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

ORDER MO-1964

Appeal MA-050018-1

City of Toronto

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NATURE OF THE APPEAL:

The City of Toronto (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for "the Fire Department Report and the notes of the officers and crew members" of a Fire Department vehicle in relation to an accident in which the requester was involved.

The City identified as responsive to the request a three-page document prepared by the Toronto Fire Service entitled "Emergency Incident Report A" (the Fire Department Report). The City granted access to parts of the Fire Department Report, including a description of how the accident allegedly happened. It applied the exemption in section 14(1) of the *Act* (personal privacy) to deny access to Fire Department staff user and personnel numbers, as well as the name and telephone number of a witness (the witness). The City's decision did not address the portion of the request asking for officer and crew notes.

The requester (now the appellant) appealed the City's decision, and this office appointed a mediator to assist in resolving the issues in the appeal.

During mediation, the City issued a supplementary decision advising the appellant that the City is relying on the exemption in section 38(b) of the *Act* in conjunction with section 14(1) to deny access to the Fire Department staff user and personnel numbers and the name and telephone number of the witness.

In its supplementary decision, the City also informed the appellant that the responsible Divisional Commander for Toronto Fire Services had been consulted and had advised that, in accordance with standard practice, all information about this accident is contained in the identified Fire Report and there are no additional notes. The appellant accepted that additional officer and crew notes do not exist.

During the mediation stage of the appeal, the appellant also narrowed the information at issue by removing the Fire Department staff user and personnel numbers from the appeal. Only the name and telephone number of the witness remain at issue.

As mediation did not resolve all the issues, this appeal entered the adjudication stage. Initially, I sent a Notice of Inquiry setting out the facts and issues in the appeal to the City and invited the City to provide representations. The City did so. I sent a copy of the City's representations to the appellant together with a Notice of Inquiry and invited the appellant to provide representations. I received representations from the appellant in response.

RECORDS:

The information at issue in this appeal is the name and telephone number of a witness to an accident, included in a record prepared by the Toronto Fire Service entitled "Emergency Incident Report A".

DISCUSSION:

PERSONAL INFORMATION

Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

The City claims that the name and telephone number of the witness are that individual's personal information, and disclosure of that information would be an unjustified invasion of the witness's personal privacy under section 14(1) or, if the record also contains the personal information of the appellant, under section 38(b).

General principles

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), 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,
>
> …
>
> (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;

The meaning of "about" the individual

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].

Analysis and findings

The Fire Department Report contains the personal information of the appellant, including his name, age and gender. It also contains the name and telephone number of another individual, who is listed as a witness to the accident involving the appellant. The name and telephone number of the witness are his personal information, as defined in paragraphs (d) and (h) of the definition of "personal information" in section 2(1) of the *Act*. There is no evidence that the information about the witness relates to his or her professional, official or business capacity.

Accordingly, I find that the record contains the personal information of both the appellant and the witness, and that the information at issue in this appeal, namely, the name and telephone number of the witness, are that individual's personal information. Therefore, it is necessary to consider whether the discretionary exemption in section 38(b) applies to the witness' personal information.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/PERSONAL PRIVACY OF ANOTHER INDIVIDUAL

Does the discretionary exemption at section 38(b) apply to the information at issue?

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.

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.

Sections 14(1) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold is met.

Do any of the exceptions in paragraphs (a) to (e) of section 14(1) apply?

If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of privacy under section 38(b).

Section 14(1)(a) to (e) provide:

> **14.** (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
>
> (b) in compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates;
>
> (c) personal information collected and maintained specifically for the purpose of creating a record available to the general public;
>
> (d) under an Act of Ontario or Canada that expressly authorizes the disclosure;
>
> (e) for a research purpose if,
>
> (i) the disclosure is consistent with the conditions or reasonable expectations of disclosure under which the personal information was provided, collected or obtained,
>
> (ii) the research purpose for which the disclosure is to be made cannot be reasonably accomplished unless the information is provided in individually identifiable form, and
>
> (iii) the person who is to receive the record has agreed to comply with the conditions relating to security and confidentiality prescribed by the regulations;

I find that none of the exceptions listed in section 14(1)(a) to (e) apply in this case. I will therefore consider the application of paragraphs (a) and (b) of section 14(4).

