

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2716

Appeal MA10-440

City of Toronto

April 11, 2012

Summary: The appellant sought access to her complete file held by Toronto Employment and Social Services. She was granted access to all of the records except the records containing information received from a complainant, which was denied on the basis of section 14(1) (that it is the complainant's personal information), and on the basis of section 8(1)(d) (that disclosure of the records would reveal the identity of a confidential source of information in a law enforcement investigation). This order finds that the records contain the personal information of the appellant, and upholds the city's decision that section 8(1)(d), in conjunction with section 38(a), applies to the records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2(1) definition of personal information, 8(1)(d), 38(a).

OVERVIEW:

[1] The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the requester's complete file held by Toronto Employment and Social Services (TESS), specifically:

... all ... information in the possession of [TESS] including any and all units/divisions, electronic mail, documented phone correspondence and my complete file (computer and paper) ... from the Downtown/Wellesley office, any and all correspondence between Employment and Social Services offices.

[2] The city granted access in full to the payment history maintained by TESS. The city granted partial access to records in the Ontario Works file, but denied access to some records or parts of records on the basis of the discretionary exemptions in section 8(1)(d) (confidential law enforcement source) and section 38(b) (discretion to refuse requester's personal information) of the *Act*. The city also referred to the presumption against disclosure in section 14(3)(b) and the factor favouring privacy protection in section 14(2)(h) in support of its decision.

[3] The appellant appealed the city's decision. During mediation, the city located additional responsive records, and granted partial access to them, denying access to small portions of them on the basis of the same exemptions identified in its earlier decision.

[4] Mediation did not resolve this appeal, and it was transferred to the adjudication stage for an inquiry. A Notice of Inquiry outlining the facts and issues in this appeal and seeking representations was sent to the city, initially. In that Notice of Inquiry, the city was also asked to address the possible application of section 38(a) (discretion to refuse requester's own information) to the records at issue.

[5] The city provided representations in response, and the Notice of Inquiry, along with a copy of the non-confidential portions of the city's representations, was sent to the appellant, who also provided representations in response.

[6] This file was then transferred to me to complete the inquiry.

[7] In this order, I find that the disclosure of the withheld pages and portions of pages at issue could reasonably be expected to disclose the identity of a confidential source of information, and that the records are exempt under section 38(a), in conjunction with section 8(1)(d).

RECORDS:

[8] The records remaining at issue consist of 13 pages, nine of which were withheld in their entirety and four of which were partially withheld. These records contain information provided to the city by the complainant, and are numbered pages 2-9 and 16 in their entirety, and portions of pages 31, 33, 44 and 48.

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1)?

- B. Does the information in the records qualify for exemption under section 38(a) in conjunction with section 8(1)(d) of the *Act*?
- C. Did the city properly exercise its discretion to apply sections 8(1)(d) and/or 38(a)?

DISCUSSION:

Issue A. Do the records contain "personal information" as defined in section 2(1)?

[9] 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). That section reads:

"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 if 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;

[10] 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.)].

[11] On my review of the records at issue in this appeal, I find that all of the records contain the personal information of the appellant, as they contain her name as well as details about the complaint relating to her (paragraph (h) of the definition).

[12] Although portions of the records also contain the personal information of other identifiable individuals, as a result of my findings below, for the purposes of this appeal it is not necessary for me to identify precisely which information relates to other individuals. It is also not necessary for me to determine whether or not the complainant's information qualifies as that individual's "personal information".

Issue B. Does the information in the records qualify for exemption under section 38(a) in conjunction with section 8(1)(d) of the Act?

[13] Section 36(1) 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.

[14] Under section 38(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information.

[15] In this case, the city relies on section 38(a) read in conjunction with section 8(1)(d). Section 8(1)(d) reads:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

[16] The term "law enforcement" is used in section 8(1)(d), and is defined in section 2(1) as follows:

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b);

[17] 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.)].

[18] Where section 8(1)(d) uses the words “could reasonably be expected to”, the institution must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Representations

[19] The city begins by reviewing the roles and practices of TESS. It states:

[TESS] delivers the Ontario Works Program in Toronto in accordance with the Ontario Works Act (OWA).

Ontario Works provides financial assistance to cover the cost of basic needs such food and housing and employment assistance in finding a job. Eligibility is based on income, assets and housing costs. Recipients are required to follow the rules of the program including the reporting of all changes in income, assets and living arrangements.

