

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4405

Appeal MA21-00398

City of Toronto

June 29, 2023

Summary: The appellant submitted a request to the city under the *Act* for a training manual for noise bylaw investigations. The city refused access to the manual under the discretionary law enforcement exemption in section 8(1)(c) (reveal investigative techniques or procedures). The appellant appealed the city's decision. In this order, the adjudicator allows the appeal and upholds the city's application of the section 8(1)(c) exemption to only some of the information at issue. For specific portions of the information at issue, which she finds are not exempt under section 8(1)(c), she orders them disclosed to the appellant.

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

Orders Considered: Orders M-16, MO-1245, MO-2347-I, P-170, P-1487 and PO-2751.

OVERVIEW:

[1] The City of the Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

a copy of the 'MLS [Municipal Licensing & Standards] Noise Investigation Technical Manual' as referenced in MLS' Noise Policy BLE-039-00.

[2] The city issued a decision denying access in full to the *Acoustics (Noise)*

Technical Manual (the manual)¹ pursuant to section 8(1)(c) of the *Act* (reveal investigative techniques and procedures).

[3] The appellant appealed the city's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[4] During mediation, the city disclosed the manual's table of contents to the appellant. The appellant continued to seek access to the manual. She also conveyed her belief that there is a compelling public interest in the disclosure of the manual as described in section 16 of the *Act* and asked that this issue be added to this appeal.²

[5] The city then advised that it would revise its decision and grant partial access of the manual to the appellant but needed time to do so. Despite this, the appellant advised the mediator that she wanted to proceed to adjudication.

[6] As no further mediation was possible, this appeal was transferred to the adjudication stage of the appeals process, in which an adjudicator may conduct an inquiry under the *Act*.

[7] As the adjudicator assigned to this appeal, I decided to conduct an inquiry into this matter. I began by inviting representations from the city on the issues set out in a notice of inquiry. I received representations from the city, along with a revised decision, granting the appellant partial access to the manual. The city's non-confidential representations were shared with the appellant, who was invited to respond to the issues set out in the notice of inquiry, as well as the city's non-confidential representations.³ I received representations from the appellant, followed by reply and sur-reply representations from each party respectively.⁴

[8] In this order, I find that some of the information at issue contains investigative techniques and procedures, making it exempt from disclosure under section 8(1)(c) of the *Act*, while other portions do not and are not exempt; I order the city to disclose these portions to the appellant. I uphold the city's decision in part.

¹ The city explains it owns the manual and it retained the services of a third party vendor to create it.

² While the issue of compelling public interest in section 16 of the *Act* was added as an issue in this appeal and I sought representations from the parties on it, the *Act* is clear that the public interest override at section 16 cannot apply to a record exempt under section 8 of the *Act*, as noted by the city. See Interim Order MO-4067-I. Accordingly, I have not considered this issue in my order.

³ The appellant argued that she was unable to respond to the city's representations given the extent to which they were redacted. She was advised that the redacted portions of the representations "would reveal the substance of a record claimed to be exempt", as per the confidentiality criterion at section 5 of the IPC's *Practice Direction Number 7* and summarized in the IPC's *Inquiry Procedure at the Adjudication Stage*.

⁴ Overall, the appellant's representations appear to take issue with the method by which the city conducts its noise bylaw investigations, which I do not have the authority under the *Act* to consider. Accordingly, I only summarize those portions of the appellant's representations that are relevant to this appeal.

RECORD:

[9] Redactions applied to the following sections of the manual remain at issue in this appeal:

- sections 4.4 - 4.7 on pages 57-60;
- sections 6.1 - 6.4 on pages 72-77;
- sections 7.0 - 7.3 on pages 78-95; and
- sections of Appendix A on page 101; (together, the information at issue).

