

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2796

Appeal MA12-56

City of Markham

October 12, 2012

Summary: This is an appeal of a decision made by the City of Markham to deny access, in full, to email records relating to an incident that the appellant alleges took place at City Hall. The city claimed the application of the mandatory exemption in section 14(1) (personal privacy). During the mediation of the appeal, the appellant raised the possible application of the public interest override in section 16. In this order, the adjudicator finds that the records contain the personal information of an individual other than the appellant, and that this information is exempt under section 14(1). The adjudicator also finds that the public interest in disclosure is not sufficiently compelling to override the exemption in section 14(1). The city's decision is upheld and the appeal is dismissed.

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

OVERVIEW:

[1] This order disposes of the issues raised as a result of a decision made by the City of Markham¹ (the city) in response to a request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for:

¹ At the time of the access request, the institution was named the Town of Markham, but has since changed its name to the City of Markham.

- A video surveillance tape recorded on the 4th floor of the Markham Civic Centre between June 27 and July 1, 2011. The tape may have captured a named Councillor allegedly stealing a number of Canada Day gift bags; and
- All existing paper and electronic records such as emails, voicemails and cellphone texts relating to the incident, above.

[2] The city located responsive records and notified an affected party who may be affected by the disclosure of the records. The city received submissions from the affected party and subsequently issued a decision letter to the requester in which it advised that:

- the Markham Civic Centre maintains video surveillance for 45 days, after which the records are taped over;
- it no longer had video surveillance for the time period specified in the request as more than 45 days had passed when the request was made; and
- it had located email records responsive to the request but that it was denying access to them, in full, claiming the exemption in section 14(1) (personal privacy) of the *Act*.

[3] The requester, now the appellant, appealed the city's decision to this office.

[4] During the mediation of the appeal, the appellant confirmed that the video surveillance tape was no longer at issue, but that she wished to obtain access to the withheld emails and was of the view that the public interest override in section 16 of the *Act* was applicable to override the personal privacy exemption. The mediator contacted the affected party, who did not provide consent to disclose the records.

[5] The appeal was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the city, the affected party and the appellant. Representations were shared in accordance with this office's *Practice Direction 7*.

[6] For the reasons that follow, I find that the records contain the affected party's personal information, which is exempt from disclosure under the mandatory exemption in section 14(1). I also find that the public interest in the disclosure of the records is not sufficient to override the exemption in section 14(1). I uphold the city's decision and dismiss the appeal.

RECORDS:

[7] The records consist of six pages of emails. The majority of the content is duplicated, as the original email was forwarded to various city staff members.

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 mandatory exemption at section 14(1) apply to the information at issue?
- C. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 14 exemption?

DISCUSSION:

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

[8] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. The city submits that the records contain personal information as described in paragraphs (b), (e), (f) and (h) of section 2(1) as follows:

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

...

- (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,

...

- (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,

...

- (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;

[9] Section (2.1) and (2.2) also relates to the definition of personal information and states:

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[10] 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.²

[11] 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.³

[12] The city submits that all of the records relate to the affected party in his personal, rather than a professional, official or business capacity and that disclosure of the records would result in the affected party's personal information being published. The city states:

An individual Member of Council, with the exception of the Mayor, is neither an Officer nor Employee of the municipality.⁴

Unless directed, by resolution or by-law, to undertake a particular action on behalf of the municipality, an individual Member of Council is not an officer of the institution.

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁴ Order MO-1264.

. . .

The Town submits that an "alleged theft" cannot be by an individual in a professional, official, or business capacity, as it is unreasonable to conclude that an official, business or professional capacity would require an individual to engage in an alleged criminal act.

[13] Lastly, the city submits that in view of paragraph (b) of the definition of personal information in section 2(1), the appellant has "tacitly" acknowledged the potential existence of personal information within the records, by requesting records pertaining to an alleged theft.

[14] The affected party states that the records contain his personal information and that at all times he was acting in his personal capacity, and not in his professional capacity carrying out city business.

