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

ORDER MO-2232

Appeal MA-060181-1

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 a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information held by the City relating to the requester, including records relating to his Ontario Works file. The requester specifically sought access to the following information:

> All data and records with regard to my Ontario Works file, my many previous requests via numerous verbal, written letters and faxes, together with the City's response (if any) to same, in particular its (City) actions taken with regard to my complaint to social service staff regarding a violation of [the *Act*] occurring with my file and previous information request in my prior correspondence, and copies of my employment record and pay records. In short, any [or] all records the City has referencing myself, through council, or department or agency of the City.

In response to the request, the City opened two files. Under access request 06-0889, the City provided access in full to a copy of the requester's employment records. The City responded that although these records fall outside of the scope of the *Act* in accordance with sections 52(3)(1), 52(3)(2), and 52(3)(3) of the *Act*, it granted access to all 33 pages of his employment record.

Under access request 06-843, the City granted access to the requester's Ontario Works file, except for the portion of one page where the personal information of another individual was severed pursuant to section 38(b) (invasion of privacy), in conjunction with section 14(1) of the *Act*.

The requester, now the appellant, appealed the decision under request 06-843.

During mediation, the appellant confirmed that he is appealing the City's decision that section 38(b) (in conjunction with section 14(1)) applies to exempt the severed information from disclosure. The appellant advised that he believes additional records responsive to the request should exist. As a result, the adequacy of the City's search was included as an issue on appeal.

After conducting additional searches, the City advised that no additional records relating to the appeal were located.

As further mediation was unsuccessful, the appeal was referred to the adjudication stage of the appeal process.

Upon my review of the file it appeared that the appellant took the position, both in a conversation with and in a letter sent to the mediator, that his request for records was much broader in nature than just records found in his Ontario Works file. As a result, I am adding "scope of the request" as an issue in this appeal.

I decided to begin my inquiry into this appeal by sending a Notice of Inquiry to the City, initially. The City provided representations in response.

I then sent a copy of the Notice of Inquiry to the appellant along with a copy of the City's non-confidential representations. The appellant responded with representations.

As the appellant's representations raised issues to which I felt the City should have an opportunity to reply, I invited the City to submit representations in reply. The City provided reply representations.

RECORDS/ISSUES:

The following are at issue in this appeal:

- Whether the scope of the request was reasonably interpreted by the City.
- Whether the City conducted a reasonable search for the requested records.
- Whether section 38(b), in conjunction with section 14(1), applies to exempt the personal information severed from the record, a one-page *Request for Corporate Information* form of the Ministry of Consumer and Commercial Relations.

DISCUSSION:

SCOPE OF THE REQUEST/RESPONSIVENESS OF RECORDS

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

Representations

The City submits:

> In responding to the appellant's request, the City adopted a liberal interpretation of the appellant's request, understanding that the request encompassed all records held by the City "referencing" the appellant with particular emphasis on his Ontario Works and employment files.
>
> Records in the appellant's employment files contain his "employment record and pay records". Records in his Ontario Works file contain all welfare benefit documents as well as records relating to the appellant's "complaints to social services about a possible violation of his privacy occurring with his file and previous information requested", etc.
>
> The [Notice of Inquiry] indicates that the appellant has taken the position that his request for records is much "broader in nature" than just the records found in his Ontario Works file. No further details have been provided as to what the appellant means by "broader in nature" and what other records the appellant is specifically looking for. As indicated above, the records in the appellant's Ontario Works file are responsive to the details given in the appellant's original request.

The appellant submits that his request was:

> intended to include ALL records that the City has, that reference myself, whether this be through City Council, a City department, or an Agency, or for that matter, to include any other 'Boards' or 'Commissions', or any other entity the City has an interest in legally or exercises some control over and acts on behalf of the City, or alternatively that the City may have hired or paid to perform a service" [emphasis in original].

Analysis and finding

As described above, the appellant's request identifies the records to which he seeks access, beginning by specifically referencing his Ontario Works file, his employment record and pay

records. The request as formulated concludes more generally with a request for all records held by the City that refer to him.

