

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER MO-3043-R

Appeals MA12-320 & MA12-388

Order MO-2994

City of Greater Sudbury

April 29, 2014

Summary: The requester sought access to the affected persons' building plans. The city denied access, citing the discretionary law enforcement exemption in section 8(1)(i). In Order MO-2994, the adjudicator did not uphold the section 8(1)(i) exemption. In this reconsideration order, the adjudicator reconsiders her decision and finds that the building plans are exempt by reason of section 8(1)(i).

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 8(1)(i).

Orders and Investigation Reports Considered: MO-2994 and PO-3072-R.

OVERVIEW:

[1] The City of Greater Sudbury (Sudbury or the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for access to copies of all records concerning two residences that exist at a specific address.

[2] The city identified the responsive records related to the request. Before making an access decision the city notified six individuals whose interests may be affected by the outcome of the request to obtain their views regarding disclosure of the records.

[3] Two individuals (the affected persons) objected to the disclosure of the records on the basis that disclosure of this information would constitute an unjustified invasion of personal privacy and disclosing the records would endanger the security of the building.

[4] Three individuals responded to the city that they had no objection to disclosing the records. One individual did not respond.

[5] After considering the representations from the individuals that responded, the city issued a decision and granted partial access to the responsive records. Portions of the records were withheld on the basis of the exemptions in sections 8(1)(i) (endanger the security of a building) and 14(1) (personal privacy) of the *Act*.

[6] The requester and the two affected persons appealed the city's decision. Specifically, the requester appealed the city's decision to deny access to portions of the records. The affected persons appealed the city's decision to grant the requester access to the records. The requester's appeal is file MA12-320. The affected persons' appeal is file MA12-388. Because these appeals deal with the same records and issues, they were both addressed in Order MO-2994.

[7] The outstanding issues were not resolved in mediation. Accordingly, the files were referred to the adjudication stage where an adjudicator conducts an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in these appeals to the city and the affected persons, seeking their representations.

[8] I received representations from the city and the affected persons. I then sent a copy of the city's representations to the requester, seeking representations in response. Portions of the city's representations were withheld from the requester due to confidentiality concerns. All of the affected persons' representations were withheld from the requester due to confidentiality concerns. I also sought representations from the affected persons in response to the city's representations.

[9] I received representations from the affected persons in response to the city's representations. The requester, however, did not provide representations in response to the city's representations. I then issued Order MO-2994, where I ordered the city to disclose all of the information in the records to the requester, except for the following information which was to be withheld:

- The names and personal contact information
- Record 1.g
- The comments in the August 10, 2006 Inspection Notice in Record 1.h.

[10] The city then disclosed all of the responsive records to the requester that were ordered disclosed except for the building plans (Record 1.n), which are the subject of the affected persons' reconsideration request in this order.

[11] The affected persons provided detailed confidential representations in support of their reconsideration request to not allow the requester to obtain a copy of their home's building plans. The requester did not provide representations in response to the affected persons' reconsideration request, despite ample opportunity to do so. The requester did, however, confirm the actual identity of their representative, who appears to be a neighbour of the affected persons.

[12] In this order, I reconsider my decision and find that the record is exempt by reason of section 8(1)(i).

RECORD:

[13] Record 1.n is at issue in this reconsideration order. This record consists of building plans for the affected persons' home. In Order MO-2994, I found that this information was not exempt by reason of sections 8(1) and 14(1).

DISCUSSION:

Are there grounds under section 18.01 of the IPC's *Code of Procedure* (the *Code*) to reconsider Order MO-2994?

[14] The city applied the discretionary exemption in section 8(1)(i) (endanger the security of a building) and the mandatory exemption in section 14(1) (personal privacy) to exempt the building plans. In Order MO-2994, I found that the building plans did not contain personal information and, therefore, the personal privacy exemption in section 14(1) could not apply.

[15] The affected persons' confidential representations in support of their reconsideration focus on the application of section 8(1)(i) to the record. Section 8(1)(i) reads:

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

endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

[16] The affected persons rely on section 18.01(a) of the IPC's *Code of Procedure* (the *Code*) and state that I made a fundamental defect in the adjudication process by not considering relevant evidence. Section 18.01(a) states:

The Commissioner may reconsider an order or other decision where it is established that there is:

a fundamental defect in the adjudication process;

[17] In its representations in support of the application of section 8(1)(i) to Record 1.n, the city stated that the relationship between the requester, the affected persons and other neighbouring property owners has been acrimonious for some time and has caused multiple issues to arise over time which in turn even resulted in requiring paid duty police officers to monitor the area. The tensions and disputes among these parties have been reflected in media coverage and resulted in a police presence in the neighbourhood. The city stated that:

In MO-2074, the IPC summarized previous orders noting that

Although this provision is found in a section of the Act dealing specifically with law enforcement matters, its application is not restricted to law enforcement situations but can be extended to any building, vehicle or system which reasonably requires protection.

