



Information and Privacy
Commissioner/Ontario

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

ORDER M-433

Appeal M-9400257

Simcoe County District Health Unit



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The Simcoe County District Health Unit (the Health Unit) received a twelve-part request for all information related to the septic tank installed on the requester's property, including the certificate of approval, inspection reports and a specific complaint form.

The Health Unit granted partial access to the records and also indicated that no records existed for some parts of the request. The requester appealed the decision of the Health Unit to deny access. The requester also claims that an analysis report in respect of a soil sample taken by the Health Unit should exist.

The Health Unit relies on the following exemption to deny access to the record:

- law enforcement - section 8(1)

A Notice of Inquiry was sent to the appellant, the Health Unit and an individual named in the record (the affected person). Because the information requested appeared to contain the personal information of the appellant and the affected person, the Notice of Inquiry raised the possible application of sections 38(a) and (b) of the Act. Representations were received from the Health Unit only.

The record consists of a two-page complaint form with a sewage permit and a hand-drawn map attached to it. The Health Unit denied access to portions of page 1 and all of page 2 of the complaint form as well as the sewage permit and the hand-drawn map. The appellant has indicated that he does not want access to the name, address and telephone number of the complainant as it appears on page 1 of the record. Therefore, I will not address those portions of the record in this order.

DISCUSSION:

LAW ENFORCEMENT

The Health Unit indicates that it is relying on section 8(1)(b) of the Act to deny access to the record. This section states:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

In order for the record to qualify for exemption under section 8(1)(b), the matter to which the record relates must first satisfy the definition of the term "law enforcement" as found in section 2(1) of the Act. There is no evidence before me to show how the record falls within that definition.

In addition, the Health Unit must demonstrate that there exists a reasonable expectation that the stated harm will probably come to pass. The harm described in section 8(1)(b), "interference with an investigation" by implication requires that the investigation be ongoing (Orders P-403 and P-449).

The Health Unit has not provided any evidence as to the status of any investigation or law enforcement proceeding in relation to the information in the record. Nor has the Health Unit indicated how disclosure of the information in the record would interfere with such an investigation or law enforcement proceeding. Consequently, I find that the record does not qualify for exemption under section 8(1)(b) of the Act.

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including individual's name where 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.

Previous orders have established that where an individual's name appears in the context of his/her employment duties or functions, it does not fall within the ambit of personal information. Therefore, I do not consider the names of Health Unit employees where they appear on the record to be their personal information.

I have carefully reviewed the information in the record and find that the name of the affected person and another individual on pages 1 and 2 of the complaint form and the name of a third individual set out on the sewage system application qualifies as the personal information of these individuals. I have highlighted these names on the copy of the record which will be sent to the Health Unit's Freedom of Information and Privacy Co-ordinator with a copy of this order.

I find that the balance of the information in the record does not qualify as personal information under section 2(1) of the Act.

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 of the Act provides a number of exceptions to this general right of access.

Under section 38(b) of the Act, where a record contains the personal information of both the appellant and another individual and the Board determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Board has the discretion to deny the requester access to that information.

Sections 14(2), (3) and (4) of the Act give 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 that 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 Health Unit 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. In my view, none of the presumptions contained in section 14(3) apply in the circumstances of this appeal.

I have considered the factors listed in section 14(2) and find that none of them apply to the information in the record. In addition, the appellant has not submitted representations outlining any factors which favour the disclosure of the personal information in the circumstances of this appeal. Accordingly, I find that disclosure of the highlighted information in the record would constitute an unjustified invasion of the personal privacy of other individuals and the discretionary exemption provided by section 38(b) of the Act applies.

REASONABLENESS OF SEARCH

The Act does not require the Health Unit to prove with absolute certainty that the requested records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Health Unit must provide me with sufficient evidence which shows that it has made a reasonable effort to identify and locate records responsive to the request.

The appellant claims that since a soil sample was taken by the Health Unit, it is reasonable to conclude that it was for the purpose of testing and that test results must exist.

In its representations, the Health Unit provides an explanation as to why the requested record does not exist. The Health Unit acknowledges that a soil sample was taken and that it is still in its possession. The Health Unit explains that this was done with the view that an analysis would be done, if the need arose. The Health Unit submits the test results do not exist because the soil sample was never tested.

I have considered the representations of the Health Unit and I accept its explanation that a soil analysis was not done as there was no need for it. Accordingly, I find that the Health Unit has made reasonable efforts to identify and locate any records that may be responsive to the request.

ORDER:

1. I uphold the Health Unit's decision to deny access to the highlighted portions of the copy of the record which is being sent to the Health Unit's Freedom of Information and Privacy Co-ordinator with a copy of this order.
2. I order the Health Unit to disclose to the appellant the portions of the record which are **not** highlighted on the copy of the record which is being sent to the Health Unit's Freedom of
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Information and Privacy Co-ordinator with a copy of this order.

3. I order the Health Unit to disclose the portions of the record ordered to be disclosed in Provision 2 within thirty-five (35) days after the date of this order but not before the thirtieth (30th) day after the date of this order.
4. I uphold the Health Unit's decision on the existence of additional records.
5. In order to verify compliance with this order, I reserve the right to require the Health Unit to provide me with a copy of the record disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
Mumtaz Jiwan
Inquiry Officer

_____ December 14, 1994