Do any of paragraphs (a) and (b) of section 14(4) apply?

If paragraphs (a) or (b) of section 14(4) apply, disclosure is not an unjustified invasion of privacy under section 38(b).

Section 14(4)(a) and (b) provide:

> (4) Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,
>
> (a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution; or
>
> (b) discloses financial or other details of a contract for personal services between an individual and an institution.

I find that section 14(4) does not apply. I will now consider whether any of the presumptions in section 14(3) apply.

Do any of the presumptions in paragraphs (a) to (h) of section 14(3) apply?

Section 14(3) provides:

> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
>
> (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;
>
> (c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels;
>
> (d) relates to employment or educational history;

> (e) was obtained on a tax return or gathered for the purpose of collecting a tax;
>
> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
>
> (g) consists of personal recommendations or evaluations, character references or personnel evaluations; or
>
> (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

If any of paragraphs (a) to (h) of section 14(3) apply, disclosure is presumed to be an unjustified invasion of privacy under section 38(b) and 14. Once established, a section 14(3) presumption can only be overcome if section 14(4) or the "public interest override" in section 16 applies [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

The City does not claim that section 14(3) applies to this information, and on my review of the record in question and the representations of the parties, I do not find any evidence that any of the presumptions in section 14(3) apply. Therefore, I will consider the application of section 14(2).

Do any of the section 14(2) factors apply?

If no section 14(3) presumption applies, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy under section 38(b) [Order P-239].

Section 14(2) provides:

> (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,
>
> (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;
>
> (c) access to the personal information will promote informed choice in the purchase of goods and services;

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

(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.

The list of factors under section 14(2) is not exhaustive. The institution must also consider any other factors that are relevant in the circumstances of the case, even if they are not listed under section 14(2) [Order P-99].

In its representations, the City submitted that the name and telephone number of the witness are "highly sensitive" information under section 14(2)(f).

In support of its position, the City relied upon two previous orders issued by this office, stating:

> In Order M-748, Inquiry Officer Laurel Cropley considered whether the personal information about a tenant contained in a fire department report should be released to the appellant, an insurance adjuster. The adjuster submitted that the report contained information from people at the scene of a fire, which would help to determine if there was liability on behalf of a tenant in the building. Ms. Cropley found that the adjuster's submissions had some bearing on the sensitivity of the information with respect to tenants and concluded that the information relating to the tenants was highly sensitive under section 14(2)(f) of the *Act*. She held that the personal information was properly exempted under section 14(1).
>
> Similarly, in Order MO-1211, Adjudicator Holly Big Canoe considered a request by an insurance company to [sic] a fire report containing the name of a property owner and other individuals involved in a particular residential fire. The insurance company argued that it requested the information to determine its subrogation rights against third parties involved in the loss. The Adjudicator held that the appellant's representations had a bearing on the sensitivity of the information at issue with respect to the individuals named in the report and

> concluded that the personal information in the report was highly sensitive within the meaning of section 14(2)(f).

The City also stated that in completing its report, the Fire Services relied in part on the witness's statement as to how the appellant sustained his injuries. The City submits that, "The fact that the appellant has retained a law firm to represent him with respect to injuries he sustained in the accident as noted in the Fire Report has a bearing on the sensitivity of the information at issue".

