



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

# **ORDER MO-2632**

**Appeal MA09-318**

**Corporation of the City of Brantford**



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## **NATURE OF THE APPEAL:**

The Corporation of the City of Brantford (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for records relating to complaints made by City staff, Councillors or Committee members to government agencies about a redevelopment site. The request states:

I would like to put in the following Freedom of Information Request for any correspondence, complaints or requests for investigation and information made to the Ontario Ministry of the Environment, Ministry of Natural Resources, or Ministry of Aboriginal Affairs from any City of Brantford Councillors, Members of the Northwest Gateway Park Steering Committee, Environmental Policy Committee, Engineering Department including Environmental and Pollution Control staff or any other City of Brantford staff member regarding any City of Brantford environmental concerns including soil and groundwater contamination related to the [named redevelopment site and address...], from January 1, 2008 to April 1, 2009.

Please provide the following:

Copies of all records and correspondence including letters, e-mails, reports, notes, minutes of meetings, complaints from members of public mentioned above either verbal or written.

The City located nine responsive records and provided the requester full access to eight of them. The City withheld the name and other identifiers of the complainant contained in the remaining record claiming that disclosure of this information would constitute an invasion of personal privacy under section 38(b), taking into consideration the factors favouring non-disclosure at section 14(2)(e)(pecuniary or other harm) and (h)(supplied in confidence) of the *Act*.

Under section 38(b), where a record contains the 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. In this case, it appears that the City raised section 38(b) taking into account that the appellant is referred to in the record. Accordingly, one of the issues this order will address is whether the requester’s information contained in the record amounts to personal information as defined in the *Act*.

The requester (now the appellant) appealed the City’s decision to deny access to the undisclosed portion of the record.

During mediation, the appellant also indicated that he believes additional records exist beyond the nine records identified by the City and that he seeks to add the issue of reasonable search to the appeal.

As the parties were unable to resolve the appeal during mediation, the matter was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*. The City provided representations in response to a Notice of Inquiry, setting out the facts and issues in this appeal, which were shared with the appellant. The appellant also provided representations, which were provided to the City in their entirety for reply. The City provided reply representations and the appeal file was subsequently transferred to me to issue a decision.

## **RECORD AT ISSUE:**

There is one record at issue, a one-page computer generated report entitled the *City of Brantford - Pollution Control Division - Activity Report*. The only information not already disclosed to the appellant is the name of the complainant and identifiers indicating whether the complainant is male or female.

## **DISCUSSION:**

### **SEARCH FOR RESPONSIVE RECORDS**

The Notice of Inquiry sent to the City asked it to provide an affidavit addressing the following questions regarding its search for responsive records:

1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.
2. If the institution did not contact the requester to clarify the request, did it:
  - (a) choose to respond literally to the request?
  - (b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?
3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

***Representations of the parties***

The City's Records and Office Services Co-ordinator/ Freedom of Information Co-ordinator (City's FOIC) provided an affidavit to this office. This individual undertook the search to locate records responsive to the appellant's request. She affirmed that she:

- sent e-mails to the General Manager and Secretary in Engineering and Operational Services, Director of Environmental Services/Pollution Control, City of Brantford Councilors and Manger of Legislative Services in the City Clerk's Department and requested their assistance in providing any records responsive to the request.
- subsequently sent e-mails to the Director/ Current Planning, Director/ Policy Planning and City Solicitor & Director of Legal and Real Estate Services in an effort to widen the scope of the search for responsive records.
- received responses from the City Clerk's Office, Environmental Services, Pollution Control, Planning Department, some Members of Council and the Legal Department.
- conducted a search for additional responsive records on the City's record management software package and found no additional responsive records.
- met with the Director, Engineering Services/Pollution Control and the Secretary to General Manager, Engineering and Operational Services to confirm that no other responsive records exist.

The City's FOIC also advises that during the mediation stage of the appeal, the Mediator advised her that the appellant believed that additional responsive records exist given the information contained in two newspaper articles. The City's FOIC's affidavit states:

[a]t no time did the appellant supply the City of Brantford with copies of said newspaper articles or provide additional clarification that may assist in the City's search. I did however, conduct a search myself for these two newspaper articles, but was not successful in locating them.

When the mediator contacted me to discuss further, I asked that the City be provided with a copy of two newspaper articles as noted above. These records were not provided to me.

