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

ORDER MO-2353

Appeal MA07-48 and MA07-254

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 building plans relating to the proposed renovation of a specified address. The City denied the requester access to the five 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 and Appeal MA07-48 was opened. During the mediation process, the City advised that it had developed a new policy regarding the disclosure of building plans of residential properties, which came into effect after the initial request.

The City's new policy states that:

> The general public …. will be provided access to building plans of buildings containing only residential uses … from the date of permit issuance up to three months after construction of the building is complete, unless the owner or his/her agent requests, by registered mail, that the plans be kept confidential for security reasons.

The City also advised the Mediator that requests for building plans made prior to the new policy's implementation would not be granted because the permit application forms did not provide the owners of residences with an opportunity to object to disclosure of their building plans.

In order to comply with the City's new policy, and as construction of the building in this matter had not yet been completed, the appellant submitted a second request for the same building plans. The City denied the appellant's request, pursuant to section 8(1)(i) of the *Act*. The appellant subsequently appealed the City's second decision to this office and Appeal MA07-254 was opened.

During the mediation process, the property owner (the affected party) was contacted. She did not consent to the disclosure of the building plans to the requester. As the parties were unable to resolve any of the issues at dispute during the mediation process, this matter was transferred to adjudication. Since both appeals deal with the same property and raise identical issues, the appeals were treated together for adjudication purposes.

To initiate the adjudication process, I sent a Notice of Inquiry to the City and the affected party and sought their representations on the application of section 8(1)(i) of the *Act*. Both the City and the affected party provided representations on the application of section 8(1)(i) of the *Act*. In addition, in their representations, both the City and the affected party raised section 13 of the *Act* (danger to safety or health), which is a discretionary exemption. I shall discuss the late raising of a discretionary exemption as a preliminary issue in this appeal.

I then sought the appellant's representations on the application of sections 8(1)(i) and 13 of the *Act*, and the late raising of discretionary exemptions. In addition, I provided the appellant with a copy of the non-confidential portions of the City's representations and the complete representations of the third party.

PRELIMINARY ISSUE

Late Raising of a Discretionary Exemption

As set out above, the City advised in its representations that it would like to add section 13 of the *Act*, which permits an institution to "… refuse to disclose a record where disclosure could reasonably be expected to seriously threaten the health or safety of an individual", to this inquiry. The affected party also raised the application of section 13. This exemption is discretionary, and the issue of the late raising of discretionary exemptions is an issue in this appeal.

The *Code of Procedure* for appeals under the *Act* (the *Code*) sets out basic procedural guidelines for parties involved in an appeal before this office. Section 11 of the *Code* sets out the procedure for institutions wanting to raise new discretionary exemption claims. Section 11.01 is relevant to this issue and reads:

> In an appeal from an access decision an institution may make a new discretionary exemption within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

Previous orders have identified that the objective of the 35-day policy established by this office is to provide government organizations with a window of opportunity to raise new discretionary exemptions, but to restrict this opportunity to a stage in the appeal where the integrity of the process would not be compromised or the interests of the appellant prejudiced. [Order PO-2113] However, the 35-day policy is not inflexible. The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period [Orders PO-2113 and PO-2331].

Furthermore, in Order PO-1832, Adjudicator Donald Hale stated as follows in reviewing this issue:

> In determining whether to allow the Ministry to claim this discretionary exemption at this time, I must balance the maintenance of the integrity of the appeals process against any evidence of extenuating circumstances advanced by the Ministry (Order P-658). I must also balance the relative prejudice to the Ministry and to the appellant in the outcome of my decision.

The City submitted that the appellant would not be prejudiced in any way by the late raising of section 13 nor would the integrity of the process be compromised, as the appellant would have the opportunity to provide representations on the application of the section.

The City relied on Order PO-1880 in support of its position. This order involved the Ministry of Health and Long Term Care in which one of the issues was the late raising of section 20 (the provincial equivalent to section 13). Adjudicator Irena Pascoe stated:

> A number of previous orders have also recognized that the harm articulated in section 20 is different from the harms contemplated by other exemptions contained in the *Act*, since it relates to the health and safety of an individual. Section 14(1)(e) is similar to section 20 in that section 14(1)(e) provides an exemption for records where the disclosure could reasonably be expected to endanger the life or physical safety of an individual. As a result, in a number of cases, affected parties, who would not normally be entitled to raise the application of discretionary exemptions which have not been claimed by the institution [Order P-257], have been permitted to rely on sections 14(1)(e) and 20, due to the nature of these exemptions and the particular circumstances surrounding those cases [Orders R-980015 and PO-1787]. Similarly, in Order PO-1858, an institution was permitted to claim the application of section 14(1)(e), even though it was not raised within the 35-day time period provided for in the Confirmation of Appeal.

