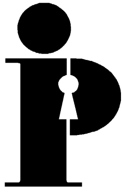

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1657

Appeal MA-020065-1

The City of Oshawa

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NATURE OF THE APPEAL:

The appellant submitted a request under *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Corporation of the City of Oshawa (the City) for access to a copy of a letter sent by a named Rape Crisis Centre (the Centre) to the City Licensing Department for bingos.

The letter in question pertains to allegations made against the appellant and the Board of Directors of a named bingo hall (the Bingo hall).

The City located a responsive record and denied access to it pursuant to sections 8(1)(b), 8(1)(d) (law enforcement) and 14 (invasion of privacy) of the *Act*.

The appellant appealed the decision of the City to this office.

During the course of mediation, the mediator attempted to contact the affected parties to determine their views with respect to the release of the records. Unfortunately, attempts to reach the affected parties were unsuccessful.

The City issued a subsequent decision letter during the course of mediation, adding section 38(b) of the *Act* as an exemption applicable to the records at issue (invasion of privacy). In addition, the City clarified that, with respect to the application of section 14, it is relying upon sections 14(3)(b) (personal information compiled and identifiable as part of an investigation into a possible violation of law) and 14(3)(h) (racial or ethnic origin, sexual orientation or religious or political beliefs) of the *Act*.

Further mediation could not be effected and this appeal was forwarded to adjudication. I decided to seek representations from the City, initially. In addition to the discretionary exemption in section 38(b), the City was asked to make representations on the possible application of the exemption in section 38(a) of the *Act*.

The City submitted representations in response. In them, the City indicates that it is not carrying out a by-law enforcement investigation into the matter and that it has insufficient information pertaining to any other investigation to support a section 8(1) claim. Therefore, it indicates that it is abandoning its reliance on the discretionary exemption in section 8 of the *Act*.

At the same time, however, the City indicates that the Alcohol and Gaming Commission (the Commission) may have an interest in the record as it is currently conducting an investigation in this matter. Although the City acknowledges that it could have transferred this request to the Commission at an earlier stage in the process and that it could have sought additional information from the Commission with respect to that investigation in order to make submissions on this issue, it did not do so.

Section 8 is a discretionary exemption and the City is entitled to withdraw its reliance on it. However, the circumstances as described by it led me to conclude that the Commission should be given an opportunity to address this issue as it appears to have the primary interest in the record.

In addition, the City changed its decision with respect to the application of section 38(b) to the record, and now indicates that it is prepared to disclose the record with minor severances pertaining to the affected persons. It was not clear whether the City notified the affected persons, and as I indicated above, despite efforts by the mediator to notify these individuals of the request, they could not be contacted.

Therefore, as a result of the City's representations, I decided to seek representations from the Commission with respect to the application of sections 8(1)(a) and (d) and 38(a) of the *Act* and from the affected persons regarding the application of section 38(b). I attached a complete copy of the City's representations to the Supplementary Notice of Inquiry that I sent to them, which outline its position on the issues at inquiry.

I received representations from one affected person, the author of the letter. In her representations, the affected person objects to the disclosure of the information contained in the record to the appellant. In doing so, she expresses concern about the requester's motivation and use of the information. In addition, her representations reflect her concerns in her capacity as a representative of the Centre, and in her personal capacity. As well, her representations appear to encompass the concerns of other individuals involved with the Centre as either employees or volunteers.

The Commission responded to the Supplementary Notice, advising that it would not be submitting representations in this appeal.

I then sought representations from the appellant. I decided not to share the affected person's representations with the appellant. However, I attached the complete representations of the City to the copy of the Notice that I sent to him. The appellant was invited to review the City's representations and to consider my comments, as set out above, regarding the affected person's position.

The appellant responded to the Notice of Inquiry.

RECORD:

The record at issue is comprised of a four-page letter, with ten pages of attachments.

