



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

ORDER M-810

Appeal M_9600134

City of Vaughan



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BACKGROUND:

The appellant's son was attacked and bitten by a dog. While she was assisting her son, the appellant herself was bitten by the animal. The appellant's daughter witnessed the incident. Both the appellant and her son were treated in hospital. An officer from the York Regional Police attended at the scene and the dog was killed.

The dog's owner was charged under the City of Vaughan (the City) by-law with permitting a dog to run at large. The appellant was to be the key witness at the trial. On January 3, 1994, the appellant was advised of the court date of January 5, 1994. The appellant was on vacation on both the notification and court dates and did not attend. The charges against the dog owner were withdrawn. When she returned from vacation, the appellant requested the City to relay the charges. The City determined that it would be inappropriate to do so.

NATURE OF THE APPEAL:

The appellant requested information from the City under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The information related to all records and correspondence concerning the charges laid against the owner of the dog. The appellant sought access to copies of the court documents indicating why the charges were withdrawn, as well as to all correspondence between the City prosecutor, the dog owner's counsel and the York Regional Police.

The City responded by advising the appellant to contact the York Regional Police to request a copy of their incident report. The City also told the appellant to contact the City prosecutor who would explain why the City decided not to relay the charge against the dog owner. The City provided the appellant with copies of the appellant's own statement as well as the statements from witnesses to the attack.

In addition, the City identified the following responsive records to which it denied access on the basis of the exemptions set out below:

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| Record 1 | Pages 1 and 8: | handwritten notes - section 12 (solicitor client privilege) |
| | Pages 2-7: | correspondence to and from the dog owner's solicitor - section 38(b) (invasion of privacy) |
| Record 2 | Correspondence to and from the dog owner's solicitor | |
| | Pages 1-2: | section 12 |
| | Pages 3-9: | section 38(b) |
| Record 3 | City By-law: | section 15(a) (information publicly available) |
| | No. 151-94 | |

The appellant appealed this decision. During mediation, the City provided the appellant with a copy of Record 3 and it is no longer at issue in this appeal. In order to assist in resolving the

appeal, the City prosecutor provided the appellant with a letter explaining why the charge against the dog owner could not be relaid. However, this did not settle the matter.

Accordingly, this office sent a Notice of Inquiry to the City, the appellant and the owner of the dog. Representations were received from the City and the appellant. In its representations, the City indicated that the records contained the personal information of both the appellant and the owner of the dog. Accordingly, a Supplementary Notice of Inquiry was sent to the parties in which they were requested to provide representations on the application of section 38(a) of the Act. This section provides the City with the discretion to deny personal information to the individual to whom it relates if certain exemptions, including section 12, would apply to the disclosure of that personal information. Only the City submitted representations on this issue.

DISCUSSION:

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/SOLICITOR-CLIENT PRIVILEGE

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

I have reviewed Records 1 and 2 to determine if they contain personal information and, if so, to whom the personal information relates. The City submits and I agree that these documents contain the personal information of the appellant and the owner of the dog. They relate to the charges laid against the owner of the dog and the complaints and concerns of the appellant related to the incident and the City's handling of it. Certain of the pages do not refer to the appellant by name; rather she is referred to as the "witness" or "complainant". However, as there is a reasonable expectation that she may still be identified from the contents of the records, I find that even those pages without her name contain her personal information.

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 provides a number of exceptions to this general right of access.

Under section 38(a) of the Act, the City has the discretion to deny access to an individual's own personal information in instances where certain exemptions, including section 12, would otherwise apply to that information.

The City claims that section 12 applies to exempt pages 1 and 8 of Record 1, and pages 1 and 2 of Record 2 from disclosure. Section 12 states:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 12 consists of two branches, which provide the City with the discretion to refuse to disclose:

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

The City is relying on Branch 2 with respect to the relevant portions of both Records 1 and 2. It also relies on Branch 1 with respect to pages 1 and 8 of Record 1. I will first consider Branch 2.

Pages 1 and 8 of Record 1 consist of notes prepared by the City solicitor for use in giving legal advice related to the decision not to relay the charge against the owner of the dog. I am satisfied that these pages constitute a record prepared by counsel employed by the City for use in giving legal advice. Therefore, they qualify for exemption under Branch 2 of section 12. As they contain the personal information of the appellant, they are exempt under section 38(a) of the Act.

Pages 1 and 2 of Record 2 consist of correspondence from the City's prosecutor to counsel for the dog owner. As there is no solicitor-client relationship between these two parties, the City has relied on Branch 2. The City submits that these records were also prepared for use in giving legal advice which it has defined as "... a legal opinion about a legal issue and a recommended course of action based on legal considerations". While I do not dispute the City's definition of "legal advice", I do not agree that the information contained in these two pages constitutes "advice". Both pages merely state the City's position vis a vis the relaying of the charge against counsel's client. In my view, in these circumstances, the City cannot be said to be providing legal advice to counsel for a party potentially adverse in interest. Accordingly, I find that pages 1 and 2 of Record 2 do not qualify for exemption under section 12.

