



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

Reconsideration Order MO-2026-R

Appeal MA-050018-1

Order MO-1964

City of Toronto



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BACKGROUND:

The City of Toronto (the City) received a request under the *Municipal Freedom of Information Act* (the *Act*) for access to “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 located a report entitled “Emergency Incident Report A” (the Fire Department Report) and granted partial access to it, applying the mandatory exemption in section 14(1) of the *Act* (invasion of privacy) to deny access the name and telephone number of a witness.

The requester (now the appellant) appealed the City’s decision.

This office assigned a mediator to assist the parties in resolving the issues in dispute. During mediation, the City issued a supplementary decision advising the appellant that it is relying on the exemption in section 38(b) of the *Act*, in conjunction with section 14(1), to deny access to the information sought.

As mediation did not resolve all the issues, this appeal was moved to the adjudication stage. I sent a Notice of Inquiry setting out the facts and issues to the City and the appellant and invited them to provide representations. Both the City and the appellant provided representations.

Subsequently, I issued Order MO-1964 on September 14, 2005. In that decision, I ordered the City to disclose the name and telephone number of the witness to the appellant.

The Reconsideration Request

The City asked me to reconsider my Order on the grounds that I made six errors, one of which involves a finding that I made regarding the application of the factor in section 14(2)(f) to the information at issue. I considered each of these alleged errors in conjunction with the IPC’s policy governing the circumstances under which this office will reconsider an order.

The IPC’s reconsideration policy, as set out in section 18 of the *Code of Procedure* (the *Code*), states:

18.01 The IPC may reconsider an order or other decision where it is established that there is:

- (a) a fundamental defect in the adjudication process;
- (b) some other jurisdictional defect in the decision; or
- (c) a clerical error, accidental error or omission or other similar error in the decision.

18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

The decision to reconsider

Upon my review of the City's request for a reconsideration of my decision, I notified the City that in my view, five of the six grounds for reconsideration did not meet the criteria set out in Articles 18.01 and 18.02. Accordingly, I decided to reconsider my order only in relation to a single issue.

The City stated in its reconsideration request that I "erred in concluding that disclosure of the name and telephone number of the deceased witness would not cause the witness's wife 'excessive distress'".

The City went on to submit that:

Although the Adjudicator states that a representative of the IPC contacted the witness's widow on April 1, 2005 and discovered that the witness had died six months earlier, there is no suggestion that the Adjudicator obtained consent from the widow to disclose the information at issue, nor is there suggestion that the Adjudicator asked the widow herself whether disclosure of this information would cause "excessive distress".

I decided to reconsider my finding that "there is nothing in the facts of this case that suggests it would cause... 'excessive distress'" because I had not complied with the notification requirement in section 39(3) of the *Act*, which states:

Upon receiving a notice of appeal, the Commissioner shall inform the head of the institution concerned and any other affected person of the notice of appeal.

I notified the City that, because I had not notified the witness's wife of the appeal and provided her with an opportunity to make representations, I would reconsider Order MO-1964.

In my letter to the City, I stated:

Although the City did not identify the personal information withheld as the personal information of the witness's wife or allege that disclosure would constitute an unjustified invasion of her privacy, the fact is that the telephone number that the witness shared with his wife could also be argued to be the wife's personal information. As a result, the wife could be a person affected by disclosure of her personal information and therefore entitled to notice under section 39(3) of the *Act* before I make a decision as to disclosure of her personal information (which may include findings as to whether section 14(2)(f) applies).

Failure to do this could be considered a fundamental defect in the adjudication process.

To begin the reconsideration process, I sent the witness's wife a Notice of Inquiry setting out the facts and issues to be considered in this reconsideration. I invited her to provide representations as to whether the record contains personal information and whether disclosure would constitute an unjustified invasion of privacy under section 38(b). I also gave her an opportunity to consider whether she wished to consent to disclosure of the name and telephone number at issue. Her son contacted this office by telephone and advised that she did not intend to provide any representations; nor did she provide a consent to the disclosure of her personal information.

I then sent the City a Notice of Inquiry and received representations from the City. In light of the City's representations, I decided that I did not require representations from the appellant.

PERSONAL INFORMATION

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) 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,
- (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;

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

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].

The meaning of “identifiable”

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.)].

Analysis, representations, and findings

In its representations in appeal number MA-050018-1, the City claimed that disclosure of the name and telephone number of the witness would constitute an unjustified invasion of the personal privacy of an individual. The City did not identify the individual or individuals to whom the personal information relates. However, from the context, the City appeared to be concerned about the protection of the privacy of the witness, and, therefore, was implicitly alleging that the records contained his personal information.

