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

ORDER MO-2513

Appeal MA09-57

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

> I would like to request a copy of the letter from [a named individual] presented to all the Councillors prior to the meeting on Nov. 18/08 in the meeting hall, Main Floor, Scarborough Civic Centre, 150 Borough Drive to discuss item SC 20.3.

After locating a responsive record, the City issued a decision letter to the requesters denying access on the basis of the exemptions in 14(1) and 38(b) of the *Act* (personal privacy).

The requesters, now the appellants, appealed the decision to this office. During the mediation stage of the appeal process, the City confirmed that it was relying on the section 14(1) (personal privacy) exemption, with reference to the factors in sections 14(2)(e), (f), (g) and (i). Mediation was not successful in resolving any issues, so the appeal was moved to adjudication stage of the appeal process for an inquiry.

Initially, I sent a Notice of Inquiry to the City and three affected parties who appeared to have an interest in the records and invited them to submit representations. I received representations from the City. None of the affected parties submitted representations. In its representations, the City decided it was no longer relying on sections 14(2)(g) or (i) of the *Act* and added section 14(2)(h) as a factor favoring the non-disclosure of the record.

I then sent the Notice of Inquiry to the appellants, along with the non-confidential portions of the City's representations, and invited their representations, which they provided in response.

RECORD:

The record at issue is a letter that was submitted by affected party A to the Scarborough Community Council. It is comprised of three separate parts. The first part is a five-page letter with a 15-page attachment of photographs and a diagram, written by affected party A. The second part is a two-page hand-written letter from affected party B that is attached to affected party A's letter. The third part is a two-page hand-written letter from affected party C, also attached to affected party A's letter.

DISCUSSION:

PERSONAL INFORMATION

I will first determine 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.)]. The information must also 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 and 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 and PO-2225].

The record at issue in this appeal consists of three letters written to the Scarborough Community Council by the three affected parties. Upon my review of the record, I find that the letters each contain the names and home addresses of these individuals. The letters also contain information regarding their interaction with the appellants and the other affected parties. Therefore, I find that the record contains the personal information of the affected parties within the meaning of paragraphs (d), (e) and (h) of the definition of "personal information" in section 2(1) of the *Act*. Paragraph (f) of the definition is also relevant. It indicates that correspondence sent to an institution that is implicitly or explicitly of a private or confidential nature would be the personal information of the author.

The letters that comprise the record also contain the views of the affected parties regarding events involving the appellants and include their views and opinions of the appellants. As set out in paragraphs (e) and (g) of the definition of "personal information" in section 2(1) of the *Act*, this comprises the personal information of the appellants.

As a result of my finding that the records contain the personal information of the appellants and the affected parties, I must consider the discretionary exemption in section 38 (b) of the *Act* in the circumstances of this appeal, rather than the mandatory exemption in section 14(1) (see Order M-352).

PERSONAL 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.

Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met.

If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 14. The parties have not claimed that any of the exclusions in section 14(4) apply and I am satisfied that none apply.

I find that none of the section 14(3) presumptions apply to the personal information in the records. Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239]. The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2) [Order P-99].

In the circumstances of this appeal, the City does not rely on section 14(3) to support its view that disclosure would be an unjustified invasion of personal privacy. Rather, the City claims that the factors weighing in favour of privacy protection at sections 14(2)(e), (f) and (h) apply to the records. The appellants did not specify any particular subsections within section 14(2) that favour disclosure. They do, however, argue that the consideration of the record at an open meeting of the Scarborough Community Council, and the impact that the record had on their interests, is a relevant circumstance favouring disclosure. In my view, this argument raises the possible application of section 14(2)(a), and several other previously described circumstances favouring disclosure. I will consider this in more detail below.

Sections 14(2) (a), (e), (f), and (h) state:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence;

Section 14(2)(e) pecuniary harm

As is evident from the language of this section, in order for it to apply, the evidence must demonstrate that the damage or harm envisioned by the clause is present or foreseeable, but that is not sufficient by itself. The evidence must also demonstrate that this damage or harm would be "unfair" to the individual involved.

The City is concerned that the language and tone of the letter from affected party A might lead to a law suit by the appellants and, therefore, affected party A may suffer some pecuniary harm. I have carefully considered the content of the record, particularly the letter prepared by affected party A. The letter was clearly prepared by affected party A for the purpose of being distributed

to the Scarborough Community Council in support of his application. The wording of his letter was chosen by affected party A with a view to the success of that application, and, as noted in the City's representations, after affected party A received legal advice. I am unable to agree that disclosure of the record can be resisted because the language selected by affected party A may now have legal consequences. I am also satisfied that the possibility of legal action against affected party A is speculative at best. I also note that affected party A was given an opportunity to provide representations in this appeal and decided not to do so. I have therefore not been presented with any evidence that affected party A shares the views of the City that disclosure of the record may lead to pecuniary harm.