The IPC held in MO-2181 that unlike some buildings such as nuclear power plants or military installations, residential buildings by their nature "do not give rise to a reasonable basis for believing that endangerment could result from disclosure" and that there is no blanket exemption for residential building plans. However, the IPC has acknowledged that the circumstances surrounding the request and the relationship between the parties may be relevant to the consideration of whether section 8(1)(i) applies.

In the case of the building plan, it is unfortunate for the [affected persons] that by abiding by the law in providing documents required for the City to enforce the Building Code that the [affected persons] residential security is put in any risk. As such, the City takes the position that in applying this exemption, said exemption was approached in a sensitive manner respectful of the animosity between the parties and with the understanding that the risk to the parties in this case is difficult to predict. It is not for the City to sit in judgment as to whether the affected [persons] have been wronged in this situation but the City feels an obligation not to exacerbate a bad situation by providing information

about [their] residence which could be used to endanger the property or [them].

[18] In their initial representations, the affected persons provided detailed confidential representations objecting to disclosure of the building plans. In their reconsideration representations, the affected persons provided detailed confidential representations as to how I failed to fully consider their initial representations as to how disclosure of the building plans could reasonably be expected to endanger the security of their home.

[19] In Order PO-3072-R, Assistant Commissioner Brian Beamish reconsidered an order on the basis that a fundamental defect in the adjudication process occurred when he failed to fully consider the exemption at issue in that appeal. He stated that:

After reviewing the affected party's reconsideration request, the representations of the appellant and Infrastructure Ontario concerning the reconsideration request, the representations of all parties made during the inquiry, and my findings in Order PO-3011, I find that I erred in failing to fully consider the inferred disclosure exception to the second part of the section 17(1) test. I find that this error constitutes a fundamental defect in the adjudication process, thereby meeting the ground for reconsideration outlined in section 18.01(a) of the IPC's Code of Procedure. Accordingly, I will reconsider my decision in Order PO-3011 on this basis and will now proceed to reconsider whether the inferred disclosure exception to the "supplied" part of the section 17(1) test applies to the records that I ordered disclosed.

[20] In this appeal, upon reviewing the affected persons' reconsideration request, the requester's representatives' communications with this office after this request, and the parties' representations, I find that I erred in failing to fully consider the application of section 8(1)(i) to the building plans. In the particular circumstances before me, I am satisfied that this amounts to a fundamental defect in the adjudication process. I will, therefore, reconsider the issue of whether section 8(1)(i) applies to exempt the building plans from disclosure.

[21] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.¹

[22] Except in the case of section 8(1)(e), where section 8 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing"

¹ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.²

[23] It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption.³

[24] As indicated in the excerpt from Order MO-2074 above, although section 8(1)(i) is found in a section of the *Act* dealing specifically with law enforcement matters, its application is not restricted to law enforcement situations but can be extended to any building, vehicle or system which reasonably requires protection.⁴

[25] In Order MO-2994 I found that, although there was a dispute in the immediate area of the affected persons' home about enforcement of by-laws against other neighbours, disclosure of the record could not reasonably be expected to endanger the security of the affected persons' home.

[26] I am unable for confidentiality reasons to refer to the evidence submitted by the affected persons. Based on my review of the affected persons' and the city's representations, I find that the requester, or those associated with the requester, have exhibited extraordinary behaviour where their actions towards the affected persons are sufficient to cause them a well-founded concern for their safety.

[27] Based on my reconsideration of the city and the affected persons' initial representations, I find that the dispute is of such a nature that disclosure of the building plans to the requester could reasonably be expected to endanger the security of the affected persons' home under section 8(1)(i) of the *Act*.

[28] Accordingly, based on my review of the record and the city and the affected persons' representations, and relying on the findings in Order MO-2074, I find that disclosure of Record 1.n could reasonably be expected to endanger the security of the affected persons' home under section 8(1)(i) of the *Act*. The record at issue, the building plans, therefore, is exempt under that section. In making this finding that the record is exempt, I have considered the city's representations on the exercise of its discretion under section 8(1)(i) and find that the city did exercise its discretion in a proper manner.

² 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.).

³ Order PO-2040; *Ontario (Attorney General) v. Fineberg*.

⁴ Orders P-900, PO-2461.

ORDER:

I reconsider my decision in Order MO-2994 and uphold the city's decision that Record 1.n is exempt under section 8(1)(i) of the *Act*.

Original Signed By: _____

Diane Smith
Adjudicator

_____ April 29, 2014 _____