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

ORDER MO-1959

Appeal MA-040370-1

City of Thunder Bay

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NATURE OF THE APPEAL:

The City of Thunder Bay (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of an incident report in regard to an incident in which the requester's dog was attacked by another dog. The City located records it considered responsive to the request. After notification to an affected third party under section 21 of the *Act*, the City granted partial access to the responsive records. In their decision not to grant full access, the City relied on sections 38(b) (personal privacy), as well as sections 8(1)(b) and 8(1)(c) and 8(2)(a) of the *Act* (law enforcement).

The requester and his wife (now the appellants) appealed the City's decision.

During mediation of the appeal, the appellants indicated they were only interested in the incident reports, and were not interested in obtaining full copies of the records in which only the name, address and/or telephone number of the affected party was severed because they already had this personal information. On this basis, the appellants agreed to remove all records **except** for pages 5, 9 and 10 from the scope of this appeal. As these records contained further information relating to the affected party, the mediator contacted the affected party in an attempt to obtain the consent of this individual to disclose his or her personal information. The affected party did not consent.

As no further issues could be resolved, the file was moved to the adjudication stage. Upon reviewing the records, I identified an additional affected party. In addition, I noted that because the records appeared to contain the appellants' personal information, section 38(a) of the *Act* may apply, in conjunction with section 8(1)(b) and (c) and 8(2)(a) of the *Act*. I raised this as an issue in the Notice of Inquiry.

I sent the Notice of Inquiry to the City and the two affected parties, initially, and invited them to submit representations. The City and affected parties provided representations. The affected parties opposed the release of their personal information. I then sent a Notice of Inquiry to the appellants along with the City's complete representations. The representations of the affected parties were summarized in the Notice of Inquiry.

The appellants provided representations in response.

RECORDS:

The records at issue in this appeal and the exemptions claimed for them are:

- Computer printout titled "Text Field Editor" (page 5) – section 38(b) in conjunction with sections 14(2)(a), (h) and (i) (personal privacy) and section 38(a) in conjunction with sections 8(1)(b) and (c) and 8(2)(a).

- City of Thunder Bay, Animal Control – Witness Statement dated September 17, 2004 (pages 9 and 10) - section 38(b) in conjunction with sections 14 (2)(a), (h) and (i) and section 38 (a) in conjunction with sections 8(1)(b), (c) and 8(2)(a).

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) and states, in part, as follows:

> "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,
>
> (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,
>
> (g) the views or opinions of another individual about the individual,

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

The meaning of "about" the individual

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

Do the records contain personal information and if so, to whom do they relate?

The City submits that the records "contain personal information relating to the dog owner and a third party individual…".

The appellants submit that "[t]he opinion of the dog owner as it relates to information about the appellant is not considered 'personal information' as defined in section [2(1)(e)] of the [*Act*]". In addition, in their representations, the appellants indicate that they do not seek access to personal information of the affected parties such as their names, addresses or telephone numbers. This information is therefore not at issue and will be severed from any passages ordered to be disclosed.

Page 5 is a printout of a computer-generated incident report. The report has been completed to record conversations between the City investigator, the appellant and one affected party. In my view, this record contains the personal information of one of the appellants and both affected parties. Page 5 also contains the name of another City employee.

Pages 9 and 10 consist of the witness statement given to the City investigator by one of the affected parties. The information in this record includes the date, time, location and a summary or description of the incident being reported, as well the name, age, employer, personal address and home and business telephone numbers of that affected party. It also refers to both appellants. I find that this record contains the personal information of the appellants and one of the affected parties.

The records also contain information of a non-personal nature, such as the time, date and location of the incident. I find this is not personal information. In addition, the records contain information about an exchange or exchanges between two dogs and other information about each of the dogs. In the circumstances of this appeal, I find that this is not "information "about an identifiable individual" and is therefore not personal information.

The information about the investigator and the other City employee appears in those individuals' employment capacity. Their involvement or presence does not reveal anything of a personal nature. Such information is normally considered to be information about employees in their professional capacity, and not considered personal information [Order MO-1288]. I find that it is not personal information.

In summary, I find that the records at issue contain the personal information of the appellants and the affected parties.

PERSONAL PRIVACY

General principles

Section 36(1) of the *Act* gives individuals a general right of access to their own personal

information held by an institution. Section 38 provides a number of exemptions from this right. The City takes the position that the undisclosed portions of the record are exempt under the discretionary exemption in section 38(b) in conjunction with sections 14(2)(a), (h) and (i) (personal privacy).

Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

Under section 42 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution.

In order for disclosure to constitute an unjustified invasion of another individual's personal privacy, the information in question must be the personal information of an individual or individuals other than the person requesting it. Some parts of the records contain the personal information of the appellants only, and others do not contain personal information at all. This information therefore cannot be exempt under section 38(b) and I find that it is not.

I will now consider whether disclosure of the information relating to the affected parties in the withheld portions of the records, other than their names, address and telephone number, would constitute an unjustified invasion of personal privacy.

Sections 14(2), (3) and (4) of the *Act* provide guidance about whether disclosure would constitute an unjustified invasion of privacy.

If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

In the circumstances, it appears that the presumption at section 14(3)(b) may apply. This section states:

> 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;

Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law [Order P-242].