Finally, the City's FOIC states that during the adjudication stage of the appeal:

I went back to the Engineering Department, for a third time, and spoke with the Director, Environmental Services/ Pollution Control. I was provided with a box of records, to which I reviewed and found no further responsive records.

The appellant made the following points in its representations:

- The City's search efforts only identified a portion of a Phase 1 Environment Site Assessment Report prepared in December 2002 (site visit October 11, 2002). A record of the site condition was also referred to during the January 20, 2004 meeting of the steering committee charged with monitoring the impacts of any redevelopment of the land in question. The minutes of the meeting refer to the committee's comments that a "record of site condition should be filed with the Ministry of Environment confirming that any contamination ... has been remediated in accordance with Ministry of Environment guidelines." The appellant takes the position that the information contained in the report is "critical for an accurate understanding by the city, Six Nations and the residents of Brantford as to the environmental concerns that have been raised as well as the actions taken to address those concerns".
- The City's search efforts failed to identify an e-mail between the appellant and a City Councilor, dated August 21, 2008. The appellant attached a copy of this email to his representations.

The appellant's representations also referred to one of the newspaper articles it identified during mediation. The appellant referred to the newspaper article in support of its position that the individual whose information was severed from the record at issue may have already been identified in a local newspaper article. The appellant argues that if the complainant is the same individual whose information is severed from the record at issue, this information should be released. I will address the appellant's argument later in this order under the heading "Personal Privacy".

As referred to above, the City provided reply representations. With respect to the appellant's position that the City should have a full copy of the report, the City states:

Upon receiving a part of the [site] report, the Records and Office Services Coordinator searched the City of Brantford Record Management System and found no reference to the report. The Environmental Services Division was also contacted to determine if a copy existed. The Director of the Environmental Services, the Subdivision Technologist and the Environmental Engineering Technologist have stated that they do not have a copy of this report. The Executive Assistant to the General Manager, Engineering and Operational Services records has reviewed the soil reports and the Engineering and Operational Services records and has not located any copy of this report. The

Records and Office Services Coordinator also searched through the Engineering records for a Report completed by [name of an environmental consulting company] and could not locate this report.

The City of Brantford would not necessary received a copy of such a report when owners of building and land complete a study on their properties. The City of Brantford did not request a copy nor was the City aware that this report was being completed. It is our understanding that [the environmental consulting company] was retained by [name of business] to compile the information in this report.

The City of Brantford did not commission this report nor request a copy at any time. The City is satisfied that following an extensive search, the Report is not in the possession of the City.

With respect to the appellant's evidence that it has in its possession a record that the City's search efforts has failed to locate, the City advises that it is not certain what the appellant is seeking given that his representations refer to an e-mail that is already in his possession.

### ***Decision and Analysis***

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 and 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 [Orders P-624 and PO-2559]. To be responsive, a record must be "reasonably related" to the request [Order PO-2554].

A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request [Orders M-909, PO-2469, PO-2592].

A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control [Order MO-2185].

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 [Order MO-2246].

A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable [Order MO-2213].

In this appeal, the appellant made two arguments in support of its position that additional records must exist. First, the appellant argues that the City should have a copy of a site assessment report in its possession and that its search efforts failed to locate it. Second, the appellant argues that the City failed to identify an e-mail between itself and a City Councilor.

I am satisfied that the City conducted a reasonable search for records responsive to the appellant's request despite the appellant's evidence that the City failed to locate an email between itself and a City Councilor. The appellant requested records relating to any correspondence, complaints or requests for investigation and information made **to** the Ministry of Environment, Ministry of Natural Resources or Ministry of Aboriginal Affairs **from** City staff, Councilors and Committee members regarding environmental concerns relating to a specified redevelopment site [Emphasis mine]. The e-mail in question does not relate to any complaints or requests for investigation or information from a City staff member, Councilor or Committee member to any of the ministries identified in the appellant's request above. The e-mail in question is from the appellant to a City Councilor. In my view, the e-mail is outside the scope of the appellant's request and thus its existence does not demonstrate that the City's search efforts for responsive records is lacking.

Arguably, the environmental site report is also outside the scope of the request as it does not appear to relate to any correspondence, complaints or requests for investigation and information made to the ministries mentioned above from a City staff member, Councilor or Committee member. In fact, my review of the portion of the report the appellant provided along with its representations confirm the City's advice that the report was prepared by an environmental consulting company for a private company. In addition, I note that the first page of the report indicates that at the time of the issuance of the report, it was only distributed between the consulting company and private company. Nonetheless, the City provided representations regarding its search efforts to locate this record and I will therefore, address them.

