



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-321

Appeal M-9200325

The Corporation of the City of Toronto



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ORDER

BACKGROUND:

The Corporation of the City of Toronto (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for the requester's personnel files from both the Parks and Recreation and the Management Services Departments of the City. The City identified a large number of responsive records and notified an affected person pursuant to section 21(1) of the Act. In its decision letter, the City granted access to some records in full, withheld some records in part and denied access to others in their entirety. The City's decision to deny access to these records was based on the exemptions contained in sections 13, 14(2)(e), (f) and (h) and 38(a) and (b) of the Act.

The requester appealed the City's decision to the Commissioner's office and indicated that he had not received the complete files he had requested. In the course of the mediation of the appeal, the parties agreed that certain records were no longer at issue. The documents remaining at issue are Records 12 through 19, 22, 23, 24, 29, 38, 39, 40, 41, 47, 51 through 56, 58, 59, 60, 63, 64, 65 and 66 as referenced in the City's index of records. These records are described in greater detail in Appendix "A" to this order.

Further 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 City and the appellant. A number of affected persons were identified as having an interest in the disclosure of the records at issue and were also provided with the Notice of Inquiry. Representations were received from the appellant, the City and 17 of the affected persons.

PRELIMINARY ISSUE:

In reviewing the records, I have determined that a portion of Record 19 refers to an individual other than the appellant who has no connection with the subject matter of the request. I also find that one note in Record 58 and portions of Record 66 do not relate to the appellant's request. These non-responsive portions of Records 19, 58 and 66, which should not be disclosed to the appellant, are identified on the highlighted copies of these records which I have provided to the City's Freedom of Information Co-ordinator with a copy of this order.

ISSUES:

The issues to be addressed in this appeal are:

- 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, and the personal information relates to the appellant and other individuals, whether the discretionary exemption provided by section 38(b) of the Act applies to the personal information contained in the records.

- C. Whether the discretionary exemptions provided by sections 13 and 38(a) of the Act apply to the records.
- D. Whether the City's search for responsive records was reasonable in the circumstances of this appeal.

SUBMISSIONS/CONCLUSIONS:

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

Section 2(1) of the Act states, in part, that:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
...
- (e) the personal opinions or views of the individual except if they relate to another individual,
...
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

Having examined the records at issue, I find that Records 12-19, 22, 23, 38, 40, 51, 53-56 and 58 contain the personal information of the appellant only. Although some of these records also contain information about other individuals, I am satisfied that this information pertains to these individuals in their professional capacities or in the execution of their employment responsibilities. Such information does not qualify as the personal information of these individuals for the purposes of the Act (Orders M-114, M-154, P-369, P-377, P-654 and P-660).

I further find that Records 24, 29, 39, 41, 47, 52, 59, 60, 63, 64, 65 and 66 contain the personal information of the appellant and other identifiable individuals.

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

Under Issue A, I found that Records 24, 29, 39, 41, 47, 52, 59, 60, 63, 64, 65 and 66 contain the personal information of the appellant and other individuals.

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 to personal information by the person to whom it relates. Specifically, section 38(b) of the Act states:

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;

Section 38(b) introduces a balancing principle. The City must look at the information and weigh the requester's right of access to his/her own personal information against another individual's right to the protection of his/her privacy. If the City determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives the City the discretion to deny the requester access to the personal information (Order 37).

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 an individual's personal privacy. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. The City, in its representations, has not raised any of the presumptions contained in section 14(3), nor have I found any of the presumptions to be relevant to this appeal. I also find that section 14(4) is not relevant to this appeal.

Section 14(2) provides a non-exhaustive list of criteria for the City to consider in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. The City submits that sections 14(2)(e), (f) and (h) of the Act apply to Records 24, 29, 39, 41, 47, 52, 59, 60, 63, 64, 65 and 66. These sections of the Act 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,

- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence;

Record 24 consists of minutes of a disciplinary interview of the appellant in May 1992. In my view, since the information contained in this record was supplied by the City to the appellant at the time of the interview, the considerations in sections 14(2)(e), (f) and (h) are not relevant to Record 24 and its disclosure would not result in an unjustified invasion of the personal privacy of other individuals.

Records 29, 39, 41, 47 and 60 are notes and memoranda of interviews and conversations with the appellant. The information relating to co-workers of the appellant in these records was supplied by the appellant to the City and should not, therefore, be withheld from the appellant pursuant to section 38(b) of the Act (Order P-654).

