

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2759

Appeal MA12-29

City of Toronto

June 29, 2012

Summary: This appeal arises from a violation of a city fence by-law involving the appellants. The appellants requested records relating to the violation, and the city provided all of the responsive records, severing only the name and identifying information of the complainant under section 38(b) and 14(1) (personal privacy). This order upholds the city's decision to deny access to the requested information identifying the complainant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of personal information), 14(1)(b), 14(2)(d) and (h), 14(3)(b), 16, 38(b).

OVERVIEW:

[1] This appeal arises from a Notice of Violation brought by the City of Toronto (the city) against two homeowners (the appellants) because of a complaint that a portion of their fence encroached on a city right-of-way. The city had received a complaint and, as a result of its investigation of the complaint, issued the Notice of Violation against the appellants.

[2] The appellants made a request to the city under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to copies of all documents and correspondence relating to the Notice of Violation and the city's right-of-way,

including the name of the person or persons who made the complaint (the affected party).

[3] In response to the request, the city granted partial access to the records, but denied access to the affected party's name, telephone number and identifying information on the basis of the exemption found in section 14(1) (invasion of privacy) of the *Act*.

[4] The appellants appealed the city's decision.

[5] During mediation, the appellants indicated that they are seeking access to the withheld information relating to the affected party because this matter involves their health, safety and welfare. The appellants referred to the exception in section 14(1)(b) of the *Act*, and certain factors in section 14(2) of the *Act*, in support of their position.

[6] Also during mediation, the mediator contacted the affected party to discuss whether consent to disclose the affected party's information could be obtained. The affected party did not consent to disclosure.

[7] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry identifying the facts and issues in this appeal to the city, initially. In the Notice of Inquiry I also noted that some of the responsive records may contain the personal information of the appellants. As a result, I raised the possible application of section 38(b) to the records, inviting the parties to address the possible application of this section.

[8] The city provided representations in response to the Notice of Inquiry. I then sent the Notice of Inquiry, along with a complete copy of the representations of the city, to the appellants. The appellants also provided representations on the issues. In their representations, the appellants also raise the possible application of the public interest override in section 16 of the *Act*.

[9] In this order, I uphold the city's decision to deny access to the affected party's name and other identifying information.

RECORDS:

[10] The records remaining at issue consist of the severed information contained on four pages of records, consisting of the city's service request, complaint form, and two emails. The severed information consists of the affected party's name, telephone number and other brief information relating to the affected party.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(b) apply to the information at issue?
- C. Did the institution exercise its discretion under section 38(b), in conjunction with section 14(1)? If so, should this office uphold the exercise of discretion?
- D. Does the public interest override in section 16 apply?

DISCUSSION:

Preliminary matter

[11] As a preliminary matter, I note that the appellants have provided detailed and lengthy representations in support of their position that they ought to have access to the name of the individual who complained to the city about the appellants' fence encroaching on the right-of-way. These representations include the following:

- allegations that the affected party's action in bringing the violation to the attention of the city is "frivolous and vexatious";
- speculation that the affected party's intention is to inflict harm and damage to the appellants personally; and
- allegations that the affected party's action is an "abuse of process" and meant to "bring damage, fear and insecurity" to the appellants.

[12] On the basis of these allegations and concerns, the appellants submit that I should contact the affected party and require the affected party to provide representations regarding the issues and, in particular, information about the affected party's reasons for complaining to the city about the by-law violation. The appellants argue that the "crux of this matter" concerns the affected party's intention in bringing the complaint and whether this party was "either acting for a proper purpose or ... committing an abuse of process."

[13] Based on the circumstances of this appeal, I do not agree with the appellants that the affected party should be required to provide representations on any of these issues.

[14] In this appeal, the appellants identify their concerns about the intentions of the affected party; however, other than the one complaint resulting in the records at issue in this appeal, the appellants have not identified any other complaints that have been

made against them or their property. They have not identified any pattern of conduct or other actions that in any way suggest an intent to inflict any "harm or unjust damage to them personally." Although the appellants speculate that affected party's intent is to harm them, it is clear from the city's representations that, in a complaint-driven by-law enforcement process, individuals are entitled to bring possible by-law violations to the attention of the City for any reason. It is then the responsibility of the city to investigate the alleged infraction and determine whether or not a violation has occurred. I note that, in this case, the city investigated the complaint and determined that the appellants' fence was encroaching on the city's right-of-way, in violation of the by-law.