DISCUSSION:

PERSONAL INFORMATION

Personal information is defined, in part, as recorded information about an identifiable individual. Section 2(1) of the *Act* sets out a non-exhaustive list of the types of information that qualify as "personal" which provides some guidance in determining whether the information at issue is "personal information":

(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,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(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;

Previous decisions of this office have drawn a distinction between an individual's personal, and professional or official government capacity, and found that in some circumstances, information associated with a person in his or her professional or official government capacity will not be considered to be "about the individual" within the meaning of section 2(1) definition of "personal information" [Orders P-257, P-427, P-1412, P-1621].

The Commissioner's orders dealing with non-government employees, professional or corporate officers treat the issue of "personal information" in much the same way as those dealing with government employees. The seminal order in this respect is Order 80. In that case, the institution had invoked section 21 to exempt from disclosure the names of officers of the Council on Mind Abuse (COMA) appearing on correspondence with the Ministry concerning COMA funding procedures. Former Commissioner Linden rejected the institution's submission:

> The institution submits that "...the name of the individual, where it is linked with another identifier, in this case the title of the individual and the organization of which that individual is either executive director, or president, is personal information defined in section of the *FIO/PPA*...." All pieces of correspondence concern corporate, as opposed to personal, matters (i.e., funding procedures for

> COMA), as evidenced by the following: the letters from COMA to the institution are on official corporate letterhead and are signed by an individual in his capacity as corporate representative of COMA; and the letter of response from the institution is sent to an individual in his corporate capacity. In my view, the names of these officers should properly be categorized as “corporate information” rather than “personal information” under the circumstances.

In Reconsideration Order R-980015, Adjudicator Donald Hale reviewed the history of the Commissioner's approach to this issue and the rationale for taking such an approach. He also extensively examined the approaches taken by other jurisdictions and considered the effect of the decision of the Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385 on the approach which this office has taken to the definition of personal information. In applying the principles which he described in that order, Adjudicator Hale came to the following conclusions:

> I find that the information associated with the names of the affected persons which is contained in the records at issue relates to them only in their capacities as officials with the organizations which employ them. Their involvement in the issues addressed in the correspondence with the Ministry is not personal to them but, rather, relates to their employment or association with the organizations whose interests they are representing. This information is not personal in nature but may be more appropriately described as being related to the employment or professional responsibilities of each of the individuals who are identified therein. Essentially, the information is not about these individuals and, therefore, does not qualify as their “personal information” within the meaning of the opening words of the definition.
>
> In order for an organization, public or private, to give voice to its views on a subject of interest to it, individuals must be given responsibility for speaking on its behalf. I find that the views which these individuals express take place in the context of their employment responsibilities and are not, accordingly, their personal opinions within the definition of personal information contained in section 2(1)(e) of the *Act*. Nor is the information “about” the individual, for the reasons described above. In my view, the individuals expressing the position of an organization, in the context of a public or private organization, act simply as a conduit between the intended recipient of the communication and the organization which they represent. The voice is that of the organization, expressed through its spokesperson, rather than that of the individual delivering the message [emphasis in original].
>
> In the present situation, I find that the records do not contain the personal opinions of the affected persons. Rather, as evidenced by the contents of the records themselves, each of these individuals is giving voice to the views of the organization which he/she represents. In my view, it cannot be said that the affected persons are communicating their personal opinions on the subjects addressed in the records. Accordingly, I find that this information cannot

> properly be characterized as falling within the ambit of the term "personal opinions or views" within the meaning of section 2(1)(e).

Previous orders have also recognized that even though information may pertain to an individual in that person's professional capacity, where that information relates to an investigation into or assessment of the performance or improper conduct of an individual, the characterization of the information changes and becomes personal information (Orders 165, P-447, M-122, P-1124, P-1344 and MO-1285). In these cases, the records must be viewed contextually (see, for example: Orders MO-1524-I and PO-1983).

In Order MO-1285, for example, I addressed records relating to the appellant in that case, which related to him as "president" of a named organization:

> From my review of the records it is apparent that the focus of the creation of the majority of them was the general review of the management of the Centre. However, within that framework, it is equally apparent that the references to the appellant in the records at issue are very critical and are directed at him personally, as opposed to being directed at the position and/or role of President. In my view, they go beyond the "professional" and pertain more to his personal attributes. In this context, I find that the information contained in the records is recorded information "about" the appellant, personally, and thus qualifies as his personal information.