The appellant did not make representations regarding the late raising of section 13.

I agree with Adjudicator Pascoe and adopt her approach on this issue. Therefore, I find that the appellant will not be prejudiced nor will the integrity of the process be compromised in allowing the late raising of section 13 of the *Act*.

RECORDS:

The records at issue in this appeal consist of five building plans for proposed renovations to the affected party's residence, identified as A1 and A2, S1, S2 and S3.

DISCUSSION:

Section 8(1)(i) Law Enforcement

The City's position, supported by the affected party, is that disclosure of the building plans at issue could reasonably be expected to endanger the security of the 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.

The City's Representations

In support of their position, the City referred me to a number of previous orders of this office. The City submitted that:

> In Order PO-2099, Adjudicator Donald Hale stated that the provincial equivalent of section 8 of the municipal *Act* requires that the expectation of one of the enumerated harms coming to pass, should a record be disclosed, not be fanciful, imaginary or contrived, but rather one that is based on reason. He concluded that an institution relying on the [section 8] exemption bears the onus of providing sufficient evidence to substantiate the reasonableness of the expected harm(s). The expectation of harm must be "based on reason." There must be some logical connection between disclosure and the potential harm that the institution seeks to avoid by applying the exemption.
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> In Order PO-1747, Senior Adjudicator David Goodis also discussed the provincial equivalent of section 8. He stated:
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> > The words "could reasonably be expected to" appear in the preamble of [section 8(1)], as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms." In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm."
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> In Order MO-2074, which also involved the City, it was confirmed that the test in 8(1)(i) does not require evidence of any actual harm, or intent to harm, or of actual intent to harm. The Adjudicator accepted that evidence provided to her, including information about the appellant's relationship with the owners, as detailed and convincing. She found that the disclosure of the records could

> `reasonably be expected to result in the endangerment of the security of the building.

It is to be noted that Order PO-1747, cited by the City, cites a standard of evidence that is no longer applied by this office. The passage quoted above indicates that, in order to demonstrate that harm could "reasonably be expected" to result from disclosure, there must be a "reasonable expectation of *probable* harm." This office requires "detailed and convincing" evidence to establish a "reasonable expectation of harm." In the case of sections 8(1)(e) and 13, a less exacting standard applies, as discussed below in my analysis of section 13.

In its representations, the City also cited Order MO-2181, in which I found that the building plans at issue were not exempt under section 8(1)(i), and sought to distinguish it. The City argued that in Order MO-2181, the homeowner did not provide any representations on the harms to the property that would occur should the building plans be disclosed.

With respect to the particular circumstances of this appeal, the City submitted that, unlike the circumstances in Order MO-2181, the homeowner did provide representations and indicated that:

> She is not so much concerned with the security of the building in and of itself but rather with her own personal health and safety, which might result from the breach of the security of the building.

In addition, although the City submitted that it was not stating that there is evidence of the intent to harm the property:

> …given the antagonistic relationship that appears to exist between the homeowner and the appellant, it is not unreasonable that the information contained in building plans could be used in a way that could threaten the security of the property.

The Affected Party's Representations

By way of background, the affected party's legal counsel advised that she had retained the appellant to assist in preparing plans for a proposed renovation on her property. According to the affected party, she terminated the appellant's retainer due to slow service, unsolicited alterations to the building plans and a loss of faith in the appellant's abilities to complete the project. A new planner and architect was retained, new building plans were made and submitted to the City for approval.

Subsequently, the appellant contacted the affected party on numerous occasions "demanding" that the building plans be provided to him, as he was of the view he had some copyright in the plans. The appellant commenced an action in Small Claims Court, which was settled by way of minutes of settlement and by the payment of money to the appellant by the affected party.