[15] In these circumstances, and based on my finding below upholding the city's decision to deny access to the requested information, I find that it is not necessary for me to seek representations from the affected party in this appeal in response to the issues identified by the appellants. I also note that the affected party was notified of this appeal during the mediation stage of the process and did not consent to the disclosure of the information.

Issue A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[16] Section 2(1) of the *Act* reads, in part:

"personal information" means recorded information about an identifiable individual, including,

(d) the address, telephone number, fingerprints or blood type of the individual,

(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;

[17] The city states that the information at issue includes the name and telephone number of the individual who made the complaint, and that it meets the requirements of paragraph (d) of the definition of "personal information" in section 2(1) of the *Act*. The appellant does not contest that this information constitutes personal information for the purpose of the *Act*.

[18] On my review of the records at issue, which consist of the city's service request, complaint form, and two emails, I am satisfied that these records contain the name and/or address of the appellants, and therefore contain the personal information of the appellants. In addition, the severed portions of these records also contain the name

and telephone number of the complainant, as well as other, brief information about the complainant. In my view, the records contain the personal information of the appellants, as well as the complainant, in accordance with paragraphs (d) and (h) of the definition of the term "personal information" in section 2(1) of the *Act* (Orders MO-1245, MO-1795).

[19] Because the records contain the personal information of the appellants as well as the affected party, I will review whether the withheld portions of the records qualify for exemption under the discretionary exemption in section 38(b).

Issue B. Does the discretionary exemption at section 38(b) apply to the information at issue?

[20] 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 exceptions to this general right of access, including section 38(b). Section 38(b) introduces a balancing principle that must be applied by institutions where a record contains the personal information of both the requester and another individual. In this case, the city must look at the information and weigh the appellants' right of access to their own personal information against the affected person's right to the protection of privacy. If the city determines that release of the information would constitute an unjustified invasion of the affected person's personal privacy, then section 38(b) gives the city the discretion to deny access to the information.

[21] In determining whether the exemption in section 38(b) applies, sections 14(1), (2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the affected person's personal privacy. Section 14(2) provides some criteria for the city to consider in making this determination; section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. In addition, if the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy under section 38(b).

Section 14(1)(b)

[22] Section 14(1)(b) states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

- (b) in compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the

last known address of the individual to whom the information relates;

[23] The city states that the appellants have not provided sufficient evidence to establish that the exception in section 14(1)(b) applies. It refers to Order MO-2677 which states that in order to meet the "compelling" threshold, the purpose for seeking the personal information in question must be a matter of "immediate and essential health or safety affecting the requester." The city states that the appellants have not provided this level of evidence in the circumstances.

[24] The appellants take the position that this exception applies. They refer to their view that, whoever the affected party is, that individual would not have been "harmed or otherwise affected" by the appellants' fence encroaching on the city's right-of-way. The appellants then identify their concern that, because the affected party would not have been affected, this individual's sole purpose in bringing the violation to the city's attention must have been "to inflict unjust harm or damage on the appellants personally." They state:

... Because of the apparent irrationality of [the affected party's] behaviour, the appellants reacted with a corresponding amount of fear and apprehension regarding a real and serious threat to the appellants' health and safety. ... that threat is veiled and unpredictable which makes it all the more disturbing. A person cannot defend himself or herself if he or she cannot identify and locate the assailant. ...

[25] The appellants also take the position that the assessment as to whether these circumstances are "compelling" for the purpose of section 14(1)(b) should be viewed "through the eyes of the appellants." They state:

It is self-evident that the appellants have taken these masked and unpredictable threats very seriously (having spent numerous personal hours in dealing with freedom of information requests and appeals) and they will continue to suffer significant anxiety until the threat is diffused. Because these threats are irrational, invisible and unpredictable that makes the defence against them "immediate and essential". There is nothing more compelling than the right of a vulnerable citizen to take steps to defend his or her person and property. Without access to the requested information, that defence is impossible.

[26] On my review of the circumstances of this appeal, I find that the exception in section 14(1)(b) does not apply.

[27] Previous orders have established that in order to meet the "compelling" threshold in section 14(1)(b), the purpose for seeking the personal information in question must be "a matter of immediate and essential health or safety affecting the requester."¹ While the identity of the affected party is clearly of great interest to the appellants, and they have identified the affect this Notice of Violation of their fence encroaching on a city right-of-way has had on them, I am not satisfied that the circumstances here meet the standard of "compelling."