[15] The appellant submits that the affected party is a member of city council, who holds a public office at the Markham Civic Centre and where he conducts official business throughout the year, including attending council and committee meetings, and talking to, emailing, and meeting with constituents.

[16] The appellant further states that the records relate to an incident which took place at city hall, where the affected party was "caught stealing gift bags" paid for by taxpayers, for citizens and put together by volunteers. The appellant states:

If this isn't viewed by the city and the councillor as a professional, official or business capacity, what are public officials supposedly elected to do while they are in office, inside city hall?

[17] Lastly, the appellant states that she did not "tacitly" acknowledge the potential existence of personal information within the records by using the word "allegedly" to describe the offence.

[18] In Order PO-2225, former Assistant Commissioner Tom Mitchinson, set out the following two-step process applicable to a determination of whether information is "about" an individual in a business rather than a personal capacity, and therefore does not constitute personal information:

. . . the first question to ask in a case such as this is: *"in what context [does the information] of the individuals appear"*? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?

. . .

The analysis does not end here. I must go on to ask: *"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? [emphasis added]

[19] I will apply the analysis described above in my examination of the personal information/professional information distinction in the present appeal.

[20] In my view, the information in the records relates to an examination into the conduct of the affected party in his professional role as a city councillor. However, I find that because the affected party was the focus of information gathering into whether his conduct was appropriate, it has taken on a different, more personal quality. As such, I find that disclosure of this information would reveal something personal about the affected party and that it qualifies, therefore, as his personal information within the meaning of that term in section 2(1). In that regard, I am following a long line of orders of this office that have held that information in records containing an examination of conduct qualifies as the individual's personal information under the definition in section 2(1) of the *Act*.⁵

[21] In my view, therefore, the records contain information about the affected party that meets the definition of "personal information" in paragraph (h) (the affected party's name along with other personal information relating to him).

[22] Accordingly, I will go on to determine whether disclosure of the information I find qualifies as "personal information" would constitute an unjustified invasion of personal privacy under section 14(1).

B. Does the mandatory exemption at section 14(1) apply to the information at issue?

[23] 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.

[24] In order for the section 14(1)(f) exception to the mandatory exemption in section 14(1) to apply, it must be established that disclosure would not be an unjustified invasion of personal privacy. Sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Section 14(2) provides some criteria for the institution to

⁵ See Orders P-165, P-448, P-1117, P-1180, PO-2525 and PO-2778.

consider in making this determination; section 14(3) lists the types of information the disclosure of which 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.

[25] 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.⁶

[26] The city submits that the mandatory exemption in section 14(1) applies to the information contained in the records, as their disclosure would give rise to an unjustified invasion of the affected party's privacy. In support of its position, the city cites the presumption in section 14(3)(b), which 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.

[27] The city also states the records were created as part of an investigation it conducted, and were not created after the investigation had concluded.

[28] The affected party submits that the disclosure of the records would lead to an unjustified invasion of his personal privacy.

[29] The appellant submits that the disclosure of the records would not give rise to an unjustified invasion of privacy, as the information in the records reflects an act the affected party committed in his official role as city councillor and in the hallways of city hall. In addition, the appellant states that none of the presumptions in section 14(3) apply, but that the exception in section 14(1)(b) applies, as a city councillor's behaviour relates directly to the safety of residents in the community.

[30] Having regard to the city's representations and the records, 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

⁶ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

investigation itself, regardless of whether the investigation resulted in charges being laid.⁷

[31] 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 in section 14(2) also apply to the withheld information.

[32] I find that neither the exception at section 14(1)(b) nor any of exclusions in section 14(4) apply in the circumstances of this appeal. As a result, I find that disclosure of the withheld information would constitute an unjustified invasion of the affected party's personal privacy under section 14(1), and uphold the city's decision to deny access to this information, subject to my finding with respect to the public interest override in section 16, below.

C. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 14 exemption?

[33] 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.

[34] 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 exemption.

