSUE D: Whether the records qualify for exemption under section 10(1)(d) of the Act.

The City submits that section 10(1)(d) applies to the records. This section reads:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

The introductory wording of section 10(1) requires that the information must have been supplied to the City, the "institution", by a third party which, by definition, is not part of the institution. The City's employees are part of the institution, and do not qualify as third parties for the purposes of section 10. The former employees are not part of the institution and it could be argued that they are properly considered third parties for the purposes of section 10. However, in my view, the interests of the former employees are more appropriately addressed under the privacy protection provisions of the Act.

Because I have found that the answer to Issue D is no, it is not necessary for me to consider Issue E.

ORDER:

1. I uphold the City's decision not to disclose Records 2A, 2C, 2D, 2F, 2G, 3A, 3C, 3D, 4G, 4H, 4K and part of Record 5C pursuant to section 38(b).
2. I order the City to disclose to the appellant Records 1D, 1F, 1G, 1H, 2E, 4C, 4D, 4E, 4I, 4J and 4L in their entirety. I also order the City to disclose to the appellant Records 2B, 3B, 4A, 4B, 4F, 5B and 5D in accordance with the highlighted copy of these records which I have provided to the Freedom of Information and Privacy Coordinator with the copy of this order. The highlighted portions identify the parts of these records which should not be disclosed.
3. I order the City to disclose the records referred to in Provision 2 within 35 days following the date of this order and **not** earlier than the thirtieth (30th) day following the date of this order.
4. 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 my request.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ February 9, 1993

APPENDIX A

Record	Description	City's Decision	Order
1A	Rough draft of complaint form	Disclosed	n/a
1B	Exhibits 1-8 (complainant's supporting information)	Disclosed	n/a
1C	Final complaint form	Disclosed	n/a
1D	Notes from meeting between appellant and investigators	Exempted	Disclose
1E	Copy of letter sent to appellant	Disclosed	n/a
1F	Notes from meeting between appellant and investigator	Exempted	Disclose
1G	Notes from meeting between appellant and investigator	Exempted	Disclose
1H	Notes from meeting between appellant and investigator	Exempted	Disclose
2A	Copy of letter sent to affected person advising of complaint	Exempted	Exempt 38(b)
2B	Affected person's written response to complaint	Exempted	Partially exempt 38(b)
2C	Investigator's notes on affected person's written response	Exempted	Exempt 38(b)
2D	Notes from meeting between affected person and investigators	Exempted	Exempt 38(b)
2E	Notes provided by affected person	Exempted	Disclose
2F	Notes from meeting between affected person and investigators	Exempted	Exempt 38(b)
2G	Notes from telephone conversation between affected person and investigator	Exempted	Exempt 38(b)
3A	Copy of letter sent to affected person advising of complaint	Exempted	Exempt 38(b)
3B	Affected person's written response to complaint	Exempted	Partially exempt 38(b)
3C	Notes from meeting between affected person and investigator	Exempted	Exempt 38(b)
3D	Notes from meeting between affected person and investigators	Exempted	Exempt 38(b)

Record	Description	City's Decision	Order
4A	Notes from telephone conversation between investigator and union representative	Exempted	Partially exempt 38(b)
4B	Copy of memorandum sent to Human Resources from management	Exempted	Partially exempt 38(b)
4C	Notes from meeting between investigator and Manager of Labour Relations	Exempted	Disclose
4D	Note made by investigator	Exempted	Disclose
4E	Notes of conversation between investigator and management	Exempted	Disclose
4F	Notes from meeting between management and investigators	Exempted	Partially exempt 38(b)
4G	Notes from meeting between witness and investigators	Exempted	Exempt 38(b)
4H	Notes from telephone conversation between witness and investigator	Exempted	Exempt 38(b)
4I	Notes from telephone conversation between management and investigator	Exempted	Disclose
4J	Copy of memorandum sent to management from affected person	Exempted	Disclose
4K	Notes from telephone conversation between witness and investigator	Exempted	Exempt 38(b)
4L	Notes from meeting between management and investigator	Exempted	Disclose
5A	Copy of letter sent to management advising of complaint	Disclosed	n/a
5B	Copy of findings sent to management	Exempted	Partially exempt 38(b)
5C	Copies of letters sent to appellant and affected persons following completion of investigation	Partially Exempt	Partially exempt 38(b) (Upheld)
5D	Response to findings from management	Exempted	Partially exempt 38(b)
5E	Letter to Human Resources regarding appellant's new position	Disclosed	n/a