

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2823

Appeal MA10-356

City of Vaughan

December 21, 2012

Summary: The appellant sought access to information relating to invoices submitted to the City of Vaughan by law firms pertaining to a wrongful dismissal action commenced by a named individual against the city. The city refused to confirm or deny the existence of responsive records on the basis that doing so may constitute an unjustified invasion of personal privacy pursuant to section 14(5) of the *Municipal Freedom of Information and Protection of Privacy Act*. The adjudicator does not uphold the city's section 14(5) claim and orders the city to disclose those parts of records responsive to the appellant's request.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) "personal information, 14(1)(a), 14(2)(a), 14(3)(d), 14(5).

Orders and Investigation Reports Considered: Orders M-421, MO-1922 and MO-2689.

OVERVIEW:

[1] This appeal concerns an access to information request submitted to the City of Vaughan (the city), pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for information contained in invoices from various law firms rendered to the city, for the period ending September 2010, in relation to wrongful dismissal litigation commenced by a named individual (the affected party) against the city.

[2] In response to the request, the city issued an access decision in which it stated that it could not confirm or deny the existence of any records responsive to the request, as doing so may constitute an unjustified invasion of privacy pursuant to section 14(5) of the *Act*.

[3] The requester (now the appellant) appealed that decision.

[4] During the mediation stage of the appeal process, the appellant advised that she disagrees with the city's position, stating that the named individual that is the subject of her request has been identified in newspaper articles. As a result, the appellant asserts that the city should proceed with the processing of her request.

[5] The parties were unable to resolve this issue during the course of mediation. The appeal was then transferred to the adjudication stage of the appeal process for a written inquiry to be conducted by an adjudicator.

[6] As the assigned adjudicator, I initially sent a Notice of Inquiry identifying the facts and issues to the city, and received representations in response. I then sent the Notice of Inquiry, along with a complete copy of the city's representations to the appellant, who also provided representations in response. I then shared the appellant's representations with the city and sought and received reply representations. The city's reply representations were shared with the appellant who was invited to provide sur-reply representations. The appellant responded with further representations.

[7] As well, during the course of the inquiry I sent the affected party a consent form and invited this individual to consent to the disclosure of their personal information contained in any invoice records responsive to the appellant's request, in the event such records exist. The affected party consented to the disclosure of their surname and any information that might exist in such records in the following categories, for the period ending September 2010: the receiver of the invoice (city address and name of city official), law firm name, file numbers (for both city and law firm) and invoice number and total fees (including disbursements and taxes) on the invoice.

[8] In this order, I do not uphold the decision of the city to refuse to confirm or deny the existence of records relating to the appellant's request pursuant to section 14(5) of the *Act*, and I order the city to disclose the records responsive to the appellant's request in accordance with the affected party's consent.

ISSUE:

[9] Has the city properly applied section 14(5) of the *Act* in this appeal by refusing to confirm or deny the existence of records responsive to the appellant's request?

DISCUSSION:

Has the city properly applied section 14(5) of the *Act* in this appeal by refusing to confirm or deny the existence of records responsive to the appellant's request?

[10] Section 14(5) states:

A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

[11] Section 14(5) gives an institution discretion to refuse to confirm or deny the existence of a record in certain circumstances.

[12] A requester in a section 14(5) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 14(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases.¹

[13] Before an institution may exercise its discretion to invoke section 14(5), it must provide sufficient evidence to establish both of the following requirements:

1. Disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy; and
2. Disclosure of the fact that the record exists (or does not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[14] The Ontario Court of Appeal has upheld this approach to the interpretation of section 21(5) of the *Freedom of Information and Protection of Privacy Act*, which is identical to section 14(5) of the *Act*, stating:

The Commissioner's reading of s. 21(5) requires that in order to exercise his discretion to refuse to confirm or deny the report's existence the Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy.²

¹ Order P-339.

² Orders PO-1809, PO-1810, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813 (C.A.), leave to appeal to S.C.C. dismissed (May 19, 2005), S.C.C. 30802.

Would the disclosure of the existence of the records reveal personal information?

[15] Under part one of the section 14(5) test, the city must demonstrate that disclosure of the records, if they exist, would constitute an unjustified invasion of personal privacy. An unjustified invasion of personal privacy can only result from the disclosure of "personal information."