In its representations on this reconsideration, the City alleges that the record at issue contains the personal information of the witness's wife and the personal information of “an individual employed by the City”. The City does not address whether the record contains the personal information of the witness. Although the City states that the record contains the personal information of a City employee, whether the information about this employee may be disclosed has not been put in issue in this appeal.

The City states that, “record 2 does not in fact contain the appellant's personal information”, although the City previously took the position that the record at issue does contain the appellant's personal information.

Although the City refers to “record 2”, there is only one record at issue in this appeal. As stated in the Notice of Inquiry and in Order MO-1964, and not previously disputed by the City, the record is a three-page document entitled “Emergency Incident Report A”. This record contains

the name of the appellant, together with additional information about him, including his age, gender and medical condition. The unit of analysis for the purpose of determining whether a request is for the requester's own personal information or the personal information of other individuals is the record rather than individual pages, paragraphs, sentences or words contained in a record [Order M-352].

I find that the record therefore contains the appellant's personal information. In my view, the name of the individual found on page two of this record relates purely to that individual in his professional or employment capacity, and is not the "personal information" of this individual. However, as disclosure of this information has not been requested in this appeal, nothing turns on this finding.

I found in Order M0-1964 that the record also contains the personal information of the deceased witness, and that finding is not disputed by the City, nor does any issue in this reconsideration turn on it.

The City claims that the record also contains the personal information of the witness's wife:

The City submits that in the circumstances of this appeal, the telephone number of the witness is also his widow's telephone number. The name of the witness is also her married name... . Further the name and telephone number can be used to ascertain her address. The name is an uncommon one and the address can be found by simply looking it up in the Toronto telephone directory and matching it to the telephone number.

I agree that the information that the appellant seeks includes the personal information of the witness's wife. As the record contains the information of both the appellant and the witness's wife, it is necessary to consider whether the wife's personal information is exempt from disclosure under section 38(b).

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.

As noted earlier, I previously found that disclosure of the information at issue would not constitute an unjustified invasion of the personal privacy of the deceased witness. This finding is not an issue in this reconsideration. Therefore, I will consider only whether disclosure of the witness's name, and the witness's telephone number, which is also the telephone number of the witness's wife, would constitute an unjustified invasion of the wife's privacy.

The City has not claimed that any of the presumptions of an unjustified invasion of privacy in section 14(3) apply, and based on my review of the evidence, I find that none of these presumptions 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) or 14 [Order P-239]. The City relies on the consideration favouring privacy protection set out in section 14(2)(f), which reads:

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,

(f) the personal information is highly sensitive;

The City argues that the section 14(2)(f) factor applies in relation to the witness's wife, and also identifies other unlisted factors that it argues favour non-disclosure. The City also argues that there are no relevant factors that favour disclosure. The City states that two factors that I relied upon in Order MO-1964 as favouring disclosure are not relevant in relation to the privacy of the witness's wife.

The question to be determined is whether the City has met its onus to establish that disclosure of this information would constitute an unjustified invasion of the witness's wife's personal 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. More specifically, under section 38(b), the parties resisting disclosure must demonstrate that disclosure *would be* an unjustified invasion of personal privacy.

The City alleges that the personal information in question is “highly sensitive” within the meaning of section 14(2)(f). Previous orders have stated that for personal information 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 individual to whom the personal information relates. The City relies on the fact that the witness’s wife has not consented to disclosure of the information in question as evidence that the information is highly sensitive.

The City *believes*...that it is *possible* that she did not give her consent because the disclosure of her personal information to the appellant would not only be unwelcomed but would cause her excessive personal distress. [Emphasis added].

The City provides no evidence to support its belief. The City, which has the onus of proving the facts that it alleges, has never contacted the wife to determine her reasons for not consenting to disclosure. I find that this allegation does not rise above speculation and I cannot give it more than marginal weight.

The City states that previous orders have held that the failure of an affected party to provide representations cannot be construed to mean that the party does not object to the release of information. It cites Orders PO-1791 and MO-1450.

In Order MO-1450, Adjudicator Sherry Liang stated:

I do not infer from the failure of the other theatre company to provide submissions in this appeal that it consents to the disclosure of its information...As I have noted elsewhere (see Order PO-1791), the absence of representations may be important if it results in a lack of evidence, but that is clearly not the case here.