In addition, given that the function of the courts is to arrive and the fair and just outcome of disputes, I am not satisfied that, even if the disclosure of the records did lead to litigation, any pecuniary harm that might result could be called "unfair."

For all these reasons, I find that section 14(2)(e) does not apply.

Section 14(2)(f): highly sensitive

To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed [Orders PO-2518, PO-2617, MO-2262 and MO-2344].

In its representations, the City states that affected party A, "has indicated that he would be very concerned if the information were to be disclosed". The City also states that affected parties B and C are also concerned about distress if the information were to be disclosed to the appellants.

I am of the view that the disclosure of the three letters which comprise the record at issue in this appeal might have the effect of making the affected parties uncomfortable considering some of the comments they have made about the appellants. However, I cannot find that the disclosure of their contents would cause significant personal distress to them. As the letters clearly indicate, the relationship between the affected parties and the appellants has been strained for some time. Disclosure of this fact to the appellants is, in my view, highly unlikely to come as any surprise to the appellants and it is therefore not reasonable to expect that any discomfort experienced by the affected parties would amount to "significant personal distress." I note that the three affected parties were offered an opportunity to submit representations in this appeal and chose not to do so. I therefore have no direct evidence from them as to the sensitivity of the contents of the records. Accordingly, I place little weight on this section as a factor favouring privacy protection.

Section 14(2)(h): supplied in confidence

This section applies if both the individual supplying the information and its recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation [Order PO-1670].

Each of the letters was expressly prepared to be considered at an open meeting of the Scarborough Community Council. The letter from affected party A was a request to the City which would affect the interests of the appellants in a clear and obvious way. The author of the letters ought to have contemplated that the letters could be read, considered and publically commented on by any number of individuals and then potentially added to a public record. On my close examination of the letters prepared by affected parties B and C, their comments suggest that they are willing to "testify" to anything they have stated in their respective letters. This willingness suggests that they did not expect that the statements had been supplied in confidence to the City. I note that the affected parties have submitted no representations indicating that their letters were submitted to the council in confidence.

In my opinion the affected parties did not have a reasonable expectation that their letters would be treated confidentially and the City has not provided sufficient evidence to convince me otherwise. Accordingly, I find that section 14(2)(h) does not apply in the circumstances of this appeal.

Section 14(2)(a): public scrutiny

In Order P-1014, Senior Adjudicator John Higgins considered the possible application of this section to a request for information by an individual who had been accused of workplace harassment. The requester in that case sought access to various records created or obtained in relation to the investigation of the harassment allegation. Although the context in the appeal before me is different, there is some overlap with Order P-1014 since the appellants, whose interactions with others are referred to in the letters comprising the records at issue, wish to obtain and review these records. Senior Adjudicator Higgins addressed the equivalent of section 14(2)(a) found at section 21(2)(a) of the *Freedom of Information and Protection of Prviacy Act*, in Order P-1014, stating as follows:

> The objective of section 21(2)(a) is to ensure an appropriate degree of **scrutiny by the public**. In my view, there is public policy support for proper disclosure in proceedings such as [Workplace Discrimination and Harassment Policy (WDHP)] investigations, as evidenced by the rules of natural justice. For this reason, I agree with the appellant that an appropriate degree of disclosure to the parties involved in WDHP investigations is a matter of considerable importance. I will return to this issue under the heading "Public Confidence in the Integrity of an Institution", below.
>
> However, as regards section 21(2)(a), it is my view that the interest of a party to a given proceeding in disclosure of information about that proceeding is essentially a private one. The appellant is not arguing that the public should be able to scrutinize these records. Rather, he seeks to review them himself, in order to ensure that justice was done in this particular investigation, in which he was personally involved. For this reason, I find that section 21(2)(a) does not apply in the circumstances of this appeal.

In my view, similar considerations arise here, and based on the reasoning in Order P-1014, which also applies in this case, I find that section 14(2)(a) does not apply. However, I will consider the issue of "public confidence in the integrity of an institution," below.

Public Confidence in the Integrity of an Institution

The opening words of section 14(2) require the head of an institution to "consider all the relevant circumstances."

