

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3987-I

Appeal MA17-302

The City of Windsor

December 14, 2020

Summary: The appellants sought access to all records relating to their service call with 311 regarding an incident with their neighbour. The city located 24 records responsive to the request and disclosed four of them, all 311 Service Request Summary Reports, to the appellants. The city denied access to the remaining records under section 38(a) (discretion to refuse requester's own information), in conjunction with section 8(1)(d) (confidential source of information), of the *Municipal Freedom of Information and Protection of Privacy Act*.

The adjudicator finds that the city has not established the application of the section 38(a) exemption, but defers her decision on disclosure pending notification of the affected parties in this appeal. She also does not uphold the reasonableness of the city's search for records and she orders the city to conduct a further search for additional records responsive to the appellants' request.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, sections 2(1) (definition of "personal information"), 8(1)(d), 17, 38(a) and 42.

Orders Considered: MO-3245.

OVERVIEW:

[1] This Interim Order addresses two individuals' right of access to municipal records related to a call for service one of them made to 311. The appellants submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Windsor for access to all records relating to a 311 call regarding an incident with their neighbour (the 2016 incident). The appellants' access request states

and seeks:

All records including but not limited to reports, call logs, memos, emails, notebook entries, post-its, audio recordings, computer terminal usage, City of Windsor network usage, and WAN/internet logs generated, considered, or linked to a call made by the requester on [specified date] to the Windsor Police Service Board Chair's office via 311. [Named individual] spoke with the requester regarding a systemic Police Service Act [s/c] deficiency, viewed supplementary (digital) material, called the Windsor Police Service with the requesters' knowledge, then viewed additional supplementary materials. [s/c] Access logs are available.

[2] In response to the appellants' access request, the city issued a decision letter refusing to confirm or deny the existence of records pursuant to section 8(3) (law enforcement) of the *Act*. The appellants were not satisfied with the city's decision and appealed it to the Information and Privacy Commissioner of Ontario (IPC).

[3] The IPC attempted to mediate the appeal. During mediation, the appellants confirmed their position that records ought to exist. In support of their position, the appellants submitted records they obtained from an access request to the Windsor Police Service and claimed that those records related to the 2016 incident and proved that the city has records related to the 2016 incident in its custody or control. The city maintained its decision to refuse to confirm or deny the existence of records. A mediated resolution of the appeal was not possible and the appeal was transferred to the adjudication stage of the appeal process where an adjudicator may conduct an inquiry.

[4] An IPC adjudicator conducted an inquiry. During the inquiry, the city issued a revised decision to the appellants, disclosing four complete records—all 311 Service Request Summary Reports—and confirming that it withheld the remaining 20 records, in their entirety, on the basis of section 8(1)(d) (confidential source of information) of the *Act*. After reviewing the records remaining at issue, the adjudicator sent the parties Notices of Inquiry that included several issues that were raised on the facts of the appeal but were not previously addressed. These added issues were: the scope of the appeal, the reasonableness of the city's search for responsive records, the consideration of whose "personal information" is found in the records, the possible application of the discretionary exemptions in sections 38(a) (discretion to refuse requester's own information) and 38(b) (personal privacy), and the city's exercise of discretion. The adjudicator received representations from the city and the appellants. The appellants' representations included confidential submissions that were not shared with the city. The appellants' non-confidential representations were shared with the city, which provided reply representations. The appeal was then transferred to me to continue the inquiry.

[5] In this Interim Order, I find that the city has not satisfied its burden of proof under section 42 of the *Act*, because it has not established that the records fall within

the section 38(a) exemption. I defer my decision on disclosure of the records in order to notify the affected parties and invite their representations on the possible application of section 38(b) of the *Act*, which the city declined to address. I also find that the city did not conduct a reasonable search for responsive records and I order it to conduct a further search.

RECORDS:

[6] The 20 records at issue consist of one page of handwritten notes (Record 5) and 19 emails (Records 2, 6-16 and 18-24). The emails consist of email exchanges between city staff, and between city staff and the Windsor Police, all relating to the 311 call made by one of the appellants regarding the 2016 incident.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1)?
- B. Does the discretionary exemption at section 38(a), in conjunction with the section 8(1)(d) exemption, apply to the information at issue?
- C. What is the scope of the request and did the city conduct a reasonable search for responsive records?

DISCUSSION:

A. Do the records contain "personal information" as defined in section 2(1)?

[7] In order to determine which sections of the *Act* apply, I must first determine whether the records contain "personal information" and, if so, to whom it relates. "Personal information" is defined in section 2(1) as recorded information about an identifiable individual, and includes the types of information specified at paragraphs (a) through (h) of the definition.