[28] The appellants have not provided any evidence suggesting that any other by-law complaints have been made against them or their property, nor have they established that there is any pattern or intent to inflict any "harm or unjust damage to them personally." Although the appellants speculate that affected party's intent is to harm them, as identified above, individuals are entitled to bring possible by-law violations to the attention of the city for any reason, and it is the city's responsibility to investigate the alleged infraction and determine whether or not a violation has occurred. Based on the circumstances of this appeal and the evidence provided, I do not accept the appellants' position that the affected party's "sole purpose in bringing the violation to the city's attention must have been to inflict unjust harm or damage on the appellants personally." There may be any number of reasons for an individual to bring a by-law violation to the city's attention and, in the circumstances of this case, the appellants' fence does appear to have been encroaching on the city's right-of-way. In the absence of any other evidence (such as, for example, possible numerous complaints and other threats or concerns) I find that I have not been provided with sufficient evidence to establish that the "compelling circumstances" in section 14(1)(b) has been met.

[29] In addition, I do not accept the appellants' position that the assessment as to whether these circumstances are "compelling" for purposes of section 14(1)(b) should be viewed "through the eyes of the appellants." Although the impact on the appellants may be a factor to consider in determining whether "compelling" has been met, it cannot be the sole factor, and other factors must also be considered. In the circumstances, I find that the combination of factors is not sufficient to meet the "compelling circumstances" referred to in section 14(1)(b).

The presumption in section 14(3)(b)

[30] In this appeal, the city relies on the "presumed unjustified invasion of personal privacy" in section 14(3)(b) of the *Act*, which states:

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

¹ See Orders MO-2677 and PO-2541.

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;

[31] The city begins by referring to previous orders of this office which have determined that an investigation into a violation of a municipal by-law is considered an "investigation into a possible violation of law" for the purpose of section 14(3)(b), and states:

In Order M-382 involving the former City of Toronto, Inquiry Officer John Higgins stated that:

It has been previously established that personal information relating to investigations of alleged violations of municipal by-laws falls within the scope of the presumption provided by section 14(3)(b) of the *Act*.

In Order MO-1496, Senior Adjudicator David Goodis found that section 14(3)(b) applied to information compiled by the City of Toronto as part of its investigation into a possible violation of the Building Code and the City's zoning by-law.

Similarly, Adjudicator Donald Hale upheld the City of Peterborough's decision to deny access to information that was compiled and identifiable as part of an investigation into a property standards by-law complaint and possible contravention of the Building Code. [MO-1845]

[32] The city then states that:

... in the current appeal, the personal information at issue, i.e., the name and telephone number of an individual who filed a complaint concerning a property, was compiled by the City as part of its investigation into an alleged encroachment of a fence on the City Right-of-Way. This would be considered a contravention of a City of Toronto by-law, specifically former City of Scarborough By-law 21208 ... Furthermore, the City advises complainants that their personal information will be kept confidential and therefore, they have an expectation of this confidentiality.

The City therefore submits that the presumption in section 14(3)(b) applies to exempt the personal information at issue from disclosure.

[33] The appellants take the position that the presumption in section 14(3)(b) does not apply because the personal information in question was not “compiled as part of an investigation”. They state:

Clearly, at the time that [the affected party] filed [the complaint] with the City, there was no investigation into the fences in progress. Our understanding is that it would have taken several days from the date on which the complaint was lodged before any City investigation was organized. Therefore, it simply cannot be correct that the personal information in this case was compiled as part of an investigation. The personal information was received by the City before the investigation began, not as part of an investigation. Therefore, the presumption under section 14(3)(b) does not apply to this case.

[34] As determined by the orders referred to by the city, this office has established that personal information relating to investigations of alleged violations of municipal by-laws falls within the scope of the presumption provided by section 14(3)(b). In addition, previous orders have consistently held that section 14(3)(b) may still apply even if no proceedings are commenced against any individuals, and that the presumption only requires that there be an investigation into a possible violation of law.² Although the presumption does not apply to information compiled after the completion of an investigation into a possible violation of law,³ it does apply to information compiled as part of the investigation. Furthermore, because the complaint initiated the investigation, I find that records describing the complaint, including the name of the complainant and the nature of the complaint, were compiled and identifiable as part of an investigation into a possible violation of law. This finding is consistent with many previous orders that have confirmed that the name of a complainant is captured by the presumption in section 14(3)(b).

[35] Accordingly, based on the circumstances and the previous orders of this office, I am satisfied that the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, and that it fits within the presumption in section 14(3)(b).