Sections 14(2)(f) and (h)

The City claims that sections 14(2)(f) and (h) are relevant to Records 52, 59, 63, 64, 65 and 66. The City submits that the records are "highly sensitive" (section 14(1)(f)) on the following basis:

In each case, the records contain personal information which is sensitive, since it relates to alleged discrimination by the requester. The comments which form the basis of the

allegations are personal information which is highly sensitive. Records 63, 64 and 65 ... are documents relating to a grievance filed against the requester by a co-worker. Release of this information would cause the individuals to whom it relates excessive personal distress, in that it would once again focus attention on the discriminatory comments and actions made by the requester.

With respect to section 14(2)(h), the City submits:

The co-workers of the requester have supplied their personal information to their department implicitly in confidence. A relationship like this one, where staff communicate openly with the management of the department about difficult situations with fellow staff members is a hard one to develop. It is predicated on confidentiality. In this case, individuals came forward under considerable fear, under the understanding that the City would make every attempt to keep their statements in confidence.

I would note that the records which contain the actual statements provided by the appellant's co-workers are not at issue in this appeal.

Record 52 is a memorandum written by a supervisor which contains personal information about affected persons who were co-workers of the appellant. However, the personal information was supplied by the supervisor who wrote the memorandum, and not by the affected persons themselves. Accordingly, I find that section 14(2)(h) does not apply to Record 52. However, having considered the representations of the parties and all of the circumstances of this appeal, I find that section 14(2)(f) is applicable to the personal information of individuals other than the appellant contained in Record 52.

Record 59 is a memorandum written by a supervisor in the course of his employment duties in which he describes a meeting with the appellant and his union representative. The majority of the information contained in this record was supplied by either the appellant or by the supervisor. The last three paragraphs of this record, however, contain personal information supplied by the affected persons to whom the information relates. I am persuaded that sections 14(2)(f) and (h) are relevant to the last three paragraphs of Record 59 only.

The information at issue in Record 66 contains an observation about the appellant made by an affected person on a "log sheet" posted at a job site where the appellant was working. Immediately following that comment on the log sheet is an entry written by the appellant in response to the observation made about him. In these circumstances, I am not persuaded that this information was "supplied in confidence" nor that

its disclosure at this time would be "highly sensitive". I find that sections 14(2)(f) and (h) are not relevant to Record 66.

Records 63, 64 and 65 relate to a workplace harassment grievance brought against the appellant by a co-worker. In Order M-82, Inquiry Officer Holly Big Canoe set out general principles concerning the applicability of section 14(2)(f) of the Act in requests for information by parties involved in workplace harassment complaints as follows:

... 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, ... 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.

Regarding section 14(2)(h), she stated that:

... 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.

In this appeal, as the grievance was resolved some time ago, there is no longer an ongoing investigation of the allegations. The appellant is aware of the identity of the complainant, the nature of the complaint and the results of the grievance relating to the harassment investigation. In my view, the appellant has been provided with substantial disclosure of the nature and disposition of the complaint made against him, sufficient for him to address the validity of the allegations. In the particular circumstances of this appeal, it is my view that sections 14(2)(f) and (h) are relevant factors which weigh in favour of non-disclosure of the personal information contained in Records 63, 64 and 65.

Section 14(2)(e)

The affected persons have expressed concerns that disclosure of their personal information would result in violence, threats or property damage against them. The City states that the affected persons will be

exposed to physical harm from the appellant and notes that "[a]ll physical harm is 'unfair'". The City's representations further submit that:

disclosure of the records would make the requester aware of confidential meetings and correspondence between the Parks and Recreation Department and the requester's co-workers, and would expose the co-workers to physical harm. The requester's propensity for physical violence has been demonstrated on numerous occasions.

Having reviewed Records 52, 59, 63, 64, 65 and 66 and the representations of the parties, in the particular circumstances of this appeal, I am satisfied that section 14(2)(e) of the Act is a relevant consideration weighing against disclosure of the personal information of other individuals in these records.

To summarize, I have found that sections 14(2)(e), (f) and (h) are relevant considerations for Records 59, 63, 64 and 65. The considerations in sections 14(2)(e) and (f) apply to Record 52 and section 14(2)(e) is relevant to Record 66. These provisions weigh in favour of not disclosing the records to the appellant.

Since the appellant's representations do not raise any factors in favour of disclosure, I find that the disclosure of the personal information of the affected persons contained in Records 52, 59, 63, 64, 65 and 66 would be an unjustified invasion of the personal privacy of those individuals.

I must now consider whether it is possible to sever these records, in accordance with the principle set out in section 4(2) of the Act, so that as much of the records as possible can be disclosed to the appellant, without revealing information which is properly exempt. This issue was recently canvassed by Inquiry Officer Anita Fineberg in Order P-677 as follows:

The relationship between section 10(2) of the [Provincial Freedom of Information and Protection of Privacy Act], which is similar to section 4(2) of the Act], and records containing personal information as defined in section 2(1) was discussed in Order P-230 by Commissioner Tom Wright. He stated:

I believe that the provisions of the Act relating to the protection of personal privacy should not be read in a restrictive manner. If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under section 2(1) as personal information.