[8] Both the city and the appellants submit that the records contain the personal information of the appellants, and I agree. The emails at issue contain recorded information about the appellants that falls within the following paragraphs of the definition of personal information in section 2(1) of the *Act*:

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(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,

(g) the views or opinions of another individual about the 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[.]

[9] However, the emails at issue also contain recorded information about other identifiable individuals (the affected parties). The information about the affected parties in the records also fits within paragraphs (a), (d), (e), (g) and (h) of the definition of personal information in section 2(1) of the *Act*.

[10] I find that the records contain the personal information of the appellants and the affected parties. Accordingly, the appellants' access to the records must be determined under sections 36 through 38 in Part II of the *Act*, which addresses individuals' rights to access records containing their personal information.

B. Does the discretionary exemption at section 38(a), in conjunction with the section 8(1)(d) exemption, apply to the information at issue?

[11] Section 38 provides a numbers of exemptions from the general right of individuals under section 36(1) of the *Act* to access their own personal information held by an institution. Under section 38(a), where a record contains personal information of both the individual requesting it and another individual, the institution may refuse to disclose personal information to the requester if any of a number of discretionary exemptions in Part I of the *Act* would apply to the disclosure of that personal information. In this appeal, the city relies on section 38(a), in conjunction with the discretionary exemption in section 8(1)(d), to deny the appellants access to the records. Section 8(1)(d) states:

8.(1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

(d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source[.]

[12] The term "law enforcement" is defined in section 2(1) and means policing, or an investigation that could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings. A police investigation into a possible violation of the *Criminal Code* and a municipality's investigation into a possible violation

of a municipal by-law, both fall within the meaning of the term "law enforcement."¹

[13] Having refused the appellants access to the records, the city bears the burden of proof under section 42 of the *Act* that the records fall within the exemption in section 38(a), in conjunction with section 8(1)(d) of the *Act*. To satisfy its burden of proof, the city must establish a reasonable expectation that the identity of the source or the information given by the source would remain confidential in the circumstances.² The city must also demonstrate that, in exercising its discretion under section 38(a), it considered whether the records should be released to the appellants because the records contain the appellants' personal information.

The city's representations

[14] The city submits that Record 6 contains information that, if disclosed, could reasonably be expected to disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished by the confidential source. It relies on two orders in support of its submission that section 8(1)(d) applies, Orders MO-2716 and MO-3165. The city states that Order MO-2716 involved information provided by a confidential source about a potential criminal offence, while Order MO- 3165 involved information provided by a confidential source about a possible by-law infraction, and that the IPC found this information to be exempt from disclosure. The city argues that, like those two orders, this appeal involves information that clearly relates to a law enforcement matter and the information at issue in this appeal should be withheld.

[15] The city concludes its representations by stating that it is important that its employees are able to relay information about law enforcement matters that respects their reasonable expectation to do so confidentially. It adds that in the absence of their confidentiality being protected, city employees, who deal with the public on a regular basis, may be reluctant to provide important information to the police and the safety and welfare of the public could be compromised.

The appellants' representations

[16] In their non-confidential representations, the appellants submit that section 8(1)(d) does not apply to the information at issue. They explain that one of them, the husband, called the city's 311 service about a concern and was told by the 311 representative that a complaint should be created to document the event and that he should speak to a specific individual in the Mayor's office about his concerns. The appellants explain that the husband did speak to the suggested individual in the Mayor's

¹ See Orders M-202 and PO-2085 (police investigations), and Orders M-16 and MO-1245 (municipal by-law investigations).

² Order MO-1416.

office and this individual told him at the time that it would be best if she contacted the police about his concerns. The appellants state that the only possible confidential source is this individual from the Mayor's office. The appellants add that the police attended their home after the 311 call and the call with this individual, and when the police arrived, the officers informed them that "a reliable, trustworthy source in the Mayor's office" was alleging that one of them had threatened to kill another individual.

[17] The appellants also submit that they have additional information confirming the identity of the alleged confidential source, a redacted copy of an email that she sent to the police relaying the appellant's concerns. The appellants explain that they obtained a copy of this redacted email and other related emails and documents through an access to information request they filed with the Windsor Police Service, and that all of these documents confirm the identity of the alleged confidential source.

The city's reply representations

[18] In its reply representations, the city notes that the appellants' representations indicate that the appellants sought some, if not all, of the same records that are at issue in this appeal in a prior appeal involving the Windsor Police Service. The city states that this prior appeal, MA14-5, resulted in Order MO-3245, which upheld the police's partial disclosure decision. The city refers me to paragraph 38 of Order MO-3245, which found that the factor in section 14(2)(h) (supplied in confidence) applied and weighed in favour of protecting the privacy of other affected parties and of withholding their personal information.