The City advises that it interpreted the appellant's request as encompassing all records held by it that referenced the appellant, although it understood that he was particularly interested in access to information related to his Ontario Works file, employment file and pay records.

I am satisfied on the evidence before me that the City adopted a reasonable interpretation of the appellant's request. My conclusion is based on the wording of the request. While an institution is required to liberally interpret a request for information and to seek clarification where there is ambiguity in the wording of the request, in my view, the City conducted a search that covered the types of documents sought by the appellant in his request. Therefore, under the circumstances, considering the wording of the appellant's request, I see no reasonable basis for concluding that the City should have sought clarification from the appellant regarding his request.

In conclusion, I am satisfied that the City properly interpreted the scope of the appellant's request. I will now review the adequacy of the actual searches conducted by the City for records responsive to the appellant's request, as worded.

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.

Representations

The City makes the following submissions about its search for records responsive to the appellant's request:

1. The City believed that it understood the request and did not contact the appellant for clarification.

2. The City responded on the basis that the requester was looking for any information "referencing" him but with particular emphasis on his employment and payroll records and matters and issues related to his Ontario works file.
3. …[I]t is the City's view that reasonable searches have been conducted by a knowledgeable staff member.
4. Ontario Works files are destroyed 7 years after a file has been closed because services are no longer required or the case has been terminated. Destruction is subject to archival review. In the circumstances of this case, no records have been destroyed.

The City submitted an affidavit sworn by an Access and Privacy Officer with responsibilities for the processing of Freedom of Information requests with respect to the City's Social Services Department. The affidavit reveals that the search included the following components:

- A search on the Service Delivery Model Technology, a case management and financial assistance application managed by the Province to administer the Ontario Disability Support Program in all Ontario municipalities. The search revealed that the appellant was in receipt of social assistance.

- A search of the City's record holdings in the City's records management database that contains all client information generated by Social Services (identified by location, box, folder etc.) and which includes information for both active and inactive records. One inactive file pertaining to the appellant was identified and retrieved.

- A search for the payment history of the appellant to confirm the period in which the appellant had been in receipt of social assistance. This information was cross referenced with the information retrieved from the records management database to confirm that this was the appellant's file containing records responsive to his request

- A search for additional responsive records that might be located in other program areas. This was accomplished by contacting the Mayor's office, as well as the Secretariat unit in the City Clerk's office. One other record was located, an email from the appellant subsequent to his filing of the current appeal. Given that the date of the creation of this record occurred subsequent to the request, it was determined to be non-responsive. The Mayor's office advised the affiant that further contact with the appellant had been verbal and therefore that there were no other records.

The appellant submits in his representations:

> I have stated there are other records. The City has acknowledged this as well but deems them, not relevant. How so? It exists. I want it.

The appellant also referred to his employment contract as it is his position that it should have been located in his employment file.

On reply, the City specifically addressed the appellant's concern that his employment contract was not located in any of the City's searches for responsive records. The City submits:

> The City has conducted another search for the appellant's employment contract. No such record has been located. Currently, the retention schedule for employee records is 7 years after termination of employment. Since the appellant began his employment in 1991 and his employment appears to have ended in 1999, it is possible that this record has been misplaced or inadvertently destroyed.

Analysis and finding

The appellant has identified a specific record, his employment contract, that he feels should have been located in the search for records responsive to his request. He takes the position that the contract as well as other responsive records should exist.

The City has provided detailed representations outlining their efforts to locate records responsive to the appellant's request. Despite conducting initial searches undertaken at the request and an additional search that the City undertook during mediation it has failed to locate any of the additional responsive records sought by the appellant.

Additionally, specifically with respect to the appellant's employment contract, the City conducted a further search during the inquiry stage of the appeal process. The record could not be located and the City suggested that the contract might have been misplaced or destroyed given that the retention schedule for such records has passed.

As noted above, the *Act* does not require the City to prove with absolute certainty that further records do not exist; the City must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624]. In the circumstances of this appeal, based on the evidence provided to me by the City in its representations and in the affidavit sworn by the Access and Privacy Officer, I find that it has done so.

