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

ORDER MO-2074

Appeals MA-050064-1 and MA-050065-1

City of Toronto

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The City of Toronto (the City) received two separate requests for records relating to a named property under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). One portion of one of the requests was opened under a separate appeal (MA-050063-1) and was disposed of in Order MO-1950. The remaining requests and City's decisions are summarized in the table below under the appeal numbers assigned by this office:

Appeal #	Description of Record	Exemtpion/Issue	Withheld in Full/Part
MA-050064-1	Building plans	8(1)(i) (security)	Withheld in full
MA-050064-1	Examiner's notes	14(1) (personal privacy)	Withheld in part
MA-050065-1	Building permits	Reasonable search	N/A

The requester, now the appellant, appealed the City's decision. The appeals were not resolved in mediation, and moved to the adjudication stage of the appeal process.

I began the adjudication process by sending a Notice of Inquiry to the City and two affected parties, inviting them to submit representations. Both the City and the affected parties (owners of the named property) provided representations.

I then sent a Notice of Inquiry to the appellant, along with the severed representations of the City and the severed representations from the affected parties. The appellant retained a lawyer, who provided representations on his behalf. Throughout this order, I will refer to them as the representations of the appellant.

For clarity, throughout the remainder of this order, I will deal with the records and exemptions for both appeals by reference to the records, rather than by appeal number.

DISCUSSION:

EXAMINER'S NOTES

In his representations, the appellant states:

> The appellant takes no issue with whether or not the record contains personal information as defined, the issue is rather, the City has not produced records responsive to the request or explained why they cannot do so. The Appellant would not object with the production of the responsive records redacted to exclude any personal information as defined in the *Act* … It is submitted that while the records may contain personal information, the information may be excised or vetted and does not preclude the production of the record itself.

The redaction the appellant refers to for the removal of personal information relates to the building permits, which the City has not located, rather than the records that have been found and disclosed, in part, to the appellant. In any event, the appellant accepts that personal information may be severed. The appellant did not allege that more examiners' notes should exist. The only exemption claimed for the portions of the records withheld (the examiner's notes), was section 14(1) (personal privacy), and accordingly, there are no outstanding issues regarding the examiner's notes.

BUILDING PERMITS

REASONABLE SEARCH FOR RESPONSIVE RECORDS

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

The appellant requested access to "building permits, if any for [specific] permit applications…" The appellant listed 14 permit applications.

However, in its representations, the City states that they received a request for "… access to 14 building permit applications … as well as the *building permits* for 3 specific constructions and any examiner's notes or documents relating to the permits that were issued" [emphasis added]. The City goes on to describe its efforts and decisions, and states that it "was of the view that the request was clear and did not contact the appellant for clarification."

The City provided affidavits from their employees who were involved in the searches. In one of the affidavits, the employee states:

> … I received a request … for additional records with respect to 14 building permit applications relating to [the named property] … as well as the building permit for 3 specific constructions and any examiner's notes or documents relating to the permits that were issued.
>
> …

> [At a later date], I received a subsequent request … to conduct searches for additional records including building plans…

The City provided an affidavit from another employee which, for the most part, provides the same search explanation for the same records.

The appellant states that he never requested access to building permit *applications*. His access request was limited to "a copy of each *building permit*, if any, for the [14] permit applications [my emphasis]." The appellant states that because he was never provided with any building permits, the records provided by the City were not responsive to this part of his request. The appellant also states that he did not maintain that additional records exist and that "… it is not up to the [appellant] to show or prove that records exist, but rather it is up to the City to state if the permits exist or if they were ever issued."

Notwithstanding these representations, the appellant refers to, and provides as an exhibit, correspondence from the City wherein it is acknowledged that *building permits* were issued for the named property. The letter is dated July 6, 1994. It is from Mr. Michael L. Nixon, Commissioner and Chief Building Official. Mr. Nixon wrote to the then Chief of Police for Metropolitan Toronto, Mr. William J. McCormack, regarding a complaint made to the police about the named property, and states:

> *A permit was issued* under file #280302 on the 10th of March, 1989 … for … [the named property] … This work was completed on the 7th of September, 1989.
>
> *A permit was issued* under file #300456 on the 20th of December, 1989 … for … [the named property]. This work was completed on the 3rd of May, 1990.
>
> *A permit was issued* under file #321982 on the 6th of June, 1991 … for… [The named property]. This work was completed on the 9th of October, 1991.
>
> In addition, there *were several other permits issued* for [the named property].
>
> [Emphasis added]

In my view, it is abundantly clear that the appellant, in this part of his requests, specifically sought access to *the building permits* only. While the City provides representations that it considered the request to be clear, the evidence is overwhelming that the City did not understand the request. As noted previously, the City stated that the appellant requested access to 14 building permit applications and to 3 building permits. This is not correct. In my view, the appellant made it clear that this was not what he requested, yet the City took no steps to clarify this with the appellant, as it is required to do under section 17(2).