[19] The city submits that the IPC has already concluded that some of the records at issue in this appeal should not be disclosed because the personal information of the affected parties was provided to the police in confidence. The city argues that the finding in Order MO-3245 should be binding against the appellants in this appeal, since it would be absurd to have different conclusions apply to the same records. The city concludes by arguing that, if there is any confusion about which records are duplicated in Appeal MA14- 5, the appellants should identify the records they obtained so that these can be considered against the records at issue in this case.

Analysis and findings

[20] In order for the city to establish the application of the section 38(a) exemption in this appeal, it must first demonstrate that disclosure could reasonably be expected to disclose the identity of a confidential source or information furnished by a confidential source in accordance with the section 8(1)(d) exemption. For the reasons set out below, I am not satisfied that the city has demonstrated this, given my conclusion that neither the source nor the information is confidential.

[21] The appellants provide representations indicating that they know the identity of the individual who the city argues is a confidential source and the information she provided to the police and, in reply, the city argues that the appellants appear to have

the records at issue in their possession because of an earlier appeal. The city does not reply to the appellants' submission that disclosure of the records would not reveal the identity of, or information supplied by, a confidential source and therefore, section 8(1)(d) does not apply.

[22] I agree with the appellants that the source and the information provided are not confidential in this appeal. This is because the appellants already know the identity of the individual who the city claims is the confidential source and the information the source provided to the police. The appellant who called 311 agreed to speak with the alleged confidential source when he was directed to her by 311 and is aware of what he said to her. The appellant is also aware of the fact that the individual relayed his comments to the police because the individual told him that she intended to do so. Furthermore, the police told the appellant, during their subsequent visit to the appellants' home, that they were there about a death threat the appellant had allegedly made that was reported to them by an individual in the Mayor's office. The appellants' knowledge of the identity and information of the confidential source is confirmed in Record 17, which recounts the appellant's 311 call after the police visit about the death threat. In my view, the appellant who called 311 is the original source of the information that was provided to the police by the individual with both the appellant's knowledge and consent. In these unique circumstances, disclosure of the records cannot reasonably be expected to reveal the identity of, or information supplied by, a confidential source.

[23] I find that the city has not established that section 8(1)(d) applies to the records at issue. Since section 8(1)(d) of the *Act* does not apply in this appeal, I also find that the discretionary exemption in section 38(a) does not apply.

[24] The city does not claim that any other exemption applies to the records, even though it was invited in the Reply Notice of Inquiry to consider the possible application of the discretionary personal privacy exemption in section 38(b). Because the records contain the personal information of various affected parties and the appellants, and the city did not address section 38(b) in its representations, I will invite the affected parties to submit representations on section 38(b) prior to making a decision about the disclosure of the records.

[25] Finally, I reject the city's position that Order MO-3245 addressed access to the records at issue in this appeal. Order MO-3245 was issued in September 2016, the same month that the 2016 incident relevant in this appeal occurred. The records at issue in Order MO-3245 related to Appeal MA14-5, which the appellants filed with the IPC in 2014; the records at issue in this appeal did not exist in 2014 and Order MO-3245 did not address them.

C. What is the scope of the request and did the city conduct a reasonable search for responsive records?

[26] The scope of the request and the reasonableness of the city's search for

responsive records are overlapping issues in this appeal and I will address them together. Regarding the scope of the request, section 17 of the *Act* imposes obligations on requesters and institutions when submitting and responding to requests for access to records. Section 17(1)(b) requires requesters to provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record. Section 17(2) requires an institution to inform the requester if the request does not sufficiently describe the record sought, and to offer the requester assistance in reformulating the request to comply with section 17(1).

[27] To establish that it conducted a reasonable search for responsive records, the city must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.³ The IPC has consistently held that to be responsive to the request, records must “reasonably relate” to the request.⁴ A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records that are reasonably related to the request.⁵

[28] The city was invited to provide representations on both the scope of the request and the reasonableness of its search for responsive records. Specifically, the Reply Notice of Inquiry asked the city to provide an affidavit summarizing all the steps it took in response to the request. The city was also invited to respond to the appellants’ concerns, set out below, about several types of requested records being ignored and specific records being excluded from the list of responsive records. The city did not provide an affidavit regarding the steps it took to locate responsive records. It did not address the scope of the request or support the reasonableness of its search in its representations.