By way of contrast, however, in Order P-1124, although acknowledging that in some cases, comments about (in that case, a training program provided by a consulting firm) may reflect personally on the individual providing the program, thus qualifying as personal information, I concluded:

> In this case, however, the consulting firm was retained to provide the program and the letter suspending the program is directed at the firm rather than the individual. In these circumstances, I find that the information in Record 14 does not qualify as personal information.

I agree with the analyses and conclusions in this line of orders and adopt them for the purposes of this appeal.

In its representations, the City indicates that the record contains the personal information of both the appellant and the affected persons. It is not clear, however, whether the City is claiming that the record as a whole contains personal information or whether the personal information is limited to specific passages and is thus severable.

The letter was written by one of the affected persons in her capacity as interim executive director of the Centre. At first glance it would appear that it contains her views as expressed in her professional capacity. However, when placed in context, the content of the letter reflects on her, and the other affected persons identified in it, in a very personal way.

Similarly, the comments made by the affected person about the appellant are directed at him personally, as opposed to being directed at the position he holds.

In my view, the circumstances surrounding the matter that led to the creation of the record are not dissimilar from the circumstances in Order MO-1285. Accordingly, I find that the record, as a whole, contains the personal information of both the appellant and the affected persons.

INVASION OF PRIVACY

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

Section 38(b) of the *Act* introduces a balancing principle. The City must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their 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 access to the personal information of the requester.

In determining whether the exemption in section 38(b) applies, 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 the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the City to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

A section 14(3) presumption can be overcome if the personal information at issue falls under section 14(4) of the *Act* or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 14 exemption (See: Order PO-1764).

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

The representations

As I noted above, the City originally exempted the entire record under section 38(b) of the *Act,* relying on the presumptions in sections 14(3)(b) and (h). It subsequently changed its decision and is now prepared to disclose the record with minor severances pertaining to the affected persons.

Preliminary to its discussion under section 38(b), the City states that it is not carrying out a law enforcement investigation into the matter, but confirms that an investigation was conducted by the Commission. The City indicates that it does not believe that it has sufficient grounds to support the application of the law enforcement exemption in section 8 and, therefore, withdraws its reliance on this exemption claim.

The City continues to assert the discretionary exemption in section 38(b)

> As the record contains personal information about the authors as well as the applicant, the disclosure of which would result in an unjustified invasion of the privacy of the authors [pursuant to section 14(3)(h)]
>
> …
>
> Notwithstanding the inapplicability of subsection 14(2) on the finding of a presumption of an unjustified invasion of personal privacy, because of decision under section 38 is a discretionary decision, it was appropriate for the City Clerk to consider the circumstances found in subsection 14(2).

The City reviewed all of the factors listed under section 14(2) and concluded that the factors favouring privacy protection in sections 14(2)(f), (g), (h) and (i) are relevant to the information to which the presumption in section 14(3)(h) applies. The City submits that none of the other factors and considerations under section 14(2) are relevant.

The representations submitted by the affected person support the application of the factors considered by the City, but go further to apply them to the record in its entirety. The affected person also submits that disclosure of the record would expose her and her organization to pecuniary or other harm and thus raises the relevance of the factor in section 14(2)(e) of the *Act*.

The appellant's representations consist of a brief paragraph regarding the status of investigations into the allegations made against the Bingo hall:

> The [City] has not by their own admission either conducted or investigated any alleged by-law infractions. Attached at Exhibit 1 is a fax from the [Commission] Enforcement Unit confirming that the allegations levelled against the [Bingo hall] were investigated and found to be unsubstantiated. The investigation was complete and closed.

The complete name of the enforcement unit is "Alcohol and Gaming Commission Ontario Provincial Police Enforcement Unit". The facsimile is from a named police officer and sets out the conclusions he made in a report he prepared for the Commission.