The City stated in its representations that it also considered the possible relevance of section 14(2)(d) - whether the personal information is relevant to a fair determination of the appellant's rights. The City stated that:

> It is the City's experience that typically insurance adjusters and solicitors seek fire reports/emergency reports to confirm the details of a fire/accident, including the date, nature of the damage/injury and the cause, in order to assess the strength of a claim or potential claim. In this appeal, the appellant has been provided with nearly all of this information. The City submits that a further disclosure of the severed sensitive personal information would not add appreciably to the detailed information already released to the appellant. The City does not believe that this information is relevant to a fair determination of the rights of the appellant.
>
> The City further submits that if the appellant does require the information at issue for the purposes of litigation or potential litigation, discovery mechanisms are available to the appellant to ensure a fair hearing. In Order PO-1833, Senior Adjudicator David Goodis considered an insurer's request for an Ontario Fire Marshal's Report and other related materials. The insurer argued that it required the records for litigation purposes, relying on section 21(2)(d), the provincial equivalent of section 14(2)(d).
>
> The Adjudicator was not convinced that the information was required in order to prepare for a proceeding or to ensure an impartial hearing. He concluded that he was not convinced that discovery mechanisms available to the appellant would be insufficient to ensure a fair hearing.
>
> Similarly, the appellant in this appeal may take advantage of discovery mechanisms if he chooses to pursue litigation.

Is the information highly sensitive?

To be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause excessive personal distress to the subject individual [Orders M 1053, P 1681, PO-1736].

The orders issued by this office dealing with whether the names of witnesses are highly sensitive information indicate that this will depend upon the circumstances of each case, including the context in which the names are found. For example, the identities of witnesses have been found to be highly sensitive when they have given witness statements in relation to complaints of racial harassment involving co-workers within a small department where disclosure could affect the ongoing relationships of the witnesses with other co-workers. [Order P-1169; see also Orders P-738, P-854, and M-423].

However, this does not mean that the names of witnesses are always highly sensitive information. In each of the orders cited by the City, the Adjudicators made it clear that their findings depended on the particular representations and the particular nature of the information in that appeal. There is no indication in either order cited by the City that the circumstances were similar to this appeal. Those cases involved the owners and occupants of buildings that caught fire. The nature of their involvement led to the "highly sensitive" findings. That involvement is quite different from the role of the witness in this appeal. Here, the requester was injured in an accident at what he describes in his representations as "a busy intersection". He describes the witness as "a pedestrian" who happened to witness this accident.

According to the Fire Department Report, the accident occurred in broad daylight, at about noon. There is no suggestion or evidence that the witness was involved in or responsible for the accident, has any relationship with the requester, or any other circumstance to suggest that disclosure of the witness's name and telephone number would cause excessive distress to the witness. The mere fact that a bystander witnessed an accident and may have relevant evidence about its cause does not make his or her name and telephone number highly sensitive information.

There is another fact that is relevant to a determination of whether the name and telephone number would be likely to cause excessive personal distress. The witness is dead. When a representative of this office attempted to contact the witness to determine his views on disclosure of the information on April 1, 2005, the wife of the witness told him that the witness had died six months earlier.

In my view, this weighs against a finding that the information is highly sensitive. In addition to the effect on the deceased, I have considered whether disclosure might cause excessive distress to the witness's family; for example, if the appellant were to contact the witness's wife. While such contact might be unwelcome, there is nothing in the facts of this case that suggests it would cause any effect that could be characterized as "excessive distress".

The City argues that the fact that the appellant has retained a law firm to represent him with respect to injuries he sustained in the accident has a bearing on the sensitivity of the information at issue. However, the City does not explain how the fact that the appellant has retained a lawyer increases the sensitivity of the information. There is no suggestion in the representations of either party, for example, that the appellant seeks to impose any legal responsibility for this accident on the witness.

Even if the appellant intended to sue the witness, this would not in itself make the identity of the witness highly sensitive information. Section 14(2)(e) would also have to be considered in that event, since it deals directly with pecuniary harm. It suggests that disclosure leading to pecuniary harm would only be a factor weighing in favour of a finding of unjustified invasion of privacy where that harm would be *unfair*. A legal action tried in the Canadian court system is intended, on the contrary, to produce results that are *fair*, and to fairly assess liability. Reading section 14(2)(f) in the context of section 14(2) as a whole would therefore, absent other factors, mitigate *against* a finding that a possible intention to sue renders personal information highly sensitive.

