ORDER M-217

Appeal M-9300018

Corporation of the City of York

ORDER

BACKGROUND:

The Corporation of the City of York (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to all records of noise complaints made in respect of an identified property, including any correspondence or actions taken from September 1987 to March 1988. In its decision, the City refused to confirm or deny the existence of responsive records under section 8(3) of the Act and alternatively claimed the exemption provided by section 8(2)(a). The requester appealed the City's decision to refuse to confirm or deny the existence of responsive records and to deny access.

During the course of mediation, the City withdrew its reliance on section 8(3) of the Act and confirmed the existence of the one record it had identified as responsive to the request. The City still denied access to the record in its entirety on the basis of the exemption in section 8(2)(a) of the Act. Further mediation was not successful and notice that an inquiry was being conducted to review the City's decision was sent to the appellant, the City and one affected person. In the Notice of Inquiry forwarded to the parties, the Commissioner's office raised the issue of the mandatory exemption provided by section 14 of the Act. Representations were received from the City and the affected person.

While these representations were being considered, Commissioner Tom Wright Issued Order M-170 which interpreted several statutory provisions of the Act in a way which differed from the interpretation developed in previous orders. Since a new approach to the operation of the Act was being adopted and because the same statutory provisions are at issue in the present appeal, it was determined that copies of Order M-170 should be provided to all the parties. The parties were then afforded the opportunity to state whether the contents of Order M-170 would cause them to change or supplement the representations which they had previously made. No additional representations were received from the City or the affected person. Representations were received from the appellant.

The record at issue in this appeal is a three-page complaint/investigation form with typewritten and handwritten entries.

ISSUES:

A. Whether any of the information contained in the record qualifies as "personal information" as defined in section 2(1) of the Act.

B. If the answer to Issue A is yes, whether the mandatory exemption provided by section 14(1) of the Act applies.

C. Whether the discretionary exemption provided by section 8(2)(a) of the Act applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether any of the information contained in the record qualifies as "personal information" as defined in section 2(1) of the Act.

The City has claimed in its representations that the record contains "personal information" as defined by section 2(1) of the Act. In particular, it makes reference to paragraphs (d), (e), and (h) of the definition as applying to some of the information contained in the record. These paragraphs read as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> ...
>
> d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another 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;

The record does contain certain information relating to two individuals in particular. First, the record sets out the name and address of the owner of the property about which the complaint was made, as well as comments made by this individual to the inspector. Second, it also contains the name, address and telephone number of the person who made the complaint. I am satisfied that his information falls within the provisions of paragraphs (d) and (h) of the definition and is, therefore, personal information as defined by section 2(1) of the Act.

The City relies on paragraph € of the definition in respect of the comments of the complainant concerning the investigation conducted by the City and the ultimate resolution of the complaint. The City states that this information constitutes the "personal opinions or views" of the individual and, thus, subparagraph (e) applies.

In my view, even if the comment could be considered as an "opinion" of the complainant, that opinion could only be connected to the individual by other personal information contained in the record. There is nothing in the context of the complainant's comment that could independently identify the complainant. In the circumstances of this appeal, I conclude that the comments of the complainant cannot be considered personal information about an **identifiable individual** if the personal identifiers of the complainant are removed from the record.

ISSUE B: If the answer to Issue A is yes, whether the mandatory exemption provided by section 14(1) of the Act applies.

Under Issue A I found that the record does contain personal information. Once it has been determined that a record contains personal information, section 14(1) of the Act prohibits disclosure of this information to any person other than the individual to whom the information relates except in certain circumstances listed under the section.

The City submits, and I agree, that the only exception to the section 14(1) mandatory exemption which has potential application in the circumstances of this appeal is section 14(1)(f) which reads as follows:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > If the disclosure does not constitute an unjustified invasion of personal privacy.

Because section 14(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 14(1)(f) applies, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy.

Sections 14(2). (3), and (4) of the Act provide guidance in determining whether or not disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. In Order M-170, Commissioner Tom Wright addressed the interrelationship between sections 14(2), (3), and (4) in the following way:

> … [W]here personal information falls within one of the presumptions found in section 14(3) of the Act, a combination of circumstances set out in section 14(2) of the Act which weigh in favour of disclosure, cannot collectively operate to rebut the presumption.
>
> The only way in which a section 14(3) presumption can be overcome is if the personal information at issue falls under section 14(4) of the Act or where a finding is made under section 16 of the Act that a compelling public interest exists in the disclosure of the record in which the personal information is contained, which clearly outweighs the purpose of the section 14 exemption.

I adopt this approach for the purposes of this order.

In its representations, the City submits that the presumption in section 14(3)(b) of the Act applies in the circumstances of this appeal. This section 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

I am satisfied that the personal information contained in the record was obtained and compiled as part of an investigation into a possible violation of law, in this instance, the City's noise by-law. Accordingly, I find that the presumption of an unjustified invasion of personal privacy has been established under section 14(3) of the Act.