The law

In my view, the following sections of the *Act* are relevant to the discussion: Sections 14(2)(e), (f), (g), (h), (i), 14(3)(b) and (h). These sections read:

> (2) 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;
> >
> > (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
> >
> > (i) the disclosure may unfairly damage the reputation of any person referred to in the record.
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
> >
> > (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

Analysis and findings

Section 14(2) factors

The concerns raised in the record at issue refer to the appellant's attitudes towards and treatment of the affected persons from the affected persons' perspective. In my view, they are personal and

sensitive in nature and reflect a somewhat acrimonious relationship between two groups, and the individuals that are associated with them.

I am satisfied that disclosing the record in its entirety would cause the author and individuals referred to in it extreme personal distress (Order M-1053), and the factor in section 14(2)(f) is relevant. Moreover, given the concerns raised in the letter, I find that this factor weighs significantly in favour of non-disclosure.

I am also satisfied that the affected person who authored the letter likely sent it with an expectation that it was being submitted in confidence. I find, therefore, that the factor in section 14(2)(h) is relevant.

I am not persuaded, however, that this expectation is entirely reasonable to all of the contents of the letter. The letter was sent to a number of authorities with the intention that it lead to an investigation into the appellant's actions. In this circumstance, the author must have known that the nature of the allegations would likely be made known to the appellant. As a result, I find that this factor has little weight insofar as the specifics of the allegations are concerned.

That being said, I find that the expectation of confidentiality is greater regarding the manner in which the concerns were stated, such as the language used, the sentiment expressed. The factor in section 14(2)(h) carries greater weight insofar as this information is concerned.

I accept the affected person's argument that disclosure of the personal information in the record would expose her organization unfairly to pecuniary or other harm. This, however, is not relevant to the application of the consideration in section 14(2)(e). Despite this, I find that, as a consequence of the potential for retaliation in response to disclosure, the affected person would likely be exposed to some pecuniary harm. I accept that, in the circumstances, this harm would be unfair.

The record reveals a number of comments about various individuals, and alludes to other issues pertaining to them. I have insufficient evidence before me to conclude that the information is unlikely to be accurate or reliable, but I am satisfied that its disclosure may unfairly damage the reputation of a number of individuals referred to in the record. Therefore, I find that the factor in section 14(2)(i) is relevant, while the factor in section 14(2)(g) is not.

I have not been provided with any evidence to support a conclusion that any of the factors favouring disclosure are relevant in the circumstances.

Section 14(3) presumptions

Certain portions of the record at issue refer to the sexual orientation of a number of individuals. I find that these references fall within the presumption under section 14(3)(h). The City has withheld certain specific references under this presumption. However, in my view, the severing that the City has done is insufficient in removing the offending sentiments from the record. In other words, even with the removal of certain words and phrases, the meaning behind them is still understandable from what remains.

In addition, although the City has not submitted representations on the application of the presumption in section 14(3)(b), I am satisfied that it applies in the circumstances.

In Order PO-1892-F, Assistant Commissioner Tom Mitchinson considered whether investigations conducted by the Commission qualify as "law enforcement" activities. He concluded that the Commission has the authority to conduct investigations for compliance with the *Criminal Code* and the *Gaming Control Act*. He also found that the results of these investigations could lead to proceedings in a court where sanctions can be imposed. He found, therefore, that the Commission's investigation and enforcement activities satisfied the definition of "law enforcement" in section 2(1) of the *Act*. Other orders of this office have come to similar conclusions (see Order P-1399, for example).

I agree with these findings.

The evidence submitted by the appellant clearly shows that a member of the Ontario Provincial Police conducted an investigation into the allegations on behalf of the Commission. The fact that the allegations were found to be unsubstantiated and that the investigation is now over does not negate the applicability of subsection 14(3)(b). The presumption in subsection 14(3)(b) only requires that there be an investigation into a possible violation of law (See Order P-242).