In Order PO-1791, Adjudicator Liang stated:

The difficulty with the case before me...lies with the scarcity of evidence on the specifics of this affected party’s circumstances. ...As I have indicated, the affected party has chosen, as is its right, not to make representations on the issues. While I do not take the absence of any representations as signifying its consent to the disclosure of the information, the effect of this is that I have a lack of evidence on the issues...from the party which is in the best position to offer it.

In Order MO-1868-R, former Assistant Commissioner Tom Mitchinson addressed a situation where the affected persons were witnesses and the records at issue were their statements. He stated:

Although none of the remaining witnesses provided consent, neither did any of them provide representations in response to the Notice indicating an objection to the disclosure of their personal information. Although the absence of a response cannot be equated with consent, in my view, failure to provide representations is a

relevant consideration in assessing whether the “highly sensitive” factor in section 14(2)(f) is present.

Similarly, in this case, the failure of the City to contact the wife to find out the nature of her concerns, if any, about disclosure, together with the failure of the wife to provide any representations, leaves me with insufficient evidence to conclude that disclosure would cause the wife excessive distress, as is required to make a finding that the factor in section 14(2)(f) applies.

Previous orders have found personal information to be highly sensitive in circumstances such as the following:

- The relationship between the parties is volatile and adversarial and the emotional sensitivity of the situation is apparent from the records [Order P-1535];
- The appellant intends to use the information to make unwanted physical contact with the affected person [Order P-12] to serve the affected person with a statement of claim against her;
- The information pertains to an individual’s security clearance [P-759];
- Disclosure of the information may result in expressions of concern about an individual’s personal integrity being disseminated publicly [Order PO-1984];
- The information will disclose the candidly-expressed views of some individuals involved in a tragic accident resulting in two deaths and two criminal charges, as well as the views of investigators, about the conduct of other individuals involved in the accident [Order P-1208];
- The information relates to allegations of misrepresentation [PO-1667];
- The identity of a complainant to a government institution [PO-1706];
- Information about the residents of a women’s shelter, given the often volatile nature of the domestic conflicts that lead women to seek residence in such shelters [P-642];

In my view, none of these circumstances is sufficiently similar to the present situation to support a finding that the information is highly sensitive for the purposes of section 14(2)(f).

Accordingly, I find that section 14(2)(f) is not a relevant consideration when balancing the appellant’s access rights against the wife’s privacy interests.

The City also claims that the following unlisted factors favour non-disclosure: the fact that the witness's wife has not consented to disclosure; the fact that the wife did not provide this information to the City, and the fact that "if as indicated by the Adjudicator, this information remains 'of little or no assistance' to the appellant, then it is unlikely the appellant has any need, compelling or otherwise, to access this information."

I do not agree that the fact that the wife has not consented to disclosure is a factor in favour of non-disclosure. In the absence of an explanation for it, the lack of consent should be treated as neutral when balancing the competing access and privacy interests.

I agree that the fact that the wife's personal information was provided to the City by her husband, rather than by her, is a factor weighing against disclosure. However, given that information in government records about one person is frequently provided by another, I feel this consideration alone ought to be afforded relatively little weight in determining whether disclosure would constitute an unjustified invasion of privacy.

In Order M-1964, I found that the appellant wants the name and telephone number for the purpose of assessing the strength of a legal claim or potential legal claim and that the information is relevant for that purpose. However, while this would normally be sufficient to trigger the application of section 14(2)(d) in favour of disclosure, I was not satisfied that this factor favours disclosure in this case because the death of the witness may reduce the utility of this information to the appellant. However, while this does not weigh in favour of disclosure, it is not a relevant factor favouring privacy protection, and thus is neutral in the circumstances of this appeal. While I have received no evidence that the information will be of assistance to the appellant, there is no onus on the appellant to establish this and the City has provided no evidence that disclosure will not be relevant to a fair determination of the appellant's rights. The onus is on the City to establish that disclosure would be an unjustified invasion of the witness's wife's privacy.

While I have not found any factors that weigh in favour of disclosure and have found that one factor weighs weakly against disclosure, this does not dictate a conclusion that disclosure would constitute an unjustified invasion of the wife's privacy. In my view, City has not provided sufficient evidence, and the affected person has provided no evidence, to establish that disclosure of this particular information, under these particular circumstances, would constitute an unjustified invasion of the witness's wife's privacy.

Accordingly, I find that the information at issue is not exempt under section 38(b) of the *Act*.

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 **April 11, 2006**, but no earlier than **April 6, 2006**.

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: _____
John Swaigen
Adjudicator

_____ March 7, 2006