Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER MO-3169

Appeal MA14-322

City of Burlington

March 17, 2015

**Summary:** The City of Burlington received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for records about an altercation that is alleged to have occurred at a city hockey rink. The city refused to confirm or deny the existence of responsive records under section 14(5). This order upholds the city's decision.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss.2(1) definition of "personal information", s.14(5), 14(2)((f), (h) and (i)

**Orders and Investigation Reports Considered:** Order PO-3071

## OVERVIEW:

[1] A requester submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Burlington (the city) for records relating to altercation between a named hockey coach and two city staff members.

[2] The city issued a decision refusing to confirm or deny the existence of responsive records under section 14(5). The requester (now the appellant) appealed the city's decision to this office and a mediator was assigned to the appeal.

[3] At the end of the mediation process, the city confirmed that in addition to relying on section 14(5), the city takes the position that if there are responsive records, they would qualify for the mandatory personal privacy exemption under the *Act*. The appellant advised that he continues to seek access to the responsive records, if such records exist.

[4] The issues remaining in dispute at the end of mediation were transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. During the inquiry stage, the city provided representations which were shared with the appellant. The appellant did not submit representations in response, but confirmed that he still sought a review of the city's decision.

[5] In this order, I uphold the city's decision to refuse to confirm or deny the existence of responsive records under section 14(5).

**Did the board properly apply section 14(5) to refuse to confirm or deny the existence of responsive records?**

[6] Section 14(5) reads:

> 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.

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

[8] 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]

[9] 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.

[1] Order P-339.

[10] 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]

[11] The city advises that it received a request under the *Act* for access to records relating to an altercation that occurred at a city arena. During mediation, the parties established that the appellant was not directly involved in the altercation, or present when it is alleged to have occurred.

[12] In its representations, the city states:

> Typically, when the City becomes aware of an altercation that occurred in relation to a recreational program, facility or property rental, a response and investigation will occur under the Zero Tolerance Corporate Policy. This Policy includes a wide range of behaviors that may be deemed as "unacceptable" in a non-exhaustive list. Some of these behaviors describe actions that are illegal under Canada's Criminal Code and Ontario law, such as the illegal consumption of controlled substances, or physical assault. Other behaviors not tolerated by the City include photographing individuals in a public place without consent, hacking computer systems, and throwing articles in a deliberate manner. Just as there is a range of behaviors that may be deemed unacceptable, there is also an equally broad spectrum of potential consequences for how each incident will be addressed in its unique context: this range may include verbal or written warnings, revocation of permits, temporary or lifetime bans from City facilities and properties.

[13] The city submits that disclosure of the fact that responsive records exist (or do not exist) would in itself disclose information of a personal nature to the appellant, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of another individual's personal privacy.

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[2] Orders PO-1809 and 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.

*Part one: disclosure of the record (if it exists)*

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

[15] Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including 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. The city advises that the type of records the appellant requested, if they exist, would likely contain the type of information defined in section 2(1) as "personal information", such as the age, sex, marital or family status, education or employment history of identifiable individuals being investigated or participating in the investigation including their contact information such as home/email address and telephone numbers, along with their personal opinions or views relating to the individual and circumstances being investigated.

[16] In my view, the type of records requested, if they exist, would reveal the nature of the complaint the city investigated along with the information it gathered in the course of its investigation. Accordingly, I am satisfied that such records, if they exist, would contain the personal information of the individual being investigated and potentially the personal information of other individuals participating in the investigation.

[17] I am also satisfied that disclosure of the records (if they exist) would constitute an unjustified invasion of personal privacy under section 14(1). In making my decision, I considered the city's evidence that the type of records requested (if they exist) would contain information that is highly sensitive (section 14(2)(f)), was supplied to the city in confidence (section 14(2)(h) or would unfairly damage the reputation of the individual investigated if disclosed (section 14(2)(i)).[3] The appellant did not make submissions on

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[3] Section 14(2) reads:

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,

(f) the personal information is highly sensitive;

(h) the personal information has been supplied by the individual to whom the information relates in confidence; and

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

this issue or raise the possible application any of the factors favouring disclosure at section 14(2). Having regard to the city's evidence and the fact that the type of records requested, if they exist, would have been created as a result of the city's investigation of a complaint, I am satisfied that none of the factors favouring disclosure apply in the circumstances of this appeal. I am also satisfied that none of the exceptions in section 14(1)(a) to (e) or the exclusion in section 14(4) could apply to the type of records requested (if they exist).