[29] The appellants’ access request, set out in paragraph 1 of this Interim Order, provides sufficient detail to identify the records responsive to the request, in satisfaction of the appellants’ obligations under section 17(1)(b) of the *Act*. In addition to emails and reports, which the city identified as responsive records, the request seeks access to call logs, memos, notebook entries, post-its, audio recordings, computer terminal usage, City of Windsor network usage, and WAN/internet logs generated, considered, or linked to the appellant’s 311 call. Despite the appellants’ detailed request for several types of records beyond emails and reports, the city did not identify, locate or address these other types of records in its access decision or its representations in this appeal. Nor did the city contact the appellants to seek clarification of their request, as it is required to do under section 17(1)(b) of the *Act* if it believes the request is insufficiently detailed. The city appears to have simply disregarded parts of the request, as it also

³ Orders P-624 and PO-2559.

⁴ Order PO-2554.

⁵ Orders M-909, PO-2649 and PO-2592.

appears to have done with the IPC's request for an affidavit setting out details of its search for responsive records.

[30] In their detailed representations on the city's search for records, the appellants provide a reasonable basis for concluding that additional records exist. The appellants assert that the city did not conduct a reasonable search for responsive records because it did not identify or locate many records that they know exist or that they believe should exist. Specifically, the appellants state:

1. The city did not provide records of, or respond to their request for, computer terminal usage (user login and logout times) from relevant workstations.
2. The city did not provide records of, or respond to their request for, network usage including WAN/Internet logs. Records released in response to another request support their assertion that these types of record exist, or did exist, but were ignored by the city.
3. They sent a letter to the Mayor dated September 26, 2016 that was not identified as a responsive record.
4. Records confirming the Mayor's receipt of their September 26 letter should exist.
5. When they called the Mayor's office on September 27, 2016, they were told that no one in the office would speak with them. Records such as emails, texts or memos, should exist within the Mayor's office communicating and disseminating this position internally.
6. Records generated by city employees who responded to the appellants' call on September 27, 2016 to the Mayor's office should also exist.
7. The four 311 Service Request Summary Reports disclosed to them, Records 1, 3, 4 and 17, contain information supporting their position that additional records exist as follows:
 - a. Record 1 refers to "EIS records and file history reviewed" and "noise complaint package to be sent to complainant." The file history and noise complaint package, and any notes on the complaint that were prepared for the police officer who attended their residence should be included in the responsive records.
 - b. Record 3 states "Forward to Appropriate Department" and "sent a copy to the Mayor's office" and assigns a "311 Email Notification" to employee KS. All of these referenced records should be included in the responsive records.
 - c. Record 4 states "Forward to Appropriate Department" and "SR 37303 was forwarded to the Mayor's office" and assigns a "311 Email Notification" to

employee KS. All of these referenced records should be included in the responsive records.

- d. Record 17 refers to "Email Notification to CAO" assigned to employee LM and to a "Custom Email" sent on September 23, 2016 at 4:05 PM. All of these referenced records should be included in the responsive records.

[31] In the absence of any evidence from the city demonstrating that it has made a reasonable effort to locate all of the responsive records within its custody or control, I find that the city did not conduct a reasonable search. As a result, I will order the city to conduct a further search for responsive records, including the records that the appellants assert exist or ought to exist as set out in the preceding paragraph.

INTERIM ORDER:

1. I do not uphold the city's decision to withhold the 20 records at issue under section 38(a) of the *Act*. I defer my decision on disclosure pending notification of the affected parties in this appeal.
2. I do not uphold the city's search for records responsive to the request. I order the city to conduct a further search for all records responsive to the appellants' request, as set out in paragraph 1 of this Interim Order, including the records specified in items 1 through 7.d of paragraph 30 of this Interim Order.
3. I order the city to provide me with an affidavit or affidavits sworn by individuals who have direct knowledge of the additional search ordered. The affidavits shall include, at a minimum:
 - a. The names and positions of the individuals who conducted the search.
 - b. The steps taken in conducting the search.
 - c. The types and locations of files searched and the results of each search.
4. I order the city to provide me with the affidavits and the results of its further search by **January 18, 2021**.
5. If the city locates additional records responsive to the request through its further search, I order it to issue an access decision to the appellants in accordance with the *Act* treating the date of this Interim Order as the date of the request.
6. The timelines in order provisions 4 and 5 may be extended if the city is unable to comply due to the Covid-19 pandemic.
7. I remain seized to address any issues arising from order provisions 1 to 6 above, including any extension request for compliance.

Original signed by: _____
Stella Ball
Adjudicator

December 14 , 2020 _____