As I have found that these pages contain the personal information of both the appellant and the owner of the dog, I will consider if they are exempt under section 38(b) of the Act.

INVASION OF PRIVACY

Under section 38(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information. In this situation, the requester is not required to prove that disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual.

Since the requester has a right of access to her own personal information, the only situation under section 38(b) in which she can be denied access to the information is if it can be

demonstrated that disclosure of the information **would** constitute an unjustified invasion of another individual's privacy.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found 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 where 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 contained 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 considerations that are relevant in the circumstances of the case. The City does not claim that any of the presumptions in section 14(3) apply. I agree that none of the personal information contained in the records falls within the types of information outlined in this section.

The City does submit that section 14(2)(h) is a relevant consideration in this appeal. The appellant submits that sections 14(2)(a), (b) and (d) are relevant factors. These sections read as follows:

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,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
- (b) access to the personal information may promote public health and safety;
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence;

Having reviewed the records and the submissions of the parties, I make the following findings:

- (1) I accept the City's submissions to the effect that when a lawyer retained by an individual charged with a by-law offence, such as the owner of the dog, sends correspondence to the City discussing his client's position, it is sent implicitly in confidence. Such correspondence constitutes pages 2-7 of Record 1, and pages 3-9 of Record 2. Given the nature of these pages, I find that section 14(2)(h) is a relevant consideration favouring non-disclosure.

However, as I have previously described them, pages 1-2 of Record 2 are correspondence sent **by** the City prosecutor to counsel for the dog owner. The only information provided to the City by counsel or his client is the identity of counsel and his client. As such, section 14(2)(h) is a relevant consideration with respect to only this information on pages 1-2 of Record 2.

- (2) The appellant's submissions on the application of section 14(2)(a) relate to the manner in which the City prosecutor dealt with this matter as well as the alleged improper service of the notice of the trial date and the fact that none of the other witnesses who provided statements were notified of the trial. It is the City's position that the issues concerning notice are related to the judicial system rather than to the records at issue in this appeal. I agree. Disclosure of the records would not serve to subject the activities of the City to public scrutiny in the manner sought by the appellant. It appears that the appellant's real concern in this regard is the City's rationale for deciding not to relay the charges. This type of information contained in the records I have held to be exempt under section 38(a). Accordingly, I find that the considerations necessary for the application of section 14(2)(a) are not present in this case.
- (3) The appellant suggests that by not properly prosecuting the charges against the dog owner, the City has implicitly acquiesced in dog owners permitting their animals to run at large, thus endangering the health and safety of citizens. The appellant has provided newspaper clippings documenting dog attacks in **other jurisdictions**. I do not agree that disclosure of the personal information of the dog owner would promote public health and safety under section 14(2)(b) of the Act. There is nothing in the records, nor has the appellant provided me with any information to suggest that dogs running at large is a problem in the City and that the situation in the present appeal was anything other than a tragic set of unique circumstances.
- (4) The appellant does not specifically explain how disclosure of the requested information is relevant to a fair determination of her rights. However, in the materials she provided to this office as part of her representations, there is an indication that she has retained counsel to represent her in matters arising from the attack by the dog. In the circumstances of this case, I am prepared to accept that disclosure of the personal information is relevant to a fair determination of the rights of the appellant under section 14(2)(d).
- (5) While I am sympathetic to the appellant's concerns in this case, I find that the compelling confidentiality considerations regarding the information sent by the dog owner's solicitor to the City concerning his client's legal position outweigh the disclosure considerations in this case. Thus I find that disclosure of pages 2-7 of Record 1 and pages 3-9 of Record 2 would constitute an unjustified invasion of the personal privacy of the dog owner under section 38(b) of the Act.
- (6) I find that the same confidentiality considerations apply to the identity of counsel and his client as found on pages 1-2 of Record 2. However, once this information is removed, disclosure of the balance of the information contained in the letters sent by the City to the dog owner's counsel would not constitute an unjustified invasion of privacy. I have

highlighted the information not to be disclosed on the copies of pages 1 and 2 of Record 2 provided to the Freedom of Information and Privacy Co-ordinator of the City with a copy of this order. The remainder of the information on these pages should be disclosed to the appellant.

ORDER:

1. I uphold the decision of the City to deny access to Record 1 and pages 3-9 of Record 2 in their entirety and the highlighted portions of pages 1 and 2 of Record 2.
2. I order the City to disclose to the appellant the non-highlighted portions of pages 1 and 2 of Record 2 by sending her copies of this information by **August 30, 1996** and not before **August 26, 1996**.
3. In order to verify compliance with this order, I reserve the right to require the City to provide me with a copy of the pages disclosed to the appellant pursuant to Provision 2.

Original signed by: _____ July 26, 1996
Anita Fineberg
Inquiry Officer