In this case, it is abundantly clear from my review of the records that they were compiled and are identifiable as part of an investigation into a possible violation of the City's animal control by-law.

Sections 14(4) and 16 do not apply in this case. Subject to my finding below under "absurd result", I therefore find that disclosure is a presumed unjustified invasion of personal privacy, and to the extent that the withheld portions of the records contain the affected persons' personal information, that information is therefore exempt under section 38(b).

Absurd Result

In some instances, where the requester originally supplied the information, or is otherwise aware of it, the information may be found not exempt under section 38(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

I have considered whether this principle has any application in the present case. Some of the information that would otherwise be exempt involves conversations between one of the affected parties and one or both of the appellants, and as such would clearly be known to them. In the circumstances of this appeal, I therefore find that information is not exempt under section 38(b). The only other information to which the principle could apply is either not personal information (e.g. information about the dogs only) and therefore not exempt under section 38(b), or not at issue (i.e. information about the affected parties to which the appellants do not seek access).

DISRECTION TO REFUSE REQUESTER'S OWN INFORMATION/LAW ENFORCEMENT

Section 38(a) states:

> A head may refuse to disclose to the individual to whom the information relates personal information:
>
> (a) if section 6, 7, **8**, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information;

Sections 8(1) and (2) state, in part, as follows:

> (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (2) A head may refuse to disclose a record,
>
> (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) 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)

The term "law enforcement" has been found to apply in the following circumstances:

- a municipality's investigation into a possible violation of a municipal by-law [Orders M-16, MO-1245]
- a police investigation into a possible violation of the *Criminal Code* [Orders M-202, PO-2085]
- a children's aid society investigation under the *Child and Family Services Act* [Order MO-1416]
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997* [Order MO-1337-I]

The term "law enforcement" has been found *not* to apply in the following circumstances:

- an internal investigation to ensure the proper administration of an institution-operated facility [Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.)]

- a Coroner's investigation under the *Coroner's Act* [Order P-1117]

- a Fire Marshal's investigation into the cause of a fire under the *Fire Protection and Prevention Act, 1997* [Order PO-1833]

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.)].

Where sections 8(1)(b) and (c) uses the words "could reasonably be expected to", the institution 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. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

It is not sufficient for an institution 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* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

Sections 8(1) and (2)

Section 8(1)(b): law enforcement investigation

The law enforcement investigation in question must be a specific, ongoing investigation. The exemption does not apply where the investigation is completed, or where the alleged interference is with "potential" law enforcement investigations [Order PO-2085].

The institution holding the records need not be the institution conducting the law enforcement investigation for the exemption to apply [Order PO-2085].

Section 8(1)(c): investigative techniques and procedures

In order to meet the "investigative technique or procedure" test, the institution must show that

disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public [Orders P-170, P-1487].

The techniques or procedures must be "investigative". The exemption will not apply to "enforcement" techniques or procedures [Orders PO-2034, P-1340].

Section 8(2)(a): law enforcement report

The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact [Orders P-200, MO-1238, MO-1337-I].

The title of a document is not determinative of whether it is a report, although it may be relevant to the issue [Order MO-1337-I].

Analysis and Findings

The City's representations were: "Yes, this clearly is a law enforcement issue. Release of information could significantly jeopardize/interfere with an investigation." The appellants' representations simply submitted that the "law enforcement investigation has been completed".

This submission of the appellants is confirmed by the records. As stated above, for the exemption at 8(1)(b) to apply, the law enforcement matter or investigation must be specific and ongoing. The law enforcement matter/investigation is not ongoing. As it is not, I find that the records do not qualify for exemption under section 8(1)(b) and that section therefore provides no basis for finding them exempt under section 38(a).

I also find that the records do not qualify for exemption under section 8(1)(c). As noted previously, in order to meet the "investigative technique or procedure" test, the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public. The records, in my view, do not reveal any investigative technique or procedure, nor has the City met its evidentiary burden under section 42 of the *Act* as they have not provided me with any submissions, or "detailed and convincing" evidence that would satisfy the requirements of this section. Accordingly, section 8(1)(c) provides no basis for finding the records exempt under section 38(a).

In addition, I am not persuaded that the records qualify for exemption under section 8(2)(a). As previously noted, the word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact [Orders P-200, MO-1238, MO-1337-I]. The records at issue consist of a log-type recording of activities by date and time (page 5) and a witness statement (pages 9-10). They do not involve a "statement of the results of the collation and consideration

of information" as required to qualify as a report under section 8(2)(a). Therefore, section 8(2)(a) provides no basis for finding the records exempt under section 38(a).

As no other basis for applying it has been raised, I find that section 38(a) does not apply.

ORDER:

1. I uphold the decision of the City to deny access to those portions of the records which I have highlighted on the copies provided to the City Freedom of Information and Protection of Privacy Co-ordinator.

2. I order the City to give the appellants access to the portions of the records which are not highlighted by sending copies to them by **October 11, 2005** but not before **October 6, 2005**.

3. In order to verify compliance with Provision 2, I reserve the right to require the City to provide me with copies of the records that are disclosed to the appellants.

Original signed by: September 6, 2005
Beverley Caddigan
Adjudicator