The City has developed a protocol for the investigation and prosecution of social assistance fraud incidents. Each local social services office has an Eligibility Review Team whose purpose is to assess the current and past eligibility of clients where an allegation of suspected fraud is brought to TESS’s attention. Allegations made are received from a variety of sources including the provincial or municipal “hotline”, caseworker identification and/or file reviews. A number of staff may be involved in the investigation process including the Employment and Social Services Fraud Review Unit.

If an investigation confirms that a recipient has received OWA funds to which they are not entitled, income assistance is either reduced or terminated, as appropriate. Where sufficient evidence exists to suspect intent to commit fraud, the case will be referred to the police for investigation and possible criminal prosecution.

In the current appeal, the City received both a call on the hotline and a letter from an individual alleging that there was OWA fraud on behalf of the appellant. As a result, an investigation was conducted. ...

[20] The city then identifies that the investigation of social assistance fraud incidents is a "law enforcement investigation" for the purpose of section 8(1)(d). It states:

The term "law enforcement" has been defined to include "investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty of sanction could be imposed in those proceedings."

As previously indicated, the City conducted an investigation into the allegations of welfare fraud in accordance with the OWA. Sections 57 and 58 of the OWA speak specifically to fraud control. These sections provide that persons engaged in fraud investigations "shall be deemed to be engaged in law enforcement for the purposes of [the *Act*]...".

[21] Lastly, the city states that disclosure of the records could reasonably be expected to disclose the identity of a confidential source of information, or disclose information furnished only by the confidential source. The city states that:

... if the extensive details provided by the Hotline caller/letter writer were to be disclosed, this could reasonably disclose information furnished only by a confidential source ... in respect of a law enforcement matter. As well, such disclosure could reasonably be expected to reveal the identity of the source of this information.

[22] The city also provides confidential information in which it refers more specifically to the information in the records and identifies how their disclosure could reasonably be expected to reveal the identity of the confidential source.

[23] In other portions of its representations, the city also states:

The City submits that ... in the current appeal, while the name of the Fraud Hotline caller/letter writer is not stated, ... if the details that have been provided to the City were to be disclosed, inferences could be made that would result in the revelation of the identity of this individual. ...

... the extensive details provided by the Hotline caller/letter writer about the appellant ... could potentially lead to their identity being revealed ...

[24] The city therefore submits that, in the circumstances of this appeal, section 38(a) in conjunction with 8(1)(d) applies to withhold the information at issue.

[25] The appellant takes issue with the city's position, and provides lengthy representations in support of her position that the exemptions claimed do not apply. The appellant does not directly address the issue of whether or not the fraud investigation can be characterized as a "law enforcement investigation" for the purpose of section 8(1)(d). The appellant does, however, take issue with the city's position that disclosure of the records would reveal the identity of the affected party complainant.

[26] One of the positions taken by the appellant is that the city has not provided sufficient evidence to establish that the disclosure of the information at issue could reasonably be expected to disclose the identity of a confidential source. The appellant states:

The City's belief that the identity of the individual could potentially be inferred by details provided by that individual does not amount to *reasonable expectation* of disclosing identity. The City does not possess the name of the individual and offers no information as to the type of information that could potentially reveal the identity of the individual. ...

... the City ... asserts that the disclosure of information could lead to the identity of an individual falling under section 8(1)(d) but fails to show how it could be that the identity of a nameless individual could be revealed much less how it would be a reasonable expectation that the identity of the nameless individual could be revealed.

[27] The appellant also argues that the city has failed to provide evidence to show how disclosure of the information could reasonably be expected to disclose "information furnished only by a confidential source." The appellant states that the city's belief that the complainant may have wished or expected to remain anonymous "does not define the [complainant] as a confidential source." The appellant argues that there is no evidence to support the suggestion that the source would have had any expectation that their identity would remain confidential.

[28] In addition, the appellant states that the simple fact that sections 57 and 58 of the OWA provide that persons engaged in fraud investigations "shall be deemed to be engaged in law enforcement for the purposes of [the *Act*]" does not necessarily mean that the exemption in sections 38(a) and 8(1)(d) apply. The appellant also provides representations in support of her position that the city did not properly exercise its discretion in applying the exemptions, which I will address below.

Analysis and findings

[29] I have reviewed the records and the representations of the parties and find that the city has provided sufficient evidence to establish that disclosure of the information at issue in this appeal could reasonably be expected to reveal the identity of a confidential source of information with respect to a law enforcement matter.