DISCUSSION:

[10] The sole issue in this appeal is whether the discretionary exemption related to investigative techniques and procedures applies to the remaining parts of the manual. The city relies on section 8(1)(c) of the *Act* to withhold the information at issue. This section reads:

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

(c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

[11] In order for section 8(1)(c) to apply, the city must show that disclosure to the public of the information at issue would reveal investigative techniques or procedures used in law enforcement. However, the exemption normally will not apply where the technique or procedure is generally known to the public because it could not reasonably be expected to interfere with its effective use.⁵ Previous orders have found that the term *law enforcement* can include a municipality's investigation into a possible violation of a municipal bylaw.⁶

[12] The section 8(1)(c) exemption applies where a certain event or harm "could reasonably be expected to" result from disclosure of the record. Parties resisting disclosure of a record cannot simply assert that the harm under section 8(1)(c) is obvious based on the record. They must provide *detailed* evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms are self-evident and can be proven simply by repeating the description of harms

⁵ Orders P-170, P-1487, MO-2347-I and PO-2751.

⁶ Orders M-16 and MO-1245.

in the *Act*.⁷

Representations

[13] The city submits that:

Conducting noise investigations require the By-Law Officer to understand the scientific and technical aspects of noise and incorporate this knowledge with precision technical (acoustic) equipment in an environment to determine whether any violations of the noise by-law have occurred. The 2019 Manual provides general acoustical information that can be found in the public domain (disclosed portions of the manual), but it also includes the investigative techniques and procedures to support the proper collection of evidence and the thought processes associated. As the investigative techniques and procedures have been provided by the consultant they cannot capture every conceivable circumstance and as such other measurement methodologies may need to be used to arrive at a fair and honest evaluation.

While taking sound level measurements, the By-Law Officer needs to properly use the technical equipment, understand the environmental parameters at that time, pay careful attention and detail his/her personal observations while conducting the investigation. Unlike textbook examples, in a real noisy environment there may be external complications outside of the manual. In these cases, the By-Law Officer, with his/her knowledge and experience may take other steps, not identified in the manual, and as long as it is recorded and articulated, may be accurate. If the manual was in the public domain, this could compromise the effective utilization of many of the investigative techniques.

[14] The city explains how the information at issue reveals investigative techniques and procedures. It also explains that the manual is a useful tool to provide bylaw officers with investigative techniques to properly enforce the bylaw and that as a tool, it is not a standard operating procedure that bylaw officers are required to follow. It further explains that some procedures and terminologies have not been proven in court.

[15] The appellant submits that the city has not provided evidence that disclosure of the manual would reveal investigative techniques or procedures, which are not already in the public domain. In addition, she submits that even if portions of the manual may qualify as an investigative technique or procedure, its disclosure could not reasonably be expected to hinder or compromise its effective use.

[16] In support of her position, she submits that the information at issue is publicly

⁷ Orders MO-2363 and PO-2435.

available or generally known. She claims that most of the technical information being withheld by the city is publicly available through guidelines and other materials available online. The appellant also provides me with examples where other municipalities have published their manuals without compromising their noise bylaw enforcement efforts.

[17] The city responds that one of the published manuals referred to by the appellant is a general review of the duties of bylaw officers and does not contain investigative techniques or procedures.

Analysis and findings

[18] The issue before me is whether the city has properly applied the discretionary exemption at section 8(1)(c) of the *Act* to withhold the information at issue. Based on my review of the parties' representations and the information at issue, I find that section 8(1)(c) applies to the information at issue, except as described below.

[19] For section 8(1)(c) to apply, the city must show that disclosure to the public of the information at issue would reveal investigative techniques or procedures used in law enforcement, which includes a municipality's bylaw investigation.⁸ However, the exemption normally will not apply where the technique or procedure is generally known to the public as it could not reasonably be expected to interfere with its effective use.⁹

[20] After reviewing the representations of the parties and the information at issue, I am satisfied that the city has provided detailed evidence to establish a reasonable expectation that the disclosure of the information at issue would reveal investigative techniques and procedures used in noise bylaw investigations, except for certain portions detailed below. Overall, the manual contains information about the basics of acoustics, sound measurements and noise bylaw investigations. More specifically, the information at issue identifies investigative techniques and procedures used by city staff to investigate and collect evidence related to noise bylaw investigations. I agree that this particular information is not available to the public in the form that it is presented in the manual. Accordingly, I find that the information at issue is exempt under section 8(1)(c) of the *Act* as there is a reasonable expectation that the disclosure of this information would reveal investigative techniques and procedures, except as explained below.