[16] That term is defined in 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,

...

(h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[17] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under the paragraphs in that section may still qualify as personal information.³

[18] 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.⁴

[19] 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.⁵

[20] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁶

³ Order 11.

⁴ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁵ Orders P-1409, R-980015, PO-2225 and MO-2344.

[21] The city's representations on this issue are brief. The city relies on the presumption in section 14(3)(d) in support of its section 14(5) claim and asserts that, in the event responsive records exist, disclosure of them would reveal personal information about the affected party's "employment history." By extension, the city relies on paragraph (b) of section 2(1) (employment history).

[22] The appellant's representations do not specifically address this issue, but I note that she appears to acknowledge that responsive records, if they exist, would contain the affected party's personal information, to the extent that they would reveal the affected party's identity. On this point, the appellant states that the wrongful dismissal litigation commenced by the affected party has been widely reported in the media and, as such, both the affected party's identity and the existence of the lawsuit itself are both a matter of public record.

[23] In my view, in light of the appellant's request for invoices issued by various law firms to the city for services rendered to defend a wrongful dismissal lawsuit commenced by the affected party against the city, if records do exist they would contain the affected party's personal information, including that person's name and other information about that individual within the meaning of paragraph (h) of the definition of "personal information" in section 2(1).

[24] However, I am not convinced that such records, if they exist, would also contain information relating to the affected party's "employment history," within the meaning of that term in paragraph (d) of the definition of "personal information" in section 2(1). In my view, in order to qualify as information relating to the employment history of an identifiable individual, the information must reveal more than that person's name and that they were once employed by the institution in question and have commenced a wrongful dismissal claim against that institution.⁷ In order to qualify as information relating to an identifiable person's employment history, the information in question should contain insight into their tenure, the nature of their employment with the institution and/or their past employment experience.⁸

[25] I cannot agree that the records in question, if they exist, would reveal anything more than the mere fact that the affected party was employed by the city and commenced a wrongful dismissal claim. To reiterate, while I am satisfied that any responsive records, if they exist, would contain the affected party's personal information, I find that any such information would not constitute information relating to that person's "employment history" within the meaning of that term in paragraph (b) of the definition of "personal information" in section 2(1).

⁶ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

⁷ See Orders M-421, MO-1922 and MO-2689.

⁸ Order MO-2689.

Would disclosure of the records, if they exist, constitute an unjustified invasion of personal privacy?

[26] Having found that records, if they exist, would contain the affected party's personal information, I must now determine whether the disclosure of such information would constitute an unjustified invasion of the affected party's personal privacy.

[27] The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be "an unjustified invasion of personal privacy" under section 14(5).

[28] As stated above, the city relies on the presumption in section 14(3)(d) in support of its claim that, in the event responsive records exist, disclosure of them would constitute an unjustified invasion of the affected party's personal privacy.

[29] That section reads:

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

relates to employment or educational history;

[30] The city submits that

if a wrongful dismissal action is initiated by a former employee, confirmation of that fact to a requester who is not the former employee would constitute an unjustified invasion of the personal privacy of the former employee as envisioned by section 14(3)(d).

[31] The city submits that both parts of the two part test under section 14(5) are satisfied in this case, but it provides no further elaboration.

[32] The appellant states that it is a matter of public record that the affected party initiated a law suit against the city alleging wrongful dismissal. The appellant adds that the information sought would not reveal the affected party's employment or educational history. The appellant states that the information she seeks is limited to the "summary invoices" or invoices that identify the following categories of information for various law firms that have provided legal services to the city to defend a wrongful dismissal action brought by the affected party against the city:

- the receiver of the of the invoice (city address and name of city official)
- law firm name
- file numbers (for both the city and law firm) and invoice number

- total fees (including disbursements and taxes) on the invoice for the period ending September 2010

[33] As noted above in the "Overview" section of this order, the affected party has provided written consent to the disclosure of their surname and the above categories of information, in the event responsive records exist that contain this information.

[34] Turning to my analysis, I find that the disclosure of records responsive to the appellant's request, if they exist, would not constitute an unjustified invasion of the affected party's personal privacy under section 14(1).