With respect to section 8(1)(i), the affected party's legal counsel submits:

> Our client's experience with (the appellant) after his termination, including his repeated demands for the building plans and his harassment resulting from our client's refusal to provide the building plans, leads our client to believe that (the appellant) will endanger the security of the building once constructed.
>
> …the disclosure of the building plans could reasonably be expected to endanger the security of a system established for the protection of items. In our view, the City's policy of not providing building drawings has been put in place, in part, to protect both the detailed building drawing submitted to it for review and the buildings that are constructed on the basis of these drawings. Disclosure of the building plans will endanger the system set up to provide security to property owners who submitted building drawings, including those with safety or design feature details.
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> The information contained in the building plans is information which is not otherwise available to the public. The building plans contain information relating to a private structure not intended for public use.

The Appellant's Representations

The appellant stated that he wishes to have copies of the building plans to review and compare the drawings submitted to the City. With respect to section 8(1)(i), the appellant simply advised that he is legally blind and could not, therefore, be a danger to anyone. The appellant provided a copy of a letter from an ophthalmologist, confirming the appellant's low vision.

Analysis and Findings

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 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".

By way of contrast, in Order MO-2181, I found that residential structures, by their very nature, do not establish a reasonable basis for believing that the harms set out in section 8(1)(i) could reasonably be expected to result from the disclosure of their building plans. I also found that the evidence provided by the City, which was that the appellant chose not to view the building plans during the adjudication process and that the appellant had stated that the affected party's building violated his rights, did not provide a reasonable basis for believing that endangerment could result from disclosure.

I have carefully considered the parties' representations, the building plans at issue and the relevant orders of this office. 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.

The only evidence relative to this building provided by the City and the affected party is the fact that the appellant "demanded" copies of the building plans from the affected party, and, failing to receive them, commenced a proceeding in Small Claims Court. After the Small Claims Court matter was settled, the appellant then made a freedom of information request to the City for copies of the building plans. In my view, the appellant's actions fail to establish a reasonable basis for believing that endangerment of the building could reasonably be expected to result from disclosure. In fact, there appears to be no dispute that the appellant's motivation for wishing to have copies of the building plans is to potentially assert some proprietary interest in them, and not to endanger the building that resulted from the plans. While I do not doubt that relations between the appellant and the affected party are not good, this does not mean that providing the appellant with a copy of the building plans represents a risk to the affected party's building.

Finally, I note that neither the City nor the affected party were able to identify any particular design feature in the building plans, the disclosure of which could reasonably be expected to endanger the security of the building.

For all these reasons, I find that the section 8(1)(e) exemption does not apply.

Section 13: Threat to Health and Safety

Section 13 states:

> A head may refuse to disclose a record whose disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

The City's Representations

The City states that if the information at issue is disclosed it could reasonably be expected to seriously threaten the safety or health of the affected party. The City submits:

> In the current case, the relationship between the owner and the appellant is a relevant factor to consider. In his first appeal, the appellant stated that the homeowner did not pay for his drawings and subsequently used someone else to perform the work similar to his. He further stated that he was seeking access in order to prove his Small Claims Court action against her.
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> Following the receipt of the NOI [Notice of Inquiry], the City contacted the homeowner's solicitor for more information about the relationship between the homeowner and the appellant. The law firm advised that the matter was settled in the Small Claims Court.

The City also provided confidential representations, setting out the homeowner's specific concerns regarding the appellant, and argued that it is obliged to give considerable weight to the homeowner's concerns. The City also submitted that it is not required to have medical evidence or to prove the probability of such a negative impact on the homeowner's wellbeing. The requirement is only that there is sufficient cause to believe that the harms could reasonably be expected to happen if the records are disclosed to the appellant.

The City submitted that based on the information provided to the City by the homeowner, it is reasonable that the disclosure of the building plans could seriously threaten her health as envisioned by section 13, and that the City properly exercised its discretion after considering a number of factors.

The City advised that access to building plans are usually sought for purposes relating to the purchase of a property, to assist in developing a property, and to allow for comments about a proposed development. The City argued that these purposes are not applicable in this appeal, as the appellant originally stated that he wanted the records for his Small Claims Court action against the homeowner. As the claim has been settled, the City argued, there would appear to be no compelling need for the appellant to access the information at issue.

The Affected Party's Representations

The affected party, through her legal counsel, submitted that:

> ...[O]ur client has concerns related to (the appellant's) continued behaviour and demands in this matter, despite the fact that he agreed to settle the matter pursuant to Minutes of Settlement…(The appellant) continues to make demands for the building plans. As such, the danger to safety of health provision contained in section 13 of the *Act* applies.

