



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1864

Appeal MA-040041-1

City of Hamilton



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NATURE OF THE APPEAL:

Under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) the City of Hamilton (the City) received a request for access to an Inspection Report concerning noise at a specific municipal address.

The City identified records responsive to the request and granted access to some of the responsive records and denied access to the remainder on the basis of the exemptions contained in sections 8(1)(b) and (c) (law enforcement) of the *Act*.

The requester (now the appellant) appealed the decision.

During the course of mediation and within the 35 day limit to claim additional discretionary exemptions, the City issued a supplementary decision advising that it would also be relying on the exemption set out at section 8(1)(a) of the *Act* (interference with a law enforcement matter) to deny access to the remaining records.

The appeal did not resolve at mediation and the matter was referred to the adjudication stage.

A Notice of Inquiry setting out the issues in the appeal was sent first to the City, which then provided representations in response. In its representation the City advised that it was no longer relying on the exemptions set out in sections 8(1)(b) and (c) and would be relying only on section 8(1)(a) as the sole basis for denying access to the remaining responsive records.

A Notice of Inquiry and the City's representations modified to reflect the withdrawal of the exemptions set out in sections 8(1)(b) and (c) were then sent to the appellant, who provided representations in response.

RECORDS:

The records remaining at issue are portions of a collection of documents relating to noise at a specific municipal address.

DISCUSSION:

LAW ENFORCEMENT

The City takes the position that the records remaining at issue are exempt from disclosure under the discretionary exemption set out at section 8(1)(a) of the *Act*, which reads:

8. (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,
 - (a) interfere with a law enforcement matter.

General principles

Law Enforcement

The term “law enforcement” is used in several parts of section 8, and is defined in section 2(1) of the *Act* as follows:

“law enforcement” means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b)

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

Under section 8(1)(a), the City must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Goodis* (May 21, 2003)]. It is not sufficient for the City to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfillment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*, cited above].

The Representations of the City

In its representations the City states that the records at issue in the appeal were prepared as a submission to the court by the City’s Co-ordinator of Standards and Licensing as a result of an investigation concerning a potential infraction of the City’s Noise By-Law. The City took time to consider the request for information and released those responsive records it determined would not compromise its investigation and any proceedings that may occur. The City has laid charges, and the matter is now before the court. A pre-trial in the matter was set for October 18, 2004. The City asserts that as the matter is before the courts, disclosure of the remaining information would interfere with a law enforcement matter.

The City relies on Order M-450, a case where an investigation was concluded and charges had been laid, and where the adjudicator found that, based on their review of the records and the representations in that case, section 8(1)(a) applied.

The City also relies on the decision of this office in Order P-547 where it says it was determined that the forthcoming trial in that matter was a law enforcement matter and that any record whose disclosure could reasonably be expected to interfere with the preparation for, or conduct of, that proceeding was exempt under an equivalent provision of the *Freedom of Information and Protection of Privacy Act*.

The City submits disclosure of the remaining records could affect the prosecution and the affected party, although they fail to explain how.

The Representations of the Appellant

The appellant, who is an individual living near the municipal address, submits the following:

- a) that they are affected by the actions that take place at that location,
- b) that the investigation took place at the request of the appellant,
- c) that some measurements set out in the records may have been taken from the appellant's property, and
- d) that releasing the information would not interfere with any past, present or future law enforcement matter, particularly as notice has been given that it is intended that the appellant will be commencing a civil action as a result of actions at the municipal address.

Analysis

I am satisfied that the remaining records were generated in relation to a law enforcement matter, satisfying the definition set out in section 2(1)(b) and/or (c) above. [Order MO-1245]

However, although the City says that the prosecution and even the affected party could be affected by the disclosure of the information, they do not go the extra step to explain how, simply asserting that, as the matter is before the courts, the information should not be released. In the result, in my opinion, the City has failed to provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". As set out above, it is not sufficient for the City to simply state, without more, that the record is part of a continuing law enforcement matter to fulfil the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*, cited above]. What distinguishes this appeal from Orders M-450 and P-547 is that in those cases, the adjudicators found, after reviewing the records and the representations, that they had been provided with sufficient evidence to establish a reasonable expectation of harm. I have found that not to be the case here.

As I have found that the City has failed to provide sufficient evidence or argument to establish that the exemption in section 8(1)(a) applies, the information shall be released to the appellant.

ORDER:

1. I order the City to disclose the records to the appellant by **December 1, 2004**.
2. In order to ensure compliance with the terms of Provision 1, I reserve the right to require the City to provide me with a copy of the records that are disclosed to the appellant.

Original signed by: _____
Steven Faughnan
Adjudicator

November 9, 2004