[30] To begin, based on the city's representations and on section 57 and 58 of the OWA, I am satisfied that the investigation resulting from the complaint is a "law enforcement investigation" for the purpose of section 8(1)(d). Although I accept the appellant's position that this finding, in itself, does not necessarily mean that the claimed exemptions apply, it is one component of the section 8(1)(d) exemption.

[31] In addition, based on my review of the record at issue and the representations of the parties, I am satisfied that the city has provided sufficient evidence to establish that disclosure of the information at issue could reasonably be expected to disclose the identity of a confidential source of information or information furnished only by the confidential source. I note that, although there are a total of 13 pages or portions of pages of records at issue, a number of these pages contain similar information in slightly different format, identifying or summarizing the information received from the complainant. For example, the withheld portions of pages 31, 33 and 44 are essentially identical, summarizing information received from the complainant. The withheld portions of page 48 also contain this information, as well as a small amount of additional information which reflects information found in another withheld page. The other pages at issue consist of a complaint letter and some attachments, but I note that some of this information is also similar in nature.

[32] On my review of the withheld information, I am satisfied that if this information were to be disclosed, it could reasonably be expected to disclose the identity of the source of this information, or disclose information furnished only by the confidential source. I make this finding based on my review of the records at issue, which contain extensive details provided by the complainant, as well as on the representations of the city, including their confidential representations. Furthermore, I make this finding notwithstanding that the records themselves do not specifically include the complainant's name.

[33] Lastly, I am satisfied that the complainant is a "confidential source of information" for the purpose of section 8(1)(d). The city has stated that the complainant specifically "wanted their identity to remain unknown," and the city has provided information on the protocol it has established for conducting investigations into allegations of fraud under the OWA.

[34] As a result, I am satisfied that the disclosure could reasonably be expected to disclose the identity of a confidential source of information in respect of a law

enforcement matter, or disclose information furnished only by the confidential source. Accordingly, I find that the withheld records qualify for exemption under section 38(a), in conjunction with section 8(1)(d), subject to my review of the city's exercise of discretion, below.

[35] As I have found section 38(a) applies to the records, it is not necessary for me to consider the possible application of section 38(b).

Issue C. Did the city properly exercise its discretion to apply sections 8(1)(d) and/or 38(a)?

[36] As noted above, sections 38(a) and 8(1)(d) are discretionary exemptions. When a discretionary exemption has been claimed, an institution must exercise its discretion in deciding whether or not to disclose the record at issue. On appeal, the Commissioner may determine whether the institution failed to do so.

[37] 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 consideration,
- it fails to take into account relevant consideration.

[38] In such circumstances, 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)].

[39] The city submits that, in exercising its discretion to apply the exemptions, it considered the following:

- the purposes of the *Act*, including that exemptions from the right of access should be limited and specific;
- that individuals should have the right to their own personal information;
- that the city provided the appellant with a large number of records containing the appellant's personal information, only withholding a small portion of the over 250 pages of responsive records, and disclosing the other records to the appellant;
- the relationship between the appellant and the complainant (which is more than likely given the details that have been provided);
- that the appellant has not provided any compelling or sympathetic reason for access to the information; and

- that the city relies on members of the public to contact them with information to reduce the possibility of OWA fraud, and that members of the public may be less willingly to assist the city in its fraud investigations if their identities were revealed to the same individuals against whom they have made allegations.

[40] I also note that the city indicates in its representations that, as a result of the allegations made by the complainant, an investigation was conducted. The outcome of that investigation was a determination that there were no eligibility issues arising from the allegations, and this matter was resolved.

[41] The appellant takes the position that the city did not properly exercise its discretion in applying the exemptions. Although the appellant acknowledges that some of the factors listed by the city would be relevant considerations, the appellant takes the position that the city has not provided evidence that it considered these factors, or how they were considered. The appellant states that the city ought to provide more detailed representations on exactly how, and to what extent, these factors were considered, and to provide evidence concerning how they have been considered in other situations in the past, and whether these considerations resulted in disclosure or not.

[42] The appellant also refers to the city's position that the appellant "has not provided any compelling or sympathetic reason for access to the information." She states that in an earlier letter to the city, she did provide reasons for access which she believed were compelling and possibly sympathetic, and she questions why the city did not refer to these reasons in their exercise of discretion.