In conclusion, I uphold the City's search for responsive records as reasonable.

PERSONAL INFORMATION

In order to determine whether section 38(b) of the *Act* may apply to the undisclosed portion of the one page from the appellant's Ontario Works File (the record), it is necessary to decide whether it 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 where 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

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].

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.)].

I have reviewed the record and the only information that remains undisclosed is an individual's name which appears, along with the appellant's name, on a Ministry of Consumer and Commercial Relations request form for an electronic search to be conducted. The form contains several spaces for several different names to be entered.

The City submits that the severed information falls within paragraph (h) of the section 2(1) definition of "personal information" because it contains the name of another Ontario Works recipient, as well as the name of the appellant.

The appellant's representations do not specifically speak to whether the record at issue contains information that qualifies as "personal information".

Having reviewed the records, I find that it contains the personal information both the appellant and another individual, within the meaning of paragraph (h) of the section 2(1) definition. In my view, if either of the names listed on the form is disclosed to someone other than to the individual to whom it refers, it would reveal other personal information about that individual, specifically that he or she is an Ontario Works recipient.

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

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 under section 38(b) is met.

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 under section 38(b). 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] The factors at section 14(2) cannot be used to rebut a presumption but can be considered if a presumption is found not to apply.

In the circumstances of this appeal the City submits that the presumptions at sections 14(3)(b) and (c) apply. Those sections read:

> 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…;
>
> (c) relates to eligibility for social services or welfare benefits or to the determination of benefit levels;

The City submits that because the record at issue contains the name of another individual who was in receipt of benefits, the presumption at section 14(3)(c) applies. I agree. In my view, disclosure of the other individual's name would reveal to the appellant that the other individual is in receipt of social services. Accordingly, I find that the information at issue falls within the ambit of the presumption at section 14(3)(c) as it relates to eligibility for social services. Therefore, I find that the disclosure of the information which remains undisclosed that relates to another individual is presumed to constitute an unjustified invasion of personal privacy under section 38(b).

As I have found that the presumption at section 14(3)(c) applies to exempt the information from disclosure, it is not necessary for me to determine whether the presumption at section 14(3)(b) applies, nor whether the factor listed at section 14(2)(f) applies.

EXERCISE OF DISCRETION

The section 38(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. On appeal, an adjudicator may review the institution's decision to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.

As I have upheld the City's decision to apply section 38(b) to the information at issue. I must now review the City's exercise of discretion in determining not to release that information. I may find that the City erred in its discretion where, for example, it does so in bad faith or for an improper purpose, it takes into account irrelevant considerations, or it fails to take into account relevant considerations. In these cases, I may send the matter back to the City for an exercise of discretion based on proper consideration [Order MO-1573]. However, I may not substitute my own discretion for that of the City.

The City submits that in refusing to disclose the personal information at issue it considered all the relevant factors including the following:

- The wording of the exemption at 38(b) along with the presumption at section 14(3)(b) and (c) and the factor at section 14(2)(f).
- Individuals should have the right to their own personal information and the only information that remains at issue is the name of another individual who is a recipient of social assistance.
- The privacy of individuals should be protected and this is highly sensitive information belonging to another individual.
- The appellant has not provided a compelling or sympathetic reason as to why the personal information of another individual should be disclosed to him.
- The personal information at issue is the type of information that the City has historically protected.

The City submits that in considering the above factors it has exercised its discretion in good faith and for a proper reason, and accordingly, that it should be upheld.

Having reviewed the City's submissions and having considered all of the circumstances of this appeal, including the information that was disclosed to the appellant prior to the appeal and the specific piece of information that has been severed from the record, I am satisfied that the City has not erred in its exercise of discretion by withholding that information. Therefore, I find that the City's exercise of discretion was reasonable.

ORDER:

1. I uphold the City's interpretation of the scope of the appellant's request.

2. I find that the City's search for responsive records was reasonable and I dismiss that aspect of the appeal.

3. I uphold the City's decision not to disclose the personal information that has been severed from the record.

Original signed by: October 4, 2007
Catherine Corban
Adjudicator