In that regard, disclosure may relate to public confidence in the integrity of an institution. In Order P-237, former Commissioner Tom Wright referred this factor, stating as follows:

> ... [D]isclosure of personal information could be desirable for the purpose of ensuring public confidence in the integrity of an institution. This could be considered as an additional unlisted circumstance to be taken into consideration under subsection 21(2).

In Order P-1014, Senior Adjudicator Higgins found this to be a relevant circumstance favouring disclosure in that appeal. Writing about the WDHP investigation, where records relating to that investigation were at issue, the Senior Adjudicator stated:

> If it appears that these investigations are secret trials which prejudice the rights of those accused, public confidence will be eroded. Failure to disclose information which was considered by the investigator in arriving at his decision would clearly prejudice the rights of individuals accused of harassment. Accordingly, I find that this factor applies to information in the records which is directly related to the subject matter of the investigation, the investigator's findings and the Ministry's final disposition of the matter.

The circumstances of the meeting that the appellants attended on November 18, 2008 indicate that the record was distributed to the councillors and may have played some role in the decision-making process. As the appellants describe it in their appeal letter to this office:

> A copy of the letter requested by us was presented by (affected party) to each councillor (the decision makers) prior to the public meeting about a fence between neighbours. This letter was held private from us, even though (affected party) said at the meeting "what more can I say, it is all in my letter." We were required to speak publically while (affected party) listened. We feel that most of this letter is all about us or the fence. We should be given the same opportunity to know what was said by him to all the councillors, especially since the letter in our opinion was an attempt to give his side of the story. We accept the decision about the fence, but we are compelled to know what was said about us in the secret letter, presented as a public forum and kept from us, yet seen by everyone else present, including all the City staff.

In my view, this appeal features the circumstances described by former Commissioner Wright in Order P-237. For this reason, I find that public confidence in the integrity of an institution should be accorded considerable weight in this appeal. Although this is not a WDHP investigation, I also find that Order P-1014 provides support for this conclusion, because the circumstances involve the consideration of personal information in relation to decision-making by a public body.

In addition, I note that the City does not dispute that the record was distributed prior to the community counsel meeting by affected party A. The letters were prepared by the affected parties for consideration at an open meeting of the community council and were distributed to the decision-makers at that meeting. According to the appellants, they were initially offered an opportunity to read the letter which was later refused by the City Solicitor. Although the City Solicitor may have required councillors to return the record and copies may have been destroyed, I cannot conclude with any assurance that the record did not impact on the decision made by councillors. I accept the representations of the appellants that indicate that some councillors had read at least portions of the record.

In summary, the record was submitted by the affected parties to an open meeting of a public body. It was circulated to members of the public body and may have influenced its decision. In the circumstances, disclosure of the record is desirable to shed light on the decision-making process of the public body. I am therefore satisfied that disclosure of the record to the appellants is desirable to ensure public confidence in the integrity of an institution, and find that this circumstance should be given significant weight in this case.

Adequate Degree of Disclosure

As identified in Order P-1014, the need for an adequate degree of disclosure relates to the fairness of administrative processes, and the need for a degree of disclosure to the parties which is consistent with the principles of natural justice.

In particular, it arises in circumstances where there is a need on the part of the appellants to understand the processes of a public body in relation to themselves. In Order P-1014, this circumstance was found to relate to an individual's right to know the case that has been made against him or her, and although the circumstances here are different than a WDHP investigation, I nevertheless conclude that similar considerations apply in support of the appellants' right to know what has been said about them in the records at issue. I therefore find that this is a relevant circumstance favouring disclosure, and I accord it significant weight.

Conclusion

Having weighed the circumstances which favour disclosure of the requested personal information against those which favour the protection of privacy of individuals identified in the records, I find that the balance is tipped in favour of disclosure. I have arrived at my finding based on the significant weight I have accorded to the need for public confidence in institutional

integrity, and an adequate degree of disclosure, as balanced against the limited weight I have attributed to section 14(2)(f).

For this reason, I find that disclosure of the records would not constitute an unjustified invasion of the affected parties' personal privacy and they are therefore not exempt under section 38(b).

Given that the City refused to disclose the record solely based on the basis of the exemptions in sections 14(1) and 38(b) of the *Act*, I will order the City to disclose the record in its entirety.

ORDER:

1. I order the City to disclose the record to the appellants and to do so by **May 13, 2010** but not before **May 7, 2010**.

Original Signed by: April 8, 2010
Brian Beamish
Assistant Commissioner (Access)