> (The appellant's) actions to continue pursuing the matter in the face of the settlement between the parties suggest that it can reasonably be expected that (the affected party's) personal safety would be compromised. (The affected party) settled the Small Claims Court action in order to avoid continuing to deal with the demands and harassment of (the appellant). (The appellant's) continued requests for the Building Plans will subject (the affected party) to further harassment.

The affected party's legal counsel also argued that the onus is on the appellant to justify why the Building Plans should be disclosed.

Analysis and findings

The *Act* creates a right of access unless an exemption applies (see section 4(1)). Section 42 of the *Act* places the burden for demonstrating that an exemption applies on the City. As well, the general position in law is that a party must provide evidence to substantiate assertions upon which he or she relies. Accordingly, I disagree with the affected party that it is up to the appellant to justify why the records should be disclosed.

For this exemption to apply, the City must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. In the case of section 13, this means that the City must satisfy me that a reasonable basis exists for believing that endangerment will result from disclosure. In other words, the City must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated. In addition, while the expectation of harm must be reasonable, it need not be probable [*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.)].

An individual's subjective fear, while relevant, may not be sufficient to establish the application of the exemption [Order PO-2003].

In Order PO-1940, Adjudicator Laurel Cropley found that section 20 (the provincial equivalent of section 13) applied to deny records to an appellant who was deemed to be "angry and potentially dangerous" after having engaged in a pattern of abusive and intimidating correspondence with the institution. In that order she stated:

> [I]t is noteworthy to add (in response to the appellant's assertions that he would not physically attack anyone) that a threat to safety as contemplated by section 20 is not restricted to an "actual" physical attack. Where an individual's behaviour is such that the recipient reasonably perceives it as a "threat" to his or her safety, the requirements of this section have been satisfied. As the Court of Appeal found in *Ontario (Ministry of Labour)*:

> It is difficult, if not impossible, to establish as a matter of probabilities that a person's life or safety will be endangered by the release of a potentially inflammatory record. Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes [sections] 14(1)(e) or 20 to refuse disclosure.

It has been acknowledged by this office that individuals working in public positions will occasionally have to deal with "difficult" individuals. In a postscript to Order PO-1939, Adjudicator Laurel Cropley stated the following with regard to section 13 of the *Act*:

> In these cases, individuals are often angry and frustrated, are perhaps inclined to using injudicious language, to raise their voices and even to use apparently aggressive body language and gestures. In my view, simply exhibiting inappropriate behaviour in his or her dealings with staff in these offices is not sufficient to engage a section 20 [the provincial equivalent of section 13] or 14(1)(e) claim. Rather, … there must be clear and direct evidence that the behaviour in question is tied to the records at issue in a particular case such that a reasonable expectation of harm is established should the records be disclosed.

In the circumstances of the present appeal, I do not accept that the evidence tendered by City regarding the appellant's behaviour meets the required threshold for exemption under section 13. The evidence provided by both the City and the affected party is that the appellant made repeated requests for the building plans, commenced an action in Small Claims Court, which settled, and then made a request to the City for copies of the building plans.

The simple act of continuing to press for a copy of the building plans is insufficient to support the position that the appellant, by acquiring the plans, represents a serious threat to the safety or health of the affected party. As mentioned previously when discussing the application of section 8(1)(i), the relationship between the affected party and the appellant has clearly broken down and the appellant may well continue to feel that he has a grievance against the affected party. However, there is a complete absence of the kinds of behaviour that other orders of this office have required in order to find that section 13 is applicable. The affected party may prefer that the appellant drop his claim for a copy of the building plans. However, her unhappiness with his continued pursuit of the plans cannot be considered a threat to her health and safety.

With respect to the evidentiary standard for this exemption established by the Court of Appeal in *Office of the Worker Advisor* (cited above), I am not satisfied, based on the evidence, that a reasonable basis has been established for believing that "endangerment will result from disclosure." In my view, the basis for resisting disclosure under section 13 is exaggerated.

Accordingly, I find that the evidence presented to support the City's position in this appeal is not sufficient to substantiate denial of the building plans under section 13 of the *Act*. Given that I have also found that section 8(1)(i) is also not applicable, and no other exemptions have been claimed, I will order the disclosure of the records.

ORDER:

1. I order the City to disclose the building plans to the appellant by providing him with copies no later than **November 28, 2008**, but not before **November 24, 2008**.

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.

October 24, 2008

Brian Beamish
Assistant Commissioner