[35] The *Act* is silent as to who bears the burden of proof in respect of section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom, if ever, be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.⁸

[36] 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.⁹ 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

⁷ Orders MO-1568, MO-1431, MO-1256.

⁸ Order P-244.

⁹ Orders P-984 and PO-2607.

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.¹⁰

[37] A public interest is not automatically established where the requester is a member of the media.¹¹ The word "compelling" has been defined in previous orders as "rousing strong interest or attention."¹²

[38] The appellant submits that the public interest in the disclosure of the records outweighs the exemption in section 14(1). Specifically, the appellant argues that the disclosure of the records "speaks" directly to the *Act's* central purpose of shedding light on the operations of government and the activities of the municipality, including how it governs itself. The appellant states:

The issue is not the value of the goods or the seriousness of the action. The public's right to know the administrative policies in place at the city, as well as how tax dollars were spent, is paramount to a fair and transparent process.

[39] The city submits that the disclosure of the records would not serve to enlighten the residents of Markham about the activities of the city, and that any public interest in the disclosure of the records does not outweigh the purpose of the exemption in section 14(1).

[40] The affected party states that the records do not relate to how the city governs itself, nor do they impact any corporate or municipal decisions, as those are at the discretion of city council as a whole.

[41] Having reviewed the records, I find that their disclosure would not serve the purpose of informing the citizens of Markham about the operations of the city, or how it self-governs, or how tax dollars are spent.

[42] Further, I find that disclosure of the records would not add to the information available for use by members of the public in expressing public opinion on city matters. While I acknowledge that there will be instances where it is in the public interest to identify individuals who have been the subject of an investigation as a result of their actions as public servants, I am not satisfied that this is such a case.

[43] My finding that there is no compelling public interest in disclosure is sufficient to dispose of the section 16 argument, since the absence of such an interest means the

¹⁰ Orders, P-984 and PO-2556.

¹¹ Orders M-773 and M-1074.

¹² Order P-984.

section cannot apply. Accordingly, I find that the record is exempt from disclosure under the *Act* and section 16 of the *Act* does not apply.

[44] However, even if I had determined that there was a compelling public interest in disclosure of the records, that alone would not be sufficient to establish the requirements of section 16. Any such compelling public interest would also have to outweigh the purpose of the mandatory section 14 personal information exemption.

[45] In Order PO-1705, former Assistant Commissioner Tom Mitchinson identified the balancing that must be done when reviewing the purpose of the personal information exemption:

It is important to note that section 21 [the equivalent to section 14 found in the provincial *Freedom of Information and Protection of Privacy Act*] is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified. In my view, where the issue of public interest is raised, one must necessarily weigh the costs and benefits of disclosure to the public. As part of this balancing, I must determine whether a compelling public interest exists which outweighs the purpose of the exemption.

[46] Adjudicator Laurel Cropley elaborated on this question in Order MO-1254, where she stated:

Under section 1 of the *Act*, the protection of personal privacy is identified as one of the central purposes of the *Act*. It is important to note that section 14 is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified.

Commenting generally on the personal privacy exemption under the Freedom of Information scheme, the drafters of *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980*, vols. 2 and 3 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) indicated that the legislation must take into account situations where there is an undeniably compelling interest in access, situations where there should be a balancing of privacy interests, and situations which would generally be regarded as particularly sensitive in which case the information should be made the subject of a presumption of confidentiality. In this regard, the Williams Commission Report recommended that "[a]s the personal information subject to the request becomes more sensitive in nature ... the effect of the proposed exemption is to tip the scale in favour of non-disclosure".

[47] The personal information at issue in this appeal is covered by a non-rebuttable presumption in favour of non-disclosure. Even if the appellant had satisfied me that there was a compelling public interest in disclosure of the records, which is not the case, in my view, any such public interest would not outweigh the purpose of the mandatory personal information exemption claimed in the circumstances of this appeal.

ORDER:

I uphold the city's decision and dismiss the appeal.

Original Signed by: _____
Cathy Hamilton
Adjudicator

_____ October 12, 2012