In the circumstances, I am not satisfied that the name and telephone number of the witness are highly sensitive information.

Is the personal information relevant to a fair determination of rights affecting the appellant?

For section 14(2)(d) to apply, it must be established that:

(1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and

(2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and

(3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

(4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing

[Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)].

I am satisfied that the appellant wants the name and telephone number of the witness for the purpose of assessing the strength of a legal claim or potential claim and that the information is relevant to this purpose based on the following:

- the City's representations that the appellant has retained a law firm to represent him with respect to injuries he sustained in the accident;
- the City's representations that the description of the cause of the accident in the Fire Department Report was supplied in part by the witness;

- the fact that the request under the *Act* was submitted on behalf of the appellant by a law firm; and
- the appellant's description in his representations of his interest in this information in relation to his "claim".

In my view, the fact that this information may also be available to the appellant through the discovery process does not mean that section 14(2)(d) has no application, although it affects the weight to be given to this factor.

However, previous orders have held that where the requested information would be of little or no assistance to the requester in pursuing his or her remedies, section 14(2)(d) has no application [Order PO-1931].

In this case, the information would be of little or no assistance to the appellant because the witness has died. Because of this, I find that section 14(2)(d) is not a factor weighing in favour of disclosure.

Has the personal information been supplied by the individual to whom the information relates in confidence?

Section 14(2)(h) provides that where information has been supplied in confidence, this is a relevant circumstance in assessing whether disclosure would constitute an unjustified invasion of privacy. Neither party raised this as a potentially relevant factor. Nevertheless, in my view, it is a relevant consideration in this case. If there was an expectation that the information would be kept confidential, this would support a finding that disclosure would constitute an unjustified invasion of privacy. Conversely, if there was not only no expectation of confidentiality, but in fact it would appear there was an expectation that the information would be disclosed, this would be a relevant circumstance that weighs in favour of disclosure.

In my view, in these circumstances, it is reasonable to conclude that a witness who voluntarily came forward to provide information and gave his name and telephone number not only had no expectation of privacy, but actually expected the information to be disclosed to the parties to the accident if litigation between them were contemplated.

It might be argued in the case of voluntary disclosure of such information to the police that there is an expectation that the police will use it in their own investigation of whether to lay charges, rather than an expectation that the police would give it to the parties to the accident. In my view, however, this is not the case in the circumstances of this appeal because fire department staff who attend at the scene of an accident on the street in Toronto do so to assist in preventing or dealing with injuries rather than to investigate. Accordingly, in my view it is likely that the witness had an expectation that his name and telephone number would be disclosed to the requester should it be needed to assess the strength of a legal claim.

I find that section 14(2)(h) does not apply, and the likely expectation that the information would be disclosed is a factor that strongly favours disclosure.

Other factors

As I stated earlier, the list of factors under section 14(2) is not exhaustive. The institution must also consider any other factors that are relevant in the circumstances of the case, even if they are not listed under section 14(2).

Although the fact that the witness is deceased is relevant in considering whether his name and telephone number are highly sensitive information, as discussed above, the fact that the individual to whom the information relates is deceased has also been recognized by this office as an unlisted factor favouring disclosure of such information, on the basis that the privacy interest associated with personal information diminishes after death [Order M-50].

In this case, the witness died around October of 2004. Given the length of time that has passed since his death and the circumstances of this case, in my view the fact that the witness is deceased is a factor that weighs heavily in favour of disclosure.

Given the circumstances of this case, having considered various factors that are relevant to whether disclosure would be an unjustified invasion of the witness's privacy, I find that the disclosure of the witness's name and telephone number would not constitute an unjustified invasion of personal privacy, and therefore, this information is not exempt under section 38(b).