Having regard to the representations of the parties, I am satisfied that the City conducted a reasonable search for the environmental site report. In my view, the appellant has failed to demonstrate a reasonable basis for concluding that a complete copy of the report exists in the City's record holdings. The appellant's position appears to be that the City should have obtained a copy of the report, given its subject-matter. However, the City argues that it does not have a copy of the complete report and has never requested a copy of it. The issue I am to determine is whether the City conducted a reasonable search for responsive records not whether it ought to obtain and retain certain records.

I have also carefully reviewed the City's affidavit and am satisfied that it sets out in sufficient detail the nature of the City's physical and electronic searches conducted and directed by an individual having knowledge about the subject-matter of this appeal and the City's record holdings.

Accordingly, I find that the City conducted a reasonable search and dismiss this portion of the appellant's appeal.

## **PERSONAL INFORMATION**

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. The City submits that the withheld information qualifies as the individual’s “personal information” as defined in paragraph (e) (opinions or view of the individual) and (h) (individual’s name) of the definition in section 2(1) of the *Act*. Sections 2(1)(e) and (h) state:

“personal information” means recorded information about an identifiable individual, including,

- (e) the personal opinions or views of the individual except if they relate to another individual,
- (h) the individual’s name where 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;

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 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, PO-2225 and MO-2344].

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 withheld information in the record is the name of an individual and references to whether the individual is male or female.

### ***Representations of the parties***

The City’s representations state:

The record details a complaint by an identifiable individual. The complainant’s name appears with the complainant’s personal views respecting the matter.

During mediation, the City confirmed that at the time the complaint was made, the complainant was not a member of the City’s staff, nor did he or she hold a position as a City Councilor or Committee member. The mediator shared this information with the appellant who responded that he believed that the complainant was a Committee member at the time the complaint was made.



The appellant did not provide representations addressing whether the withheld information qualifies as “personal information” as defined in section 2(1) of the *Act*.

*Does the record contain the personal information of an identifiable individual?*

The appellant has raised questions as to whether the withheld information relates to an individual in a professional, official or business capacity. Accordingly, I will determine whether the withheld information pertains to the individual in question in a personal, as opposed to professional, 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]. Following the analysis set forth in Order PO-2225 the first question I must ask is: "*in what context do the names of the individuals appear*"? The second question I must ask is: "*is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual*"? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

With respect to the first question, I am not satisfied that the information contained in the record relates to the individual in a professional or business context.

The portion of the record disclosed to the appellant reveals that the individual contacted City staff to report that a pond located on the redevelopment site appeared green. The record was completed by two members of the City’s pollution control team who reported that upon receipt of the complaint, they attended the site and made observations and preliminary conclusions as to why the pond may appear green. These observations were reported in the record and were disclosed to the appellant, along with the information disclosing the identities of the pollution control team and other City staff.

In my view, there is a marked distinction between the information contained in the record which relate to the two pollution control team members and the individual who reported that the pond may be contaminated. The information relating to the pollution control team members clearly refers to them as part of their official duties, solely in a professional context. However, the information which relates to the individual does not refer to any professional expertise or office. Having regard to the above, I find that the information at issue does not relate to the individual in a professional or business context, but instead relates to this individual only in their personal capacity.

Accordingly, I am satisfied that the withheld portions of the record which contain the individual’s name and personal identifiers indicating whether the individual is male or female qualifies as “personal information” as defined in paragraphs (e) and (h) of section 2(1) of the *Act*.

*Does the record contain the personal information of the appellant?*

As mentioned above, the City claimed that disclosure of the withheld information would constitute an unjustified invasion of personal privacy under section 38(b). 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 record does not contain the personal information of the appellant, the City **must** refuse to disclose that information under section 14(1)(personal privacy), unless disclosure would not constitute an “unjustified invasion of personal privacy”.

Neither the City nor the appellant provided representations on this issue. As previously mentioned, the appellant/requester is not an identifiable individual, but instead is a company. In the portion of the record which was disclosed to the appellant, the company is referred to by name. No individuals associated with the company are identified in the record. Having regard to the nature of the information contained in the record which relates to the appellant and definition of “personal information” under section 2(1) of the *Act*, I find that the record does not contain the personal information of the appellant.