[35] First, I note that the affected party has consented to the disclosure of limited personal information, specifically their surname and the categories of information set out above. Section 14(1)(a) provides an exception to the section 14(1) mandatory exemption regarding the disclosure of the personal information of another individual in circumstances where that individual has provided written consent.

[36] Section 14(1)(a) reads:

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

upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

[37] Under the circumstances, it appears clear that the affected party has consented to the disclosure of information requested by the appellant, in the event such information exists.

[38] Second, even if the exception in section 14(1)(a) does not apply, I am not satisfied that disclosure of the information sought, if it exists, would constitute an unjustified invasion of the affected party's personal privacy.

[39] I acknowledge that the city has raised the application of the presumption in section 14(3)(d). However, having concluded above that any responsive records, if they exist, would not contain information relating to the affected party's employment history, I find that the presumption in section 14(3)(d) does not apply.

[40] The city has not raised the application of any other presumptions and I find that none of the presumptions in section 14(3) might apply in the circumstances of this case. Accordingly, I am left to consider the impact of other factors, including those listed in section 14(2) and any unlisted factors, weighing for or against disclosure of the information the appellant seeks, in the event that such information exists.

[41] I note that neither the city nor the appellant has specifically raised the application of any factors in section 14(2). However, in my view, it is reasonable to suggest that the appellant seeks the information requested for the purpose of subjecting the activities of the city to public scrutiny and that disclosure would, in turn, be desirable to shed light on the city's handling of this matter, thus raising the application of the factor in section 14(2)(a). The appellant argues that the commencement of a wrongful dismissal action by the affected party against the city is already a matter of public record. I am satisfied, based on my own investigation that the affected party did commence legal proceedings against the city, alleging wrongful dismissal, and that this litigation is a matter of public record. Absent any factors weighing against disclosure, I would view the disclosure of the information sought by the appellant as being desirable for the purpose of subjecting the activities of the city to public scrutiny, particularly in light of the high profile nature of the litigation between the city and the affected party and the significant level of public awareness about it.

[42] In my view, the affected party's consent coupled with the high profile public nature of the matter at issue leads me to conclude that if records responsive to the appellant's request do exist, revealing their contents would not constitute a breach of the affected party's personal privacy under section 14(1).

[43] As noted above, section 14(5) is a two-part test. Having concluded that part one of the test has not been satisfied, I need not consider part two of the test, that is, whether disclosure of the very fact that records exist (or do not exist) would in itself convey information to the appellant that constitutes an unjustified invasion of personal privacy.

[44] However, in the interests of completeness, I will comment briefly on part two of the test under section 14(5). I note that the city has not provided any insight into how disclosure of the fact that records exist (or do not exist) would in itself convey information to the appellant that would constitute an unjustified invasion of personal privacy. To reiterate, the appellant and the public at large are aware of the existence of litigation between the city and the affected party. Under these circumstances, one would expect the city to have incurred legal expenses defending such an action and that responsive records would exist. Accordingly, I am not satisfied that disclosing the fact that records exist (or do not exist) would convey information to the appellant that would constitute an unjustified invasion of the appellant's personal privacy.

[45] To conclude, I do not uphold the decision of the city to refuse to confirm or deny the existence of records relating to the appellant's request pursuant to section 14(5) of the *Act*.

[46] As the city has not raised the application of any other exemptions, I will order it to disclose all records responsive to the appellant's request in accordance with the affected party's consent.

ORDER:

1. I do not uphold the decision of the city to refuse to confirm or deny the existence of records responsive to the appellant's request. If I do not receive an application for judicial review from the city on or before **January 24, 2013** in relation to my decision that section 14(5) does not apply, I will send a copy of this order to the appellant on or before **January 29, 2013**.
2. In the event the city does not seek judicial review of this order, I order it to disclose the records responsive to the appellant's request, in accordance with the consent provided by the affected party. To be clear, I order the city to disclose the responsive records in accordance with the highlighted versions of these records provided to the city with its copy of this order, by **February 6, 2013**. To be clear, the city is not to disclose to the appellant the portions of these records that have been highlighted in yellow.
3. I order the city to provide me with copies of the severed versions of the records referred to in provision 2 that it discloses to the appellant.
4. I remain seized of this matter in order to verify compliance with order provisions 1, 2 and 3.

Original Signed by: _____
Bernard Morrow
Adjudicator

_____ December 21, 2012