ORDER:

1. I order the City to disclose to the appellant the name and telephone number of the individual described in the Fire Department Report as a witness to the accident involving the appellant by sending him this information no later than **October 6, 2005** from the date of this order.

2. To verify compliance with this order, I reserve the right to require the City to provide me with a copy of the material disclosed to the appellant.

Original signed by: September 14, 2005
John Swaigen
Adjudicator

POSTSCRIPT:

CONTACTING INDIVIDUALS WHERE AN INVASION OF THEIR PERSONAL PRIVACY IS ALLEGED

Institutions frequently make a decision that disclosure of the personal information of other individuals to requesters would unjustifiably invade the privacy of those individuals. This assessment is often made without any attempt to determine how those individuals feel about disclosure. This can be unfair to requesters, as it may result in the institution making a decision to deny them information without having all the relevant information.

In my view, it would frequently be desirable for institutions to contact affected individuals before making a decision to withhold their personal information, particularly where the requester is seeking the other individual's personal information in the context of exercising his or her right of access to his or her own personal information under the *Act*.

Contacting affected individuals before making a decision that their privacy requires protection may have several positive results:

- The individual may consent to disclosure of the personal information, making it unnecessary for the institution to determine whether disclosure would constitute an unjustified invasion of privacy and avoiding a potential appeal to this office on this issue;

- Information obtained from the individual contacted may cause the institution to decide to disclose the requested information, or some of it, or may result in a better-informed and more clearly explained decision not to disclose;

- Even if the institution finds that the personal information is subject to an exemption under section 38(b) of the *Act* or section 49(b) of the *Freedom of Information and Protection of Privacy Act*, the institution must still exercise its discretion whether to disclose it. In doing so, the institution must take into account all relevant factors and disregard any irrelevant factors. The information received from the individual may affect how the institution exercises its discretion by bringing to its attention relevant factors of which it was not aware or making it aware that factors it thought were relevant were, in fact, irrelevant.

When an institution intends to withhold personal information on the grounds that its disclosure would unjustifiably invade the personal privacy of an individual, the *Acts* do not require the institution to contact the individual whose privacy it seeks to preserve to find out his or her wishes. In some cases, it will be obvious from the circumstances that the individual would consider disclosure an invasion of his or her privacy and would not consent to disclosure. To take an extreme example, the person whose personal information is at issue could be the victim of a violent crime perpetrated by the requester. In such cases, it may not be appropriate for the institution to contact the individual.

However, as indicated above, there are many other cases where the individual, if contacted, would consent to the disclosure of some or all of his or her personal information, or the institution would find out information that is relevant to deciding whether the exemption applies or is relevant to the exercise of its discretion whether to disclose information.

This case is a good example of the pitfalls of not finding out the expectations or wishes of those whose privacy an institution has decided to protect. In this case, the individual whose personal privacy the City was protecting had died before it made its decision, and the City was unaware of this fact because it made no effort to contact him. His death is a consideration that is highly relevant to the issue of whether his personal information is subject to the section 38(b) exemption, as it affects whether the personal information is "highly sensitive", a consideration in determining this. Even if the personal information is still found to be subject to the exemption, the fact that the individual is deceased is still relevant to the proper exercise of the City's discretion whether to disclose it. In regard to the exercise of discretion, the witness' death is a relevant factor because it affects both the strength of the interest in preserving his privacy and the usefulness of the personal information to the appellant.

As a result of not attempting to contact the witness, the City was not in a position to take into account factors that were relevant both to the issue of whether disclosure would be an unjustified invasion of privacy and to the exercise of its discretion if it found disclosure to be such an invasion.

In summary, while there would clearly be situations in which it would not be appropriate to seek the views of individuals whose personal information appears in a requested record before refusing to disclose the information, it is often the case that it would be fairer to a requester to contact individuals for that purpose than to refuse to disclose their personal information on the untested assumption that they would consider this an invasion of their privacy or that any such invasion is in fact unjustified.