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

ORDER MO-2371

Appeal MA07-355

City of Toronto

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NATURE OF THE APPEAL:

The City of Toronto (the City) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

> Health Officer [named individual] visited our property in June 2005. I am requesting a copy of the file including any info that prompted the visit. Please send a complete copy of the file including any pictures.

The City located a responsive record and granted partial access to it. The City denied access to portions of the record pursuant to the personal privacy exemption found in section 14(1) of the *Act*.

Through a representative, the requester (now the appellant) appealed the City's decision to deny access to portions of the record. In this order, for ease of reference, I will refer to positions put forward by the representative as those of the appellant.

During the course of mediation, the appellant stated that additional records exist, and that photographs in the file were not provided to him. The City advised that there are no photographs. The appellant continued to maintain that additional records exist. Accordingly, reasonableness of search has been added as an issue in this appeal.

The mediator notified an affected party for the purpose of obtaining consent to disclosure of the affected party's information to the appellant. The affected party did not consent. The appellant advised that he wishes to pursue access to all of the withheld information contained in the records. Mediation did not resolve the appeal, which therefore moved on to the adjudication stage of the appeal process, in which an adjudicator conducts an inquiry under the *Act*.

The file was assigned to me for adjudication. My inspection of the records at issue indicates that they contain the appellant's personal information. In this situation, the relevant personal privacy exemption is section 38(b) rather than section 14(1) (see Order M-352). I therefore added section 38(b) as an issue in this appeal.

I commenced my inquiry by issuing a Notice of Inquiry to the City and the affected party, initially, outlining the background and issues in this appeal and inviting their representations. I received representations from the City, which agreed to share its representations with the appellant except for a very small portion which it identified as confidential. The affected party also responded to the Notice, indicating continued opposition to disclosure of that individual's personal information. I then sent the Notice of Inquiry to the appellant, inviting representations, and enclosed the non-confidential portions of the City's representations. The appellant informed this office that he would not be submitting representations.

RECORDS:

The record at issue is a nine-page Toronto Public Health Service Inspection Report mostly handwritten on a Toronto Public Health complaint form. Only the withheld portions are at issue.

DISCUSSION:

PERSONAL INFORMATION

Under the *Act*, different exemptions may apply depending on whether or not a record contains the personal information of the requester [Order M-352]. Where records contain the requester's own information and the information of other individuals, access to the records is addressed under Part II of the *Act* and the exemptions at section 38 may apply. Where the records only contain the personal information of individuals other than the appellant, access to the records is addressed under Part I of the *Act* and the exemptions found at sections 6 to 15 may apply.

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 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].

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 closely examined the inspection report at issue and find that the withheld portions contain the name, address, telephone number and other information that could identify the affected party. The record also contains the appellant's personal information.

In particular, I find that the withheld portions of the record at issue are the personal information of the affected party only. All of the appellant's personal information in the record has been disclosed to him. As the record contains the personal information of both the affected party and the appellant, I will consider whether the affected party's personal information is exempt under section 38(b) of the *Act*.

INVASION OF PRIVACY

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. See the exercise of discretion section below for a more detailed discussion of the exercise of discretion issue.

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].

Section 14(3)(b) states:

> (3) 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, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law [Order P-242].

With respect to the presumption in section 14(3)(b) the City submits:

> The City submits that in the current appeal the personal information at issue, including the address and telephone number of an individual who filed a complaint concerning the appellant/appellant's property, was compiled by the City as part of its investigation into a possible health hazard, i.e., toxic fumes/odours pursuant to section 11 of the Health Protection and Promotion Act to determine if there was a violation of this act or the City's Municipal Code (section 629).

Despite being invited to do so, and receiving several extensions of time for that purpose, the appellant did not provide any representations.

It has been previously established that personal information relating to an investigation of an alleged violation of a municipal by-law falls within the scope of the presumption provided by section 14(3)(b) of the *Act* (Orders M-181, M-382). In this case, I am satisfied that the City investigated a possible violation of section 629 B of the City's *Municipal Code*.

Accordingly, and based on my careful review of the record at issue, I find that the investigation and the report that resulted were compiled and are identifiable as part of an investigation into a possible violation of law. For that reason, the presumption in section 14(3)(b) applies to the withheld portions of the record at issue.

Therefore, I find that the disclosure of the withheld portions of the record would constitute an unjustified invasion of personal privacy pursuant to section 38(b), in conjunction with section 14(3)(b) of the *Act*, and I uphold the City's decision not to disclose those portions of the records. Because section 38(b) is discretionary, I will now consider the City's exercise of discretion.

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. 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)].

In its representations, the City lists several factors it considered in exercising its discretion to disclose the severed portions of the record. The City, states, in part, as follows:

> … The appellant is seeking the information about the complainant including their identity which has been supplied to the City in confidence and the disclosure of which would cause them stress.
>
> …
>
> Since complaints are advised that their personal information will be kept confidential, they have an expectation that the city will not subsequently be disclosing this information to third parties. In addition, the [affected] party has not given consent to the IPC for the disclosure of their personal information. In such circumstances, disclosure could reasonably cause them excessive distress.

Following my review of the records and all of the circumstances surrounding this appeal and the City's representations on the manner in which it exercised its discretion, I am satisfied that the City has not erred in the exercise of its discretion not to disclose the severed portions of the record under section 38(b).

SEARCH FOR RESPONSIVE 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).

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].

A reasonable search is one in which an experienced employee, expending reasonable effort, conducts a search to identify any records that are reasonably related to the request [Order M-909].

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.

Although the appellant did not submit representations during the adjudication stage of the appeal process, he maintained throughout the appeal that the investigator, who prepared the record at issue in this appeal, also took photographs as part of the investigation. The appellant also appears to believe that further records exist.

The City provided a sworn affidavit detailing the search and the efforts that the City put forth following the receipt of the request from the appellant.

The affidavit of the City employee states:

> I gave the file to [named individual], Public Health Inspector who had conducted the health inspection in June 2005 for her review, i.e., to ensure that the file was complete.
>
> On November 21, 2007, in response to a request by the Corporate Access and Privacy Office, I again checked the file and also confirmed with [named Public Health Inspector] that no photos existed.

In my view, through its representations and affidavit, the City has provided a thorough explanation of the efforts made by an experienced employee to identify and locate any records responsive to the request. I am satisfied that the City has conducted a reasonable search for records. Based on the evidence, I am also satisfied that no photographs exist in the possession of the City.

ORDER:

I uphold the City's decision.

Original signed by: November 28, 2008
John Higgins
Senior Adjudicator