The factors in 14(2)

[36] The city refers to the factor in 14(2)(h) in support of its decision to withhold the information at issue. The appellants refer specifically to the factor in section 14(2)(d), and also refer to other factors which they believe should be considered in this appeal. Sections 14(2)(d) and (h) read:

² See Orders P-242 and MO-2235.

³ Orders M-734, M-841, M-1086, PO-1819 and PO-2019.

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,

- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence;

Section 14(2)(d)

[37] For section 14(2)(d) to apply, the appellants must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.⁴

[38] In their representations, the appellants refer to the possibility of bringing an action against the affected party for the common law tort of "Abuse of Process." The appellants state that the essential elements of this tort are that the defendant "must have used the legal process for a purpose other than it was designed to serve, in other words, for a collateral or illicit purpose." The appellants state their view that this is what happened in the circumstances of this case and that, notwithstanding the city's decision that a Notice of Violation against the appellants was appropriate, the appellants would be entitled to bring a court action for the tort of "Abuse of Process" against the affected party. The appellants also add that it is not within my jurisdiction to determine the merits of any such action, and that any such determination must be made by the courts.

⁴ Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)]

[39] I have carefully considered the appellants' position that the factor in section 14(2)(d) applies.

[40] To begin, I note that the concerns expressed by the appellants, if they are found to be valid in the context of this by-law infraction, appear to relate more directly to the actions of the city than the affected party. In complaint-driven processes such as the one resulting in the records in this appeal, a complainant makes a complaint, and it is then the city's by-law enforcement unit's decision to decide whether the complaint has validity, and to determine what actions must be taken to comply with the by-law. After making the complaint, the complainant is no longer involved in the process. Accordingly, the rights asserted by the appellants appear to relate more to the actions of the city than those of the complainant.

[41] Having said that, based on the evidence provided by the appellants, I am prepared to accept that they may also seek to pursue a legal right related to an identified civil proceeding which may be brought (regardless of my view of the validity of any such possible action). I also accept that the affected party's name may be required in order to prepare for any such proceeding. However, I am also aware that this information may be available through other means.⁵ Accordingly, while I find that section 14(2)(d) is a relevant consideration favouring the disclosure of the personal information at issue, I only attach moderate weight to it.

Section 14(2)(h)

[42] With respect to the factor in section 14(2)(h), the city states that "the city advises complainants that their personal information will be kept confidential and therefore, they have an expectation of this confidentiality." The appellants take the position that the city's policy to advise all complainants that their personal information will be kept confidential is "not legally valid," and that the city must exercise its discretion to determine whether the disclosure of an individual's name is justified or not.

[43] On my review of the circumstances in this appeal, I am satisfied that the factor in section 14(2)(h) applies, and that the personal information was supplied by the affected party in confidence. The appellants are correct in identifying that the city must exercise its discretion to decide whether or not to disclose the information, but that does not affect my finding that section 14(2)(h) applies. The application of this factor is not determinative of the issue of disclosure, and is simply one of the factors to consider.

⁵ See, for example, Orders MO-1436 and PO-1728 which have confirmed that the Ontario *Rules of Civil Procedure* may provide alternate methods to access confidential information in circumstances where legal actions are commenced.

Additional factors

[44] The appellants identify a number of additional factors in support of their view that the information ought to be disclosed.

[45] One of the factors identified by the appellants is their view that the disclosure of the information will "increase public confidence in the operation of the city's by-law enforcement process." I am not persuaded that this is a factor in this appeal. The city has indicated that it advises complainants that their names will be kept confidential, to "foster greater assistance to the city from its citizens" and to ensure compliance with the city's various by-laws "without fear of repercussions, including unwanted contact or harassment by those they have complained about." In the circumstances, I find that the factor of "increasing public confidence" is not a relevant factor favouring disclosure in this appeal.

[46] The appellants also refer to the specific circumstances of the fence encroachment, and provide background information about the violation, the reasons for it, and their view that others are not affected by it. Although these may be relevant factors relating to the actual by-law violation, I find that these circumstances are not relevant to my determination on the disclosure of the information at issue, and will not consider them as factors in this appeal.

Findings

[47] I have found that the presumption in section 14(3)(b) and the factor favouring privacy protection in section 14(2)(h) apply to the information at issue. I have also found that the factor favouring disclosure in section 14(2)(d) applies, but have given it moderate weight. Based on these findings, I am satisfied that the disclosure of the information at issue would constitute an unjustified invasion of the personal privacy of the affected party. Accordingly, I find that the withheld portions of the records are exempt from disclosure under section 38(b) of the *Act*, subject to my review of the city's exercise of discretion.