Accordingly, I find that the City has not conducted a search, reasonable or otherwise, for *building permits* which correspond with the 14 building permit applications specified by the appellant. The appellant has provided a reasonable basis for concluding that building permits exist, and I will order the City to conduct a further search for the building permits.

BUILDING PLANS

SECURITY

Section 8(1)(i) forms part of section 8 of the *Act*, generally known as the "law enforcement" exemption. Section 8(1)(i) states:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required

Previous orders of this office have established that although this provision is found in a section of the *Act* dealing specifically with law enforcement matters, its application is not restricted to law enforcement situations but can be extended to any building, vehicle or system which reasonably requires protection [Order P-900].

The use of the words "could reasonably be expected to" in section 8(1)(i) requires the institution to 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.)].

Representations of the parties

The City takes the position that disclosure of the records at issue in this appeal could reasonably be expected to endanger the security of a named building.

The City states that the records "responsive to the request show floor layouts including kitchen and counters, washrooms, finished floors, locations of coolers, freezers, light fixtures, interior elevations, etc." Additionally, the City submits that the "building plans at issue set out a number of features … and if disclosed, they could provide information about the property's most vulnerable parts." I agree with the City's description of the records.

The City bases its claim that this exemption applies in this appeal on well-documented animosity between the appellant and the affected parties (who own the property in question). The City cites several examples in its confidential and non-confidential representations. The following were included in the City's non-confidential representations:

- The appellant was charged with assault on one of the affected party's family members,

- There was a restraining order against the appellant

- The Judge who issued the recognizance of peace respecting the appellant found that the:

> "appellant's behaviour is quite extraordinary, to the extent that one suspects that he would benefit from a visit to a psychiatrist. Certainly his actions towards the [affected parties] family are sufficient to cause them extreme concern for their safety. It certainly would to any reasonable person if they had somebody like [the appellant] next door behaving in a manner in which he had admittedly on his own admission behaved".

The City provides further details, however, due to their confidential nature, I am not able to make direct reference to them in this decision.

The affected parties submit that there is a 14-year ongoing animosity between them and the appellant. The affected parties also submit that there is an action currently before the court for the appellant's "alleged spreading of false and defamatory remarks and libelous documentation regarding the [affected parties] and their family". The appellants also make reference to the Judge's comments as quoted above. The affected parties submit they fear that the release of the building plan drawings may endanger the security of the building.

The appellant submits that the City has not satisfied the section 8(1)(i) test in that the City has failed to provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". The appellant submits that the City has taken the position that harms under section 8(1)(i) are self-evident from the records.

The appellant submits that his position is supported because there has been no allegation or evidence that the restraining order has been breached, or that he has done anything of a threatening nature or which could reasonably be expected to cause harm to the building. There have been no allegations of property damage, vandalism or sabotage. The appellant also submits that he has also obtained injunctive relief against the owners and that the long history of bad feelings between the appellant and owners is not one-sided. Both parties have laid assault charges against each other.

The appellant submits further that the City has failed to establish that releasing the records will result in any reasonable expectation of harm to the building. Additionally, the appellant submits that while he owns the adjacent property, it is managed and administered by the mortgagee and he does not have access to the premises. He submits further that even if disclosure of the plans endangered the security of the building by exposing its vulnerable spots, he cannot gain entry and, in any event, he already knows the building well and possesses numerous reports outlining its weaknesses. Additionally, the appellant states that his reason for his request is not to cause harm to the building; rather it is to reveal the unsatisfactory nature of the examination conducted by City staff in approving building permits, if any, relating to the property.