[21] My review of specific portions of the information at issue reveals that these portions are generally known or available to the public. For example, some portions refer to definitions and concepts outlined in publicly available sources, like the city's noise bylaw, provincial publications and technical materials.¹⁰ In addition, given that the

⁸ Orders M-16 and MO-1245.

⁹ Orders P-170, P-1487, MO-2347-I and PO-2751.

¹⁰ Such as the city's Noise Bylaw Chapter 591 and Ontario's *Residential Air Conditioning Devices - Publication NPC-216, Environmental Noise Guideline - Stationary and Transportation Sources - Approval*

city has already disclosed the manual's table of contents to the appellant, the titles and subtitles redacted throughout the information at issue are already generally known to the appellant, meaning that its disclosure could not "reasonably be expected to" reveal investigative techniques or procedures used in law enforcement. Accordingly, I find that section 8(1)(c) of the *Act* does not apply to these specific portions of the information at issue, which I will identify and order the city to disclose to the appellant.¹¹

Exercise of discretion

[22] The section 8(1)(c) exemption is discretionary, meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, I may determine whether the institution failed to do so.

Representations

[23] The city submits that it properly exercised its discretion to withhold the information at issue under section 8(1)(c). It submits that:

In considering how to respond to the request, the head, consulted with staff knowledgeable with the relevant issues. In this appeal, the head exercised his discretion in good faith and took into account all relevant considerations with respect to the application of [section 8(1)(c)]. These considerations included the following:

- the purposes and principles of [the *Act*] including that the information should be available to the public, exemptions to access should reflect the specific and limited circumstances where non-disclosure is necessary for the proper operation of municipal institutions; the wording of the relevant exemptions; the importance of the interest sought to be protected by the [section 8(1)(c)] exemption;
- the fact that the information [at issue] cannot be considered to be the [appellant's] "own" information;
- the lack of any sympathetic or compelling need to receive the specific information withheld;

and Planning NPC-300 and Environmental Noise Guidelines for Installation of Residential Air Conditioning Devices.

¹¹ There is also an instance where the city started its redactions mid-sentence and may have inadvertently redacted the end of a sentence, which was otherwise disclosed to the appellant. It appears as though the end part of the sentence should have been disclosed along with the rest of the sentence. Accordingly, I will also order the city to disclose the end of this sentence on page 60 of the manual.

- disclosure will not have any impact on increasing public confidence in the operation of the City;
- the requested information is of a highly sensitive nature; and
- the recent nature of the requested information.

Further, there is a public interest in the non-disclosure of information that would assist in circumventing regulatory compliance. The City does not consider to advance the public interest in the transparency of municipal enforcement, where the disclosure would decrease our limited ability to attempt compliance with municipal licensing regulations.

The City thoroughly deliberated these matters in considering the current request and used the discretionary exemption exceptionally sparingly to deny access in a specific and limited fashion. The City severed only limited portions of the responsive record in an effort to maximize transparency while still protecting the enforcement activities designed to further valid municipal objectives. It is the City's submission that in considering all relevant factors, including the ones listed above, the head properly engaged in a good faith exercise of her discretion under [the *Act*].

[24] The appellant does not directly address this issue.

Analysis and findings

[25] Based on my review of the information at issue and the parties' representations, I find that the city did not err in exercising its discretion to withhold the information found to be exempt under section 8(1)(c) of the *Act*.

[26] The city's representations list the factors it considered in exercising its discretion under section 8(1)(c) of the *Act* to show that it exercised its discretion in good faith and for a proper purpose. There is no evidence before me to suggest that the ministry considered any irrelevant considerations or that it exercised its discretion in bad faith. Therefore, I find that its exercise of discretion was proper and I uphold the city's exercise of discretion in the circumstances.

ORDERS

1. I order the city to disclose to the appellant the information highlighted in green in the copy of the manual included with the city's copy of this order by **July 31, 2023**. To be clear, the green portions are to be disclosed to the appellant, while the yellow portions are to remain withheld from the appellant.
2. I otherwise uphold the city's decision.

3. In order to verify compliance with this order, I reserve the right to require the city to provide me with a copy of the manual as disclosed to the appellant.

Original Signed By: _____

Valerie Silva
Adjudicator

June 29, 2023 _____