Issue C. Did the institution exercise its discretion under section 38(b) and, if so, should this office uphold the exercise of discretion?

[48] The section 38(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[49] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

[50] In these cases 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)].

[51] In support of its decision to exercise its discretion not to disclose the affected party's identifying information, the city states that it considered all the relevant factors including the following:

- the wording of the exemption in section 38(b);
- that individuals should have the right to access their own personal information, and that the appellants have been granted access to all of the records except the portions that contain the affected party's personal information;
- the nature of the information remaining at issue;
- that the privacy of individuals should be protected;
- that there are no compelling or sympathetic reasons to disclose the remaining information;
- that the city has historically maintained the confidentiality of the identities of complainants to alleged by-law infractions, in order to foster greater assistance from its citizens for the purposes of its investigations, and to ensure compliance with the city's various by-laws without fear of repercussions, or unwanted contact or harassment by those they have complained about; and
- that the affected party did not consent to disclosure.

[52] The appellants submit that the city has failed to properly exercise its discretion to release the requested information to the appellants in that the city has:

- (a) facilitated the withholding of the requested information in furtherance of the affected party's improper purpose;
- (b) taken into account irrelevant considerations; and
- (c) failed to take into account relevant considerations.

[53] The appellants rely on the following in support of their position:

- the city's practice of granting blanket anonymity to all complainants constitutes an arbitrary and improper exercise of discretion (or a complete failure to exercise any discretion);
- the city has aided, abetted and facilitated the affected party's improper purpose in bringing the complaint (which constitutes an Abuse of Process);
- the city has failed to consider the appellants' "sympathetic and compelling" need to receive the information;
- the disclosure of the requested information will result in "an enormous increase in public confidence in the operation of the City's by-law enforcement process;" and
- the city failed to consider all of the circumstances in this appeal (and the appellants list a number of the factors they consider to be relevant, relating largely to their view of the fence encroachment at issue).

Finding

[54] On my review of the representations of the parties, I find no reason to disturb the manner in which the city exercised its discretion to deny the appellants access to the affected party's name and other identifying information.

[55] Although the appellants list numerous reasons why they believe they ought to have access to the information requested, most of these reasons are based on their view that the affected party's actions are frivolous, vexatious, or an abuse of process. In my analysis above under "Preliminary matter" I indicate my view of the position of the appellants on this issue. Accordingly, I conclude that these factors are not relevant ones to consider in the circumstances of this appeal.

[56] With respect to the appellant's concern that, by granting a "blanket confidentiality" to all complainants, the city did not exercise its discretion, I do not accept that position. I noted under the discussion in section 14(2) above that whether the information was provided in confidence is one factor to consider, and not determinative of the issue. The city clearly considered a number of factors, including the expectation of confidentiality, in exercising its discretion to deny access.

[57] With respect to the other factors identified by the appellants, I am satisfied that the city considered those factors (and whether they had any validity or not). Therefore, I am satisfied that the city properly considered these factors in exercising its discretion to deny access to the records.

[58] As a result, based on all of the circumstances, I am satisfied that the city did not err in exercising its discretion to deny access to the affected party's identity, and I uphold the city's decision to deny access to the records under section 38(b).

Issue D. Does the public interest override in section 16 apply?

[59] As identified above, the appellants take the position that the public interest override at section 16 of the *Act* applies in the circumstances of this appeal, as there exists a compelling public interest in disclosure of the information at issue.

[60] Section 16 states:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[61] In this appeal, I have found that the information at issue qualifies for exemption under section 14(1) the *Act*.

[62] In order for section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the section 14(1) exemption.

[63] In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Orders P-984, PO-2607]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Orders P-984 and PO-2556].

[64] A public interest is not automatically established where the requester is a member of the media [Orders M-773 and M-1074].

[65] The word “compelling” has been defined in previous orders as “rousing strong interest or attention” [Order P-984].

[66] Any public interest in *non*-disclosure that may exist also must be considered [Ontario Hydro v. Mitchinson, [1996] O.J. No. 4636 (Div. Ct.)]. If there is a significant public interest in the non-disclosure of the record then disclosure cannot be considered “compelling” and the override will not apply [Orders PO-2072-F and PO-2098-R].

[67] A compelling public interest has been found *not* to exist where, for example:

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568, PO-2626, PO-2472 and PO-2614];
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613].

