



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-2181

Appeal MA06-258

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 copies of the building permit application and building plans related to a specified address. The City granted the requester, who is not the owner of the residential property, access to the records related to the building permit applications but withheld the name of the owner pursuant to section 14(1) of the *Act*. The City also denied the requester access to the nine building plans responsive to the request pursuant to section 8(1)(i) of the *Act*.

The requester (now the appellant) appealed the City's decision to this office. The parties were unable to resolve any of the issues at dispute during the mediation process and this matter was transferred to adjudication.

Before a Notice of Inquiry was sent to the City, an Adjudication Review Officer of this office contacted the appellant to inquire whether he continued to seek access to the portions of the building permit applications which contain the building owner's name. The appellant responded that he did not require access to building owner's name. Accordingly, these portions of the records and the City's claim that section 14(1) of the *Act* apply to them are no longer at issue in this appeal. The appellant, however, advised this office that he continues to seek access to the building plans.

I then sent a Notice of Inquiry to the City and sought its representations on the application of section 8(1)(i) of the *Act*. Shortly after its receipt of the Notice of Inquiry, the City contacted this office to advise that the building owner (affected party) was prepared to allow the appellant to view the building plans though he remained opposed to the appellant having a copy of the same plans. In a telephone message to this office, the appellant advised that he wanted to proceed with the appeal, which was communicated to the City. The City, in turn, submitted its representations.

Upon my review of the City's representations, I decided to seek the representations of the affected party on the application of section 8(1)(i) of the *Act*. The affected party, however, did not respond to my correspondence.

I then sought the appellant's representations and provided the appellant with a copy of the non-confidential portions of the City's representations. The appellant wrote to me to advise that it appeared that the withheld portions of the City's representations sought to question his credibility. The appellant advised that he could not make full representations until an unsevered copy of the City's representations was provided to him. The appellant also raised a concern about the City making reference to information he shared during the mediation process in its representations. The appellant requested that I schedule an oral hearing to consider his request to permanently expunge the portions of the City's representations which question his credibility and refer to mediation-privileged information.

I have carefully considered the appellant's concerns, along with the City's representations, and I am of the view that I do not require further information to review the City's access decision, and therefore an oral hearing is not necessary. In making my decision to issue an order at this stage of the appeal, I took into account that the City's representations did not raise issues that require a

response from the appellant in order for me to adjudicate this appeal. I also am of the view that the confidential portions of the City's representations fail to address the central question in this appeal, namely, whether disclosure of the requested building plans to the appellant could reasonably be expected to endanger the security of the affected party's building.

Taking into account the fact that the appeal process at this office does not currently have a process for permanently removing portions of representations provided to this office and my view that the information the appellant seeks to have expunge is, in any event, not relevant to the issues in this appeal, I have decided to proceed to order in an effort to adjudicate this appeal in a timely manner.

DISCUSSION:

LAW ENFORCEMENT

The City's position is that disclosure of the building plan at issue could reasonably be expected to endanger the security of the property. The City describes the information at issue, as follows:

In the current case, the plans at issue contain specific information about the locations and measurements of rooms: recreation, family, bedrooms, living room, laundry, furnace, bathrooms, as well as the location of fireplaces, stairs, windows, refrigerators, new walls, elevations, construction notes and materials for the neighbour's property.

Section 8(1)(i) forms part of the section generally known as the "law enforcement" exemption. The section reads:

- (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,
 - (i) 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]. Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

In the case of section 8(1)(i), the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.)].

The City's Representations

The City submits that the events of September 11, 2001 have highlighted the vulnerability of residential and commercial property. In particular, the City argues that municipalities must consider the safety of building occupants in addition to the possibility of future liability and litigation. In support of its position, the City provided a few examples of how building permit requests are handled by municipalities in Canada, the United States and Australia. The examples provided by the City highlight that there is a growing concern regarding disclosure of building plans to requesters who are not the owners of the building. Accordingly, municipalities are increasingly placing restrictions on who may obtain copies of the building plans.