[18] Having regard to the above, I find that disclosure of the records (if they exist) would constitute an unjustified invasion of personal privacy under section 14(1) and that the city has satisfied the first part of the section 14(5) test.

*Part two: disclosure of the fact that the record exists (or does not exist)*

[19] Under part two of the section 14(5) test, the institution must demonstrate that disclosure of the fact that a record exists (or does not exist) would in itself convey information to the appellant, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[20] The city submits that disclosure of the fact that records exist (or does not exist) would convey personal information about other identifiable individuals to the appellant and that disclosure of this personal information (if it exists) would constitute an unjustified invasion of personal privacy. In support of its position, the city refers to Order PO-3071. In that order, Adjudicator Steve Faughnan found that disclosing the existence or non-existence of certain records would itself reveal personal information about whether or not a complaint was made against an identifiable individual.

[21] Having regard to the circumstances of this appeal, including the city's Zero Tolerance Policy, I find that disclosure of the fact that records responsive to the appellant's request exist (or do not exist) would itself reveal personal information to the appellant about the subject individual and, potentially, others who may have been involved in the situation. In particular, I find that disclosure would reveal personal information about whether or not the city received a complaint regarding the altercation referred to in the appellant's request and whether the city investigated the complaint.

[22] In my view, disclosing the existence or non-existence of the type of records responsive to the appellant's request would constitute an unjustified invasion of personal privacy based on factors favouring privacy protection at sections 14(2)(f), (h) and (i) which I have found apply in the circumstances of this appeal. Again, in the absence of contrary evidence from the appellant, I am satisfied that none of the factors favouring disclosure, or any of the exceptions in section 14(1)(a) to (e) or the exclusion in section 14(4) apply to the circumstances of this appeal.

[23] Accordingly, I find that the city has met the second part of the section 14(5) test and as a result find that both requirements for section 14(5) has been met.

[24] Turning now to the question of whether the city properly exercised its discretion in invoking section 14(5). 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.[4]

[25] An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[26] 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.

[27] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[5] This office may not, however, substitute its own discretion for that of the institution.[6]

[28] In support of its position that it properly exercised its discretion, the city submits:

> It is the City's view that there is no compelling public interest at issue in this appeal, as the original request was not intended to shed light on the operations of government. The City has received no information that would indicate the requester is acting in the public's interest, or on a matter that they believe to be a general public health and safety concern.
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> Other mitigating factors in the City's current position include the general principle of privacy protection, keeping the spirit of the Act; encouraging the reporting of incidents in a fair and just manner; and maintaining the confidentiality of all aspects of incident investigation mechanisms, including confirmation of whether or not they occur, in order to maintain fairness and discretion in these processes.

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[4] Order P-339.
[5] Order MO-1573.
[6] Section 43(2).

[29] Having regard to the circumstances of this appeal, I am satisfied that the city's evidence demonstrates that it properly exercised its discretion to invoke section 14(5) and in doing so, took into account relevant considerations such as the sensitive nature of information that would generally be contained in records relating to a complaint process. I am also satisfied that the city did not exercise its discretion in bad faith or for an improper purpose, nor is there any evidence that it took into consideration irrelevant considerations.

[30] In making my decision, I also took into consideration that one of the purposes of the *Act* is that the privacy of individuals should be protected.

[31] Having regard to the above, I find that the city properly exercised its discretion in invoking section 14(5) to refuse to confirm or deny the existence of responsive records.

## ORDER:

I uphold the city's decision.

Original Signed by: March 17, 2015
Jennifer James
Adjudicator