Accordingly, I will go on to determine whether disclosure of the information I found qualifies as “personal information” would constitute an unjustified invasion of personal privacy under section 14(1).

## **PERSONAL PRIVACY**

Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

If the information fits within any of paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure under section 14. The only exception that can apply in the circumstances of this appeal is section 14(1)(f), which states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except if the disclosure does not constitute an unjustified invasion of personal privacy.

The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f).

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.

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 14. 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 (Div.Ct.)]. Neither of the parties claim that any of the presumptions apply, however, I am of the opinion that the presumption at section 14(3)(b) may apply in the circumstances of this appeal. This section states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information, 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

***14(3)(b): investigation into violation of law***

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 [Orders P-242 and MO-2235]. The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn [Orders MO-2213, PO-1849 and PO-2608].

Section 14(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law [Orders M-734, M-841, M-1086, PO-1819 and PO-2019].

The presumption can apply to a variety of investigations, including those relating to by-law enforcement [Order MO-2147].

As noted above, the City did not raise the possible application of the presumption at section 14(3)(b). However, in support of its position that disclosure of the withheld information would constitute an unjustified invasion of personal privacy, the City stated the following in its representations:

The City of Brantford treats complainant information sent by concerned citizens as confidential. Staff [has] been instructed to do just that. It would be reasonable to expect that an individual could file a complaint with the municipality and that their identity remain confidential.

The City does not have [the] individual’s consent to disclose personal information pursuant to Section 14(1)(a) of the Act.

The City would also argue that disclosure of the complainant’s name would constitute an unjustified invasion of their personal privacy (Section 14(1)(f)).

After reviewing the City's representations above, I asked the Adjudication Review Officer assigned to the appeal file by this office to contact the City by telephone and inquire whether the investigation the City undertook upon its receipt of the complaint was done so in accordance to a municipal by-law. The City was also asked to identify the relevant municipal by-law.

The City advised that the investigation in question related to an alleged contravention of the City of Brantford Municipal Code, Chapter 281, Article 5 (Storm Sewers). The relevant sections state:

**281.5.1 Discharge - prohibited**

No person shall, whether directly or indirectly, discharge or deposit or cause or permit the discharge or deposit of matter of a kind listed in Section 281.5.2 and 281.5.3 into or in any land drainage works, private branch drains or connections to any storm sewer.

**281.5.2 General limitations - obstruction - hazardous**

Matter of any type or at any temperature or in any quantity which may:

(d) impair the quality of the water in any well, lake, river, pond, spring, stream, reservoir or other water or watercourse

While the City did not raise the possible application of the presumption at section 14(3)(b), its representations referred to Orders MO-1671-I (Final Order MO-1702) and PO-1706. These Orders found that personal information relating to the investigation of alleged violations of municipal by-laws fall within the scope of the presumption provided by section 14(3)(b) of the *Act*. These orders also establish a line of reasoning in orders of this office that personal information relating to investigations of alleged municipal by-law infractions fall within the scope of the presumption provided by section 14(3)(b) of the *Act* (see also Orders MO-1295, MO-1626, MO-2147, MO-2322, MO-2331). I agree with the reasoning in these orders and adopt it for the purposes of this appeal.

Having regard to the City's representations, the record itself and the municipal by-law the City identified, I am satisfied that the information at issue was compiled and is identifiable as part of an investigation into an alleged violation of the law. The section 14(3)(b) presumption applies as long as a record that contains personal information was compiled during the course of the investigation itself (Orders MO-1568, MO-1431, MO-1256), regardless of whether the investigation resulted in charges being laid.

As already indicated, the section 14(3)(b) presumption cannot be overcome by any factors, listed or unlisted, under section 14(2). Accordingly, it is not necessary for me to consider whether the factors favouring privacy protection at section 14(2)(e) or (h) also apply to the withheld information.

I find found that neither the exception at section 14(1)(f) nor any of exclusions in section 14(4) apply to the circumstance of this appeal and the appellant did not raise the possible application of the “public interest override” provision in section 16. As a result, I find that disclosure of the withheld information would constitute an unjustified invasion of personal privacy and uphold the City’s decision to deny access to this information.

**ORDER:**

I uphold the City’s decision and dismiss this appeal.

Original signed by: \_\_\_\_\_  
Jennifer James  
Adjudicator

\_\_\_\_\_ June 27, 2011