Analysis and Findings

The building in question is not one that, by virtue of its very nature, would necessarily raise security concerns, such as an airport or public building. Nevertheless, based on the evidence before me regarding the relationship between the parties, I am satisfied that the City and the affected parties have provided "detailed and convincing" evidence to demonstrate that, in the circumstances of this case, disclosure of the records could reasonably be expected to establish a reasonable expectation of endangerment to the security of a building as contemplated by section 8(1)(i).

I find support for this decision in Order MO-1719 wherein Adjudicator Donald Hale upheld an institution's decision to deny access to site plans for a synagogue. After considering the totality of the evidence before him, Adjudicator Hale found:

> In my view, the City and the affected parties have provided me with sufficient evidence to establish a reasonable basis for their belief that endangerment to the synagogue and school facility will result from the disclosure of the building plans. I find that the City and the affected parties have demonstrated that their reasons for resisting disclosure are not frivolous or exaggerated. I reach this conclusion for the following reasons:
>
> - while the appellant has been given access by the Committee of Adjustment to certain site plans which describe the subject property as it exists today, those records do not include the type of detailed information that is contained in the records which are the subject of the request and appeal;
>
> - the appellant and the affected parties are embroiled in a land use dispute that has lead to an intractable situation between them. Although the appellant's right of access to the records is a legitimate one and I have been provided with no evidence whatsoever to indicate that the appellant intends to use the records to encourage or create a security problem for the synagogue, disclosure to the appellant may be equated with disclosure to the world in these circumstances [Orders P-169 and PO-2197]; and
>
> - the synagogue facility has been the subject of other threats and vandalism in the past and is now subject to certain restrictive security measures. The concerns expressed by the affected parties concerning the security of the facility should disclosure of the requested information be ordered are not, in my view, frivolous or exaggerated.

In considering all of the evidence in the present appeal, I find that the City and the affected parties have provided sufficient evidence to establish a reasonable basis for their belief that the

harms contemplated by section 8(1)(i) may result from the disclosure of the building plans. In addition, the City and the affected parties have demonstrated that their reasons for resisting disclosure are not frivolous or exaggerated. My reasons for these conclusions are as follow:

- In a recognizance of peace issue, the presiding Judge found that the appellant's behaviour "is quite extraordinary" and suggesting that "[the appellant] would benefit from a visit to a psychiatrist". The Judge also concluded that, in his opinion, the affected parties had reason to have "extreme concern for their safety".

- As in the case before Adjudicator Hale, I note the long-standing animosity between the appellant and the affected parties that continues to the present day. The appellant submits that I have not been provided with evidence of any actual harm, or intent to harm, the building on his part. However, the test does not require evidence of actual harm, or of actual intent to harm. What is required is "detailed and convincing" evidence that disclosure of the records "could reasonably be expected to" result in endangerment to the security of a building. On the basis of the well-documented animosity between the appellant and the affected parties, I am satisfied that the City and the affected parties have met their onus.

EXERCISE OF DISCRETION

The section 8(1)(i) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose

- it takes into account irrelevant considerations

- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

The City submits that it correctly exercised its discretion in this matter. The City relies on the existence of "a most acrimonious relationship" between the appellant and the affected parties over many years and which continues to this date, and states that the appellant's past actions and behaviour toward the third parties would reasonably give rise to concerns about the safety and security of both persons and property should the plans be disclosed.

The appellant submits that the City did not properly exercise its discretion. The appellant submits that the City's exercise of discretion was either in bad faith and/or for an improper purpose in that it has taken into account irrelevant considerations such as "stale-dated allegations of civil disobedience."

In carefully considering all of the evidence, I find that the City properly exercised its discretion in refusing to disclose the records at issue under section 8(1)(i). It took into account and appropriately balanced relevant considerations, including the appellant's right of access and the interests section 8(1)(i) seeks to protect. I also find that the City did not rely on any irrelevant considerations in making its decision not to disclose the records to the appellant.

ORDER:

1. I uphold the City's decision not to disclose the building plans to the appellant.

2. I order the City to search for *building permits* relating to building permit applications specified by the appellant.

3. I order the City to search for any other building permits relating to the named property.

4. I order the City to provide the appellant with a decision regarding his request for building permits in accordance with sections 19, 21, 22, and 23 of the *Act*, as applicable, treating the date of this order as the date of the request, and without recourse to a time extension under section 20(1) and (2).

Original signed by: July 28, 2006
Beverley Caddigan
Adjudicator