In this appeal, once the names and other information which would render the individuals "identifiable" has been severed from this record, the remaining information will no longer constitute "personal information" as defined in section 2(1) of the Act. Therefore, there can be no unjustified invasion of personal privacy in the disclosure of the balance of the information contained in Record 13.

In my view, following the approach stated by Inquiry Officer Fineberg above, if the names and other personal identifiers of affected persons are removed from Records 52 and 66 and portions of the last three paragraphs of Record 59 are withheld, the identities of the affected persons cannot be discerned. The disclosure of the remaining information would not be an unjustified invasion of the personal privacy of other individuals under section 38(b) of the Act. I have provided the City's Freedom of Information Co-ordinator with a highlighted copy of Records 52, 59 and 66 which indicates those portions of these records which are not to be disclosed.

In my view, it would not be possible, however, to sever Records 63, 64 and 65 to permit partial disclosure to the appellant.

To summarize, I have found that the disclosure to the appellant of Records 24, 29, 39, 41, 47 and 60, in their entirety, would not be an unjustified invasion of the personal privacy of other individuals. I further find that the disclosure of Records 63, 64 and 65 in their entirety and portions of Records 52, 59 and 66 would constitute an unjustified invasion of the personal privacy of other individuals and, therefore, this information is properly exempt from disclosure under section 38(b) of the Act.

I have reviewed the City's exercise of discretion under section 38(b) to deny access to these records and find nothing improper in the determination that has been made.

ISSUE C: Whether the discretionary exemptions provided by sections 13 and 38(a) of the Act apply to the records.

The City has claimed the section 13 exemption for all of the records at issue in this appeal. Due to my findings under the Preliminary Issue and Issue B, I need not consider the application of section 13 to Records 63, 64, 65 or the withheld portions of Records 19, 52, 58, 59 and 66.

In order to qualify for exemption under section 13, the parties objecting to disclosure must establish that the disclosure of the records **could reasonably be expected to** lead to the specified harm of seriously threatening the safety or health of an individual.

The words "could reasonably be expected to" have been interpreted in the context of other sections of the Act and the Provincial Freedom of Information and Protection of Privacy Act, which use the same terminology, to mean that there must exist a reasonable expectation of probable harm. The mere possibility of harm is not sufficient. At a minimum, the institution must establish a clear and direct linkage between the disclosure of the information and the harm alleged (Orders M-202, P-555 and P-581).

In support of its view that section 13 applies to the records and in addition to its related submissions concerning section 14(2)(e), the City has referred to other documents (which are not at issue in this appeal) and has provided an affidavit to support its contention that the disclosure of any of the records at issue in this appeal would seriously threaten the health or safety of the individuals whose names appear in the records.

Record 53 consists of notes taken at a meeting with the appellant, his union representative and other City employees to discuss discipline matters involving the appellant. In my view, these matters are already within the appellant's knowledge and, for this reason, I find that section 13 does not apply to this record.

Records 12, 13, 14, 15, 16, 17, 18, 19, 22, 23 and 40 consist of ordinary business and administrative matters which were dealt with during the appellant's employment with the City. Records 51, 55 and 58 document administrative matters, which relate to the investigation or the results of disciplinary infractions involving the appellant.

Having considered the representations of the City and the affected persons and the other circumstances of this appeal, including the nature of these particular records, I am not satisfied that there is clear and direct evidence linking the disclosure of these records to a serious threat of harm to the personal health or safety of the individuals whom the City has identified as being at risk of harm. Accordingly, I find that Records 12, 13, 14, 15, 16, 17, 18, 19, 22, 23, 40, 51, 55 and 58 do not qualify for exemption under section 13.

In my view, once the personal information of other individuals contained in Records 52, 59 and 66 is withheld from disclosure as described in my discussion of Issue B, the remaining portions of these records would similarly not qualify for exemption under section 13. Further, in my view, Records 24, 29, 39, 41, 47 and 60 do not qualify for exemption under section 13.

Record 38 consists of internal City Hall correspondence dated December 1991 concerning conditions to be included in the Minutes of Settlement which resolved several outstanding grievances which had been filed by the appellant. Record 54 is a memorandum setting out a chronology of meetings and telephone conversations in late July and early August of 1991 between the author and the appellant or his union representative concerning discipline matters. Record 56 consists of handwritten notes which appear to have been written prior to or during a meeting with the appellant on August 1, 1991.

I have carefully considered the representations of the affected persons and the City and all of the other relevant circumstances in this appeal. In support of its claim for the application of section 13 to the records, the City refers to several incidents of unattributed vandalism which occurred against the property of several of the affected persons. These incidents occurred at the same time as the disciplinary proceedings against the appellant were commenced which are the subject of these records.