The City's representations also suggest that this office should re-consider what constitutes a reasonable expectation of harm taking into consideration current security concerns. The City states:

... that it is a widely held view that due diligence must be taken with respect to disclosure of plans of both commercial and residential buildings, and that it is not unreasonable to anticipate harms to the security of the property, if access to such plans is not restricted. Further, what constitutes reasonable expectation of harm has changed since the IPC's earlier orders.

In support of their position, the City referred me to Order MO-2074. In Order MO-2074, Adjudicator Beverley Caddigan found that disclosure of residential building plans, which showed "floor layouts including kitchen and counters, washrooms, finished floors, locations of coolers, freezers, light fixtures, interior elevations, etc." could reasonably be expected to endanger the security of a building. In making her determination, Adjudicator Caddigan took into account that the requester was charged with assault on one of the affected party's family members which resulted in a restraining order against the requester. Further, the Judge who issued the restraining order against the appellant commented that the requester's "... actions toward the [affected parties] and their family are sufficient to cause them extreme concern for their safety".

With respect to the particular circumstances of this appeal, the City submits that disclosure of the building plans at issue could reasonably be expected to endanger the security of the affected party's building on the basis that the appellant has "... turned down any attempts to resolve the issue, including the offer by the owner to show and discuss the plans with him. It is obvious from what he has stated that he feels that his neighbour's building of an addition has violated his rights". As noted above, the City also provided confidential representations in support of its

position. The City's confidential representations, however, did not provide any evidence to support the position that disclosure of the building plans to the appellant could reasonably be expected to endanger the security of building owned by the affected party.

I have carefully considered the City's representations, the building plans at issue and Order MO-2074. I find that the City has not demonstrated that disclosure of the building plans could reasonably be expected to endanger the security of the building owned by the affected party.

In general, the City's position is that, in a post September 11th environment, all building plans should be subject to restricted access on the basis of a potential risk of endangerment as set out in section 8(1)(i). With respect, I disagree with this interpretation of section 8(1)(i). I acknowledge that some buildings, such as nuclear power plants or sensitive military installations, may by their very nature, give rise to a reasonable basis for believing that endangerment could result from disclosure. However, in the absence of other evidence, this same approach cannot be applied to residential buildings. Residential structures, by their very nature, do not establish a reasonable basis for believing that harms set out in section 8(1)(i) will result from the disclosure of their building plans. In my view, the wording of section 8(1)(i) does not support a blanket application to the building plans of all structures, regardless of their nature, or the circumstances in which access is sought.

The only evidence relative to this residential building provided by the City is the fact that the appellant chose not to view the building plans during the adjudication process and that the appellant has stated that the addition to the affected party's home violates his rights. In my view, this fails to establish a reasonable basis for believing that endangerment could result from disclosure. The circumstances in this case are very different from those in Order MO-2074, where the affected party provided representations supporting the City's position. Further, the evidence presented in Order MO-2074 provided a clear and rational basis for the adjudicator to conclude that disclosure of the building plans at issue in that appeal to a requester who was subject to a restraining order could reasonably be expected to endanger the affected party's residence. This contrasts sharply with the evidence that has been presented to me in this appeal. In fact, as noted above, the owner of the building did not provide representations when offered the opportunity. That the owner was also willing to allow the appellant to view the building plans also undermines the City's position that disclosure of the plans would endanger the security of the residence.

Though I appreciate the important role the City plays in taking steps to ensure that law enforcement concerns are considered before plans of buildings are disclosed to requesters, the evidence presented to support the City's position in this appeal is not sufficient to substantiate denial of the building plans at issue under section 8(1)(i) of the *Act*.

ORDER:

1. I order the City to disclose the building plans to the appellant by providing him with copies no later than **May 14, 2007**, but not before **May 9, 2007**.
2. In order to verify compliance with Order Provision 1, I reserve the right to require the City to provide me with evidence that a copy of the records have been disclosed to the appellant.

Original signed by: _____
Brian Beamish
Assistant Commissioner

_____ April 5, 2007