The appellants' representations

[68] The appellants' representations on the public interest override are fairly extensive. Early in their representations, the appellants state that this appeal raises "important issues of public policy and, in reality, the public interest." They state:

We believe that the average citizen and resident of the City would be shocked to find out the manner in which these privacy laws are being applied in this case and the extreme cost and inconvenience that we are being forced to personally incur (with no direct right of recoupment or reimbursement) to defend our personal safety and the security of our property. We submit that this is completely outrageous when all that we want to do is to defend our person and property.

[69] The appellants also refer at some length to the improper use by the complainant of the freedom of information legislation. They also state that this case is not about by-law compliance but about "the ability of one citizen to use the facilities of the State to assert power over other citizens and the resulting outrage of the State becoming the passive dupe of the unjustified citizen."

[70] The appellants also state that a complainant ought not to have "absolute protection" and that if a complainant uses the by-law complaint process for an "Abuse of Process," this brings the administration of justice into disrepute.

[71] With respect to the specific application of section 16, the appellants state

There is an obvious public interest in a complainant's identity being protected in the case of serious criminal matters or other matters where widespread harm and damage to other citizens might occur or be prevented. On the other hand, there is an even more compelling public interest in promoting peaceful, orderly, respectful, harmonious and civilized relations among citizens. A decision in [this] case to withhold [the affected party's] identity, on these particular facts, would represent an absolute trampling of those dearly held values It sends the terribly wrong message that it is quite acceptable for a citizen to launch an

unjustified attack on another citizen and then hide behind the machinery of the State.

[72] The appellants also submit that the average resident of Toronto would be "shocked, appalled and disgusted" by the circumstances resulting in this appeal. In addition, they state that:

... the law and the authorities are perfectly capable of applying the proper discretion in cases which involve criminal activity or some serious and imminent danger and harm, just as the law and the authorities are fully able to ferret out the cases involving indiscriminate, frivolous or vexatious or otherwise improper behaviour.

[73] The appellants also state that there are undoubtedly other similar situations occurring, and refer to previous orders of this office which have upheld the denial of access to a complainant's name. They state that these "abuses" must be stopped, and then state:

We therefore submit that the compelling public interest in the disclosure of the requested records that we have demonstrated above clearly outweighs the purpose of any otherwise applicable exemption under the *Act* so as to fully deny any exemption to [the affected party] in the face of [this individual's] indiscriminate, frivolous, vexatious, abusive, improper (and reprehensible) behaviour in this case.

Findings

[74] I have carefully reviewed the appellants' representations on the public interest override, as well as the information which I have found qualifies for exemption under the *Act*. In the circumstances, I am not satisfied that there exists a public interest, compelling or otherwise, in the disclosure of this information sufficient to override the exemption claimed.

[75] In the first place, I find that there is no relationship between the withheld information at issue and the *Act's* central purpose of shedding light on the operations of government, nor would its disclosure add to the information the public has to make effective use of the means of expressing public opinion or to make political choices.⁶

[76] Secondly, in my view, the interest identified by the appellants is primarily a private interest in the disclosure of information at issue in this appeal, and revolves around the appellants' allegations that the affected party's actions were improperly motivated. I address these allegations above. Other than the information provided by

⁶ See Orders P-984 and PO-2556.

the appellants regarding their views of the affected party's actions, I have not been provided with sufficient evidence to indicate that there exists a strong public interest in this matter. The information at issue relates directly to the by-law complaint about the appellants' fence and the circumstances of this appeal. The appellants acknowledge that there are situations where the name of a complainant ought to be withheld, but that it ought not to be withheld in this appeal. In my view, this confirms the appellants' private interest in the information, notwithstanding the lengthy submissions made by the appellants regarding the other issues.

[77] Furthermore, I note that the city has indicated that they regularly advise complainants that their personal information will be kept confidential, and that numerous previous orders have found that the names of complainants in by-law violations are confidential. In my view this argues against the appellants' contention that citizens would be "shocked" by the circumstances of this appeal.

[78] Lastly, the *Act* has clearly established the process by which decisions on access to personal information are made, and section 14 clearly sets out the presumptions, factors, and other matters to consider in making a finding about disclosing the name or identity of a complainant.

[79] In the circumstances of this appeal, I do not find that a "public interest" exists in the disclosure of the withheld information at issue within the meaning of section 16. Accordingly, I find that section 16 does not apply in the circumstances of this appeal.

ORDER:

I uphold the city's decision to deny access to the withheld portions of the records at issue on the basis of the exemption in section 38(b), and I dismiss the appeal.

Original Signed By: _____ June 29, 2012
Frank DeVries
Adjudicator