In my view, and particularly given the lapse of time between these events and this appeal, the possibility that the harm alleged will occur is not sufficient. I am not convinced that there is a reasonable expectation of probable harm and, accordingly, I find that the exemption provided by section 13 of the Act does not apply

to Records 38, 54 and 56.

Because I have found that section 13 does not apply to any of the records at issue, I do not need to consider the application of section 38(a).

ISSUE D: Whether the City's search for responsive records was reasonable in the circumstances of this appeal.

The appellant submits that further records responsive to his request should exist. The appellant has provided information as to the type of records he believes exist and the identities of persons who might have such records. This information was provided to the City by the Commissioner's office in the Notice of Inquiry.

When a requester provides sufficient details about the records which he or she is seeking and the City indicates that additional records do not exist, it is my responsibility to ensure that the City has made a reasonable search to identify any records which are responsive to the request. While the Act does not require that the City prove to the degree of absolute certainty that such records do not exist, the search which an institution undertakes must be conducted by knowledgeable staff in locations where the records in question might reasonably be located.

With its representations, the City provided an affidavit, sworn by the Commissioner of Parks and Recreation, detailing his knowledge of record keeping within the Parks and Recreation department and outlining the search undertaken to locate records relating to the requester. The affidavit states that no further records of the type described by the appellant were located as of July 9, 1992 which was the date of the appellant's access request.

Based on this evidence, I find that the City's search for records responsive to the request was reasonable in the circumstances of this appeal.

ORDER:

1. I uphold the City's decision not to disclose Records 63, 64, 65 and those portions of Records 19, 52, 58, 59 and 66 indicated on the highlighted copy of the records which will accompany the copy of this order sent to the City's Freedom of Information Co-ordinator.
2. I order the City to disclose to the appellant Records 12, 13, 14, 15, 16, 17, 18, 19, 22, 23, 24, 29, 39, 40, 41, 47, 51, 53, 54, 55, 56, 58 and 60 and those portions of Records 19, 52, 58, 59 and 66 in accordance with the highlighted copy of these records which will accompany the copy of

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this order. The highlighted portions should **not** be disclosed.

3. I order the City to disclose the records described in Provision 2 within thirty-five (35) days following the date of this order, but not earlier than the thirtieth (30th) day after the date of this order.
4. In order to verify compliance with this order, I order the City to provide me with a copy of the records disclosed to the appellant pursuant to Provision 2, **only** upon request.

Original signed by: _____

Donald Hale
Inquiry Officer

_____ May 26, 1994

APPENDIX "A"

RECORDS AT ISSUE IN THIS APPEAL			
RECORD	DESCRIPTION	ORDER DISPOSITION	EXEMPTION APPLIED
12	Field memorandum concerning appellant	disclosed	
13	Memorandum with added handwritten note	disclosed	
14	Memorandum about injury report	disclosed	
15	Injury report memorandum	disclosed	
16	Memorandum re: request from appellant	disclosed	
17	Department memorandum regarding conversations with appellant	disclosed	
18	Memorandum re: telephone conversation with appellant	disclosed	
19	Note re: medical information about appellant	partly disclosed	not responsive in part
22	Letter to physician	disclosed	
23	Letter to physician	disclosed	
24	Minutes of Disciplinary Interview	disclosed	
29	Notes of interview of appellant	disclosed	
38	Letter re: grievance settlement	disclosed	
39	Notes of conversation with appellant	disclosed	
40	Memorandum re: work related injury to appellant	disclosed	
41	Notes of interview with appellant	disclosed	
47	Notes of conversation with appellant	disclosed	
51	Note re: appellant work assignment	disclosed	
52	Memorandum re: work related discipline incidents	partly disclosed	38(b)/14(1)

RECORDS AT ISSUE IN THIS APPEAL			
RECORD	DESCRIPTION	ORDER DISPOSITION	EXEMPTION APPLIED
53	Notes re: grievance meeting with appellant	disclosed	
54	Memorandum re: appellant's leave of absence	disclosed	
55	Memorandum re: telephone conversation with appellant	disclosed	
56	Notes relating to meeting with appellant	disclosed	
58	Notes of telephone conversations regarding W.C.B. status of appellant	partly disclosed	non-responsive
59	Memorandum re: meeting with appellant	partly disclosed	38(b)/14(1)
60	Memorandum - interview with appellant	disclosed	
63	Memorandum concerning grievance	not disclosed	38(b)/14(1)
64	Memorandum concerning grievance	not disclosed	38(b)/14(1)
65	Letter concerning grievance	not disclosed	38(b)/14(1)
66	Portion of Log Sheet	partly disclosed	non-responsive/ 38(b)/14(1)