[43] I have reviewed this earlier letter provided by the appellant to the city. In that letter, the appellant indicated that she was interested in accessing the withheld information because she wanted to know the identity of the person who had the detailed information about her, as she was concerned and frightened about the idea that someone would have this sort of information about her. She also stated that she ought to know what she was accused of and investigated for. In that letter she also states that she was able to view some of the information in the complaint letter and in some of the other withheld records, although she does not refer to this in her representations.

[44] In addition, the appellant argues that the consideration that members of the public might be less willingly to assist the city in its fraud investigations in the future ought not to be considered a relevant factor. The appellant refers to a number of Federal Court decisions which reviewed section 16(1)(c) of the *Access to Information Act*, and states that these decisions determined that the "chilling effect" disclosure

might have on possible future investigations has been consistently denied as a ground for refusing disclosure under that section.¹

[45] Lastly, in her representations the appellant states that there is a “strong possibility” that the complainant is a particular identified person, and provides evidence in support of her belief that this might be the complainant.

Finding

[46] I have carefully considered the representations of the parties regarding the city’s exercise of discretion in applying the exemptions in section 8(1)(d) and 38(a), and I am satisfied that the city did not err in exercising its discretion to deny the appellant access to the withheld records.

[47] To begin, I do not accept the appellant’s argument that the city did not provide sufficient evidence to indicate how certain factors were considered. The city has identified the factors it considered in exercising its discretion, and I am satisfied that these were considered by the city in making its determination to apply the exemptions to the withheld records. A primary consideration in making this finding is the city’s decision to disclose over 200 pages of responsive records to the appellant, exercising its discretion to only apply the exemptions to the withheld records.

[48] I have also carefully considered the appellant’s reference to the “sympathetic and compelling” reasons she cited in her earlier letter. One of these reasons is her concern that she ought to know what she was accused of; however, although I am not in possession of all of the records that were disclosed to the appellant, it is clear from the portions of the pages in my possession that the city withheld only the information provided by the complainant, and disclosed to the appellant all other information about the investigation. The city has also stated that the investigation is complete and this matter resolved. In that regard, it appears that the appellant has had access to the information about any allegations which were investigated, and that her concerns about knowing the allegations against her are addressed.

[49] With respect to the appellant’s concern that an additional “sympathetic and compelling” reason not considered by the city is that she wants the information to know the identity of the person who provided the information, I am satisfied that the city considered this factor in its decision, as one of the purposes of the section 8(1)(d) exemption, relied on by the city, is to withhold information that would identify a confidential source of information.

¹ The appellant refers to *Rubin v. Canada (Ministry of Transport)*, [1988] 2 F.C. 430 at 445 (CA.); *Canada (Information Commissioner) v. Canada (Immigration and Refugee Board)*, 82 CPR (3d) 290 at para. 45; *Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 270 at para. 12.

[50] Furthermore, although the appellant refers to the earlier letter she wrote, in which she suggests that she has seen portions of the responsive records, in the absence of more specific information about the nature and extent of this disclosure, I find that this is not a factor that the city ought to have considered in this appeal.

[51] Addressing the appellant's argument that the city should not have considered as a factor that members of the public might be less willingly to assist the city in its fraud investigations in the future, I have reviewed the Federal Court decisions cited by the appellant. I accept that in those decisions the Federal Court has found that the "chilling effect" disclosure might have on possible future investigations has been denied as a ground for applying the exemption in section 16(1)(c) of the federal *Access to Information Act*. However, I also note that the wording of section 16(1)(c) is different from the wording of section 8(1)(d) at issue in this appeal. Section 16(1)(c) of the federal Act also requires that disclosure be "injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations." The Federal Court's findings that the application of that exemption could not simply be based on the "chilling effect" disclosure might have on possible future investigations does not mean that the "chilling effect" cannot be considered as a factor in the city's exercise of its discretion in this appeal, which involves the application of section 8(1)(d).

[52] Lastly, I note that many of the positions taken by the appellant and arguments put forward by her support her position that she ought to be able to access the records so that she will be able to determine the identity of the complainant. The wording of section 8(1)(d) indicates that it was enacted to allow an institution to deny access to a record if the disclosure could reasonably be expected to disclose the identity of a confidential source of information. I have found that the withheld portions of the records qualify for exemption under this section and, based on all the circumstances, I am satisfied that the city did not err in exercising its discretion to deny the appellant access to the records which qualify for exemption under sections 8(1)(d) and 38(a). As a result, I uphold the city's decision.

ORDER:

I uphold the decision of the city and dismiss the appeal.

Original Signed by: _____
Frank DeVries
Adjudicator

_____ April 11, 2012