I have considered section 14(4) of the Act and find that none of the personal information at issue falls within the ambit of this provision.

The appellant has argued that the "public interest override" found in section 16 of the Act applies to rebut the presumption under section 14(3)(b). Section 16 of the Act 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. [emphasis added]

There are certain requirements in section 16 of the Act which must be satisfied in order to invoke the application of the so-called "public interest override": there must be a **compelling** public interest in disclosure, and this compelling public interest must **clearly** outweigh the **purpose** of the exemption, as distinct from the value of disclosure of the particular record in question (Order 24).

While the burden of proof as to whether an exemption applies falls on the institution, the Act is silent as to who bears the onus of proof in respect of section 16. Where the application of section 16 to a record has been raised by an appellant, it is my view that the burden of proof cannot rest wholly on the appellant, where he or she has not had the benefit of reviewing the record 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 the appellant.

The appellant submits that there is a compelling public interest in disclosure of the record for the following reasons:

> The disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny. (I have the impression the "City" was in the least, negligent in their duty and in the worst, giving favourable treatment to [the identified address]….)
>
> The personal information is relevant to the fair determination of the rights of the individual who made the request. (I don't believe [a named individual's] rights to enjoy his property were allowed by the "City's actions".)

In my view, neither of these factors is relevant in determining whether section 16 of the Act applies to the personal information contained in the record. They are both factors which are listed in section 14(2) of the Act as circumstances to consider in determining whether disclosure of personal

information constitutes an unjustified invasion of personal privacy. I have found that there is a **presumed** unjustified invasion of personal privacy as section 14(3)(b) applies in the circumstances of this appeal. Furthermore, I believe that these concerns raise only a **personal** interest on behalf of the appellant, rather than any **public** interest.

Having reviewed the record, I am of the opinion that there is no compelling public interest at stake in this appeal and find that section 16 of the Act does not apply. Accordingly, the presumption contained in section 14(3)(b) of the Act applies and the personal information contained in the record is properly exempt from disclosure.

ISSUE C: Whether the discretionary exemption provided by section 8(2)(a) of the Act applies.

For a record to qualify for exemption under section 8(2)(a) of the Act, the institution must satisfy each part of the following three part test:

1. the record must be a report; and

2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[Orders 200 and M-17]

The record at issue was prepared by members of the City's By-Law Enforcement Section in response to a complaint that the City's noise by-law was being contravened. The record sets out the substance of the complaint and notations of the inspector investigating the complaint. I am satisfied that the record was prepared in the course of law enforcement and that it was prepared by an agency which has the function of enforcing and regulating compliance with a law. Accordingly, the record at issue satisfies the second and third parts of the test under section 8(2)(a) of the Act

With respect to the first part of the test, it was decided in Order 200 that for a record to be a report for the purposes of section 8(2)(a), it had to contain "… a formal statement or account of the results of the collation and consideration of information", and those results would not generally include "… mere observations or recordings of fact".

The City has submitted that because one of the inspector's notations on the record states: "File complete", the record contains the inspector's **conclusion** that there was no need for further investigation. Because the record contains that conclusion, the City argues that the record constitutes a "report" for the purposes of the test under section 8(2)(a). I do not agree.

The record is a pre-printed form which provides for the recording of the particulars of a by-law complaint. There are sections of the form for recording the particulars of the property which is the subject of the complaint, particulars of the complainant, the substance of the complaint and a space for notations with respect to the investigative steps taken. The form seems to be designed and used

as an ongoing record of steps taken by the Enforcement Section's staff and I note that the entries are individually dated and are some months apart.

The "conclusion" pointed out by the City as being significant is really only a final or concluding statement of fact. The fact that the notation **may** be indicative of some conclusion by its author and relates to other facts contained in the document is not enough to render a record a "report" for the purposes of section 8(2)(a) of the Act. In my opinion, both of the entries in the "Investigation" section of the record constitute a mere recording of facts, rather than the results of the collation and consideration of information. Accordingly, I find that the record fails to satisfy the first part of the test under section 8(2)(a) of the Act and, therefore, does not qualify for exemption from disclosure under that section.

ORDER:

1 I order the City to disclose the record to the appellant in accordance with the highlighted copy of the record I have provided to the City's Freedom of Information Co-ordinator with a copy of this order. The highlighted portions should **not** be disclosed.

2. I order the City to disclose the record referred to in Provision 1 within 35 days following the date of this order and not earlier than the thirtieth (30^{th}) day following the date of this order.

3. In order to verify compliance with this order, I order the City to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1, **only** upon request.

Original signed by:_____ _____November 18, 1993_____
Anita Fineberg