In summary, I find that the presumption in section 14(3)(b) applies to the record in its entirety and that the presumption in section 14(3)(h) applies to portions of it. I also find that the factors favouring privacy protection in sections 14(2)(e), (f), (h) and (i) are relevant to varying degrees. In the circumstances, I conclude that disclosure of the personal information in the record would constitute an unjustified invasion of privacy.

The City indicates that it has exercised its discretion under section 38(b) to disclose the majority of the record, and to withhold only small portions pursuant to the presumption in section 14(3)(h).

Exercise of discretion

Recently, in Order PO-2129-F, Senior Adjudicator David Goodis commented on an institution's exercise of discretion under the provincial *Act*. In my view, this discussion is relevant to an exercise of discretion under the *Act*. He said:

> The section 49(b) exemption is discretionary, and permits the Ministry to disclose information, despite the fact that it could be withheld. On appeal, this office may review the Ministry's decision to determine whether it exercised discretion and, if so, to determine whether it erred in doing so. However, this office may not substitute its own discretion for that of the institution [see section 54(2)]. This office may find that an institution erred in its exercise of discretion where, for example:
>
> - it does so in bad faith or for an improper purpose;

- it takes into account irrelevant considerations; or

- it fails to take into account relevant considerations.

In that event, this office may send the matter back to the institution for a re-exercise of discretion, based on proper considerations [Order MO-1573].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that:

  - information should be available to the public;

  - individuals should have a right of access to their own personal information;

  - exemptions from the right of access should be limited and specific;

  - the privacy of individuals should be protected

- the wording of the exemption and the interests it seeks to protect;

- whether the requester is seeking their own personal information;

- whether the requester has a sympathetic or compelling need to receive the information;

- whether the requester is an individual or an organization;

- the relationship between the requester and any affected persons;

- whether disclosure will increase public confidence in the operation of the institution;

- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;

- the age of the information; and

- the historic practice of the institution with respect to similar information.

The City states:

> So long as the City was claiming an exemption to disclosure under subsection 8(1)(b) and (d) it was not possible to sever the record. Now that the City is abandoning its claim to an exemption under section 8, we believe that the record should be disclosed pursuant to subsection 36(1) of the *Act* provided the personal information of the authors is severed in accordance with subsection 4(2) of the *Act*.

In my view, the City's rationale for exercising its discretion in favour of disclosing the majority of the record at issue to the appellant reflects a number of errors, not the least of which is a failure to explain how it exercised its discretion.

First, the City failed to consider whether the record in its entirety qualified as personal information. Although the City identified certain portions of the record that clearly fell within one of the enumerated classes of information set out in section 2(1) of the *Act*, it is not clear from the representations that the City turned its mind to the remaining portions of the record. As a result, I am unable to conclude that the City took into consideration that the record as a whole contained the personal information of the parties.

Moreover, the City failed to consider whether the personal information in the record was subject to the presumption in section 14(3)(b). Despite confirming that the Commission was conducting an investigation, the City's representations do not address this issue. Therefore, I am unable to conclude that the City took this into consideration in exercising its discretion to disclose the record.

Finally, the City has identified and argued the relevance of a number of factors that favour privacy protection. Yet, without discussion or a finding that any factors or considerations favour disclosure, the City has exercised its discretion to disclose the record. In my view, these inconsistencies suggest a lack of full consideration of all relevant factors.

In conclusion, I find that the City has erred in its exercise of discretion in that it has failed to take into consideration relevant considerations. Therefore, I am sending this matter back to the City for a re-exercise of discretion, based on proper considerations.

It is open to the City at this point to exercise its discretion in favour of disclosure or non-disclosure. In addressing this issue, however, the City should refer to the above discussion and articulate the considerations on which its decision is based.

ORDER:

1. I do not uphold the City's revised decision.

2. I order the City to re-exercise its discretion under section 38(b) of the *Act* and to provide the appellant and the affected persons with a decision on or before **June 19, 2003**.

3. In order to verify compliance with the provisions of this order, I Order the City to provide me with a copy of this decision within 25 days.

Original signed by: ____________________ ____________May 30, 2003______

Laurel Cropley
Adjudicator