Information and Privacy
Commissioner/Ontario

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

ORDER M-180

Appeal M-9200321

City of North York

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ORDER

BACKGROUND:

The City of North York (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of a complaint letter about the requester written by a neighbour.

The City notified the neighbour who had written the complaint letter of the request, and the neighbour objected to disclosure of her letter. The City subsequently denied access to the complaint letter, based on sections 8(1)(d), 14 and 38(a) and (b) of the Act. The requester appealed the City's decision.

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 the neighbour. Representations were received from all parties. In its representations, the City indicates that it is no longer relying on sections 8(1)(d) and 38(a) of the Act.

While the representations were being considered, Commissioner Tom Wright issued Order M-170, adopting the Ontario Court (General Division) (Divisional Court) June 30, 1993 decision in the case of John Doe et al. v. Information and Privacy Commissioner et al. (unreported). This decision interpreted several provisions of the Act in a way which differed from the interpretation developed in orders of the Commissioner. Since similar statutory provisions were also at issue in the present appeal, it was determined that copies of Order M-170 should be provided to the parties. The appellant and the Ministry were provided with the opportunity to change or to supplement the representations previously submitted. No additional representations were received.

PRELIMINARY ISSUE:

The appellant states that an official from the City met with the her to discuss the complaint letter and that she was allowed to read the complaint letter during that meeting. At the meeting, the appellant asked the official to mail her a copy of the letter. Subsequent to her request, the appellant received a decision from the City indicating that it was denying access to the complaint letter, based on certain provisions of the Act.

In Order P-274, former Assistant Commissioner Tom Mitchinson dealt with a similar issue. In that appeal, the records in issue had been read to the appellant during the course of two meetings. Following the meetings the appellant made a formal request for access under the Act. The institution informed the appellant that access to certain portions of the records was denied, on the basis that certain exemptions applied. The appellant maintained that he had been given access to the records that he viewed, and was entitled to copies.

Assistant Commissioner Mitchinson did not accept the appellant's position in that appeal. He found the intention of the institution is an important fact in determining whether access under the Act has been provided. Assistant Commissioner Mitchinson stated:

> ... in order to be provided with access for the purposes of the Act, there must be some evidence that the institution has treated the matter as coming under the provisions of the Act.
>
> In the circumstances of the current appeal, I am satisfied that if and when the records were read to the appellant, the institution was not intending to provide access under the Act. In making this decision, I am particularly mindful of the fact that the institution clearly did not consider the notice provisions ... of the Act prior to reading the documents to the appellant.

I agree.

The City submits that it did not intend to provide access to the record under the Act:

> It is the position of the [City] that the act of allowing the appellant to read the record must not be construed as the [City] having originally granted access to the record under section 23(1) of the Municipal Freedom of Information and Protection of Privacy Act (the "Act"). At the time the record was shown to the appellant, it was done so without any consideration of the provisions of the Act. The decision to allow the appellant to read the record was not made by the Head of the Institution, therefore intent to release the record under the Act was not present.

In the circumstances of this appeal, it is my view that access under the Act has not been provided to the appellant.

ISSUES:

A. Whether 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, and the personal information is that of the appellant and another individual, whether the discretionary exemption provided by section 38(b) of the Act applies.

C. If the answer to Issue A is yes, and the personal information is solely that of another individual, whether the mandatory exemption provided by section 14 of the Act applies.

SUBMISSIONS/CONCLUSIONS:

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

"Personal information" is defined in section 2(1) of the Act, in part, as "recorded information about an identifiable individual". Having reviewed the record, I am satisfied that it contains the personal information of both the appellant and the appellant's neighbour.

Because I have found that the personal information is that of the appellant and another individual, it is not necessary for me to consider Issue C.

ISSUE B: If the answer to Issue A is yes, and the personal information is that of the appellant and another individual, whether the discretionary exemption provided by section 38(b) of the Act applies.

In Issue A, I found that the record contains the personal information of the appellant and the appellant's neighbour.

Section 36(1) of the Act gives individuals a general right of access to any personal information about themselves in the custody or under the control of an institution. However, this right of access is not absolute. Section 38 provides a number of exemptions to this general right of access. One such exemption is found in section 38(b) of the Act, which reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Section 38(b) of the Act introduces a balancing principle. The City must look at the information and weigh the appellant's right of access to his/her own personal information against another individual's right to the protection of his/her personal privacy. If the City determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, section 38(b) gives the City discretion to deny the requester access to the personal information (Order 37).

In my view, where the personal information relates to the requester, the onus should not be on the requester to prove that disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the requester has a right of access to his/her own personal information, the only situation under section 38(b) in which he/she can be denied access to the information is if it can be demonstrated that disclosure of the information **would** constitute an unjustified invasion of another individual's privacy.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of an individual's personal privacy. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

The City submits that section 14(3)(f) of the Act applies to one sentence on the first page of the record. Section 14(3)(f) reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

I agree with the City. The information contained in this line relates to the value of certain of the neighbour's assets. I am satisfied the requirements for the presumption of section 14(3)(f) have been met.

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 (Order M-170).

I have considered section 14(4) of the Act and find that none of the personal information at issue in this appeal falls within the ambit of this provision. In addition, the appellant has not argued that the public interest override set out in section 16 of the Act applies. Accordingly, I find that disclosure of the one line on the first page would constitute an unjustified invasion of the personal privacy of the affected person and section 38(b) applies.

In my view, the remainder of the record does not contain any of the types of information listed in section 14(3).

Section 14(2) provides some criteria for the City to consider in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. For the remainder of the record for which I have found that no presumption is present, the City submits that section 14(2)(h) applies to the record. This section states:

> 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,

> the personal information has been supplied by the individual to whom the information relates in confidence;

The City offers no representations with respect to section 14(2)(h), except to refer to the neighbour's recent request that the record not be disclosed to the appellant.

In her representations, the appellant's neighbour contends that had she known that the appellant would receive a copy of the complaint, she would have made her complaint to the City over the telephone, rather than in writing. The appellant's neighbour also states that before she wrote the letter she was advised by the City that once the letter was received, the City would advise the appellant of the contents of the letter and the identity of the individual who initiated the complaint.

Given the appellant's neighbour's representations, it appears that she decided to write to the City knowing that her identity as well as the information in the letter itself would be shared with the appellant. Accordingly, I find that the affected person did not supply her personal information in confidence to the City. Consequently, I find that section 14(2)(h) is not a relevant consideration in the circumstances of this appeal.

After carefully considering the contents of the record, the representations of the parties and the provisions of the Act, I find that disclosure of the remainder of the record to the appellant would not constitute an unjustified invasion of the personal privacy of the neighbour. Accordingly, I find that except for the one sentence on the first page of the record, section 38(b) does not apply.

Section 38(b) is a discretionary exemption. I have reviewed the City's representations regarding the exercise of discretion in favour of withholding the one sentence on the first page of the record. I have found nothing improper, and would not alter it on appeal.

ORDER:

1. I order the City to disclose the record with one sentence on page one severed. I have provided the City with a copy of the record in which I have highlighted the line which is **not** to be disclosed.

2. I order the City to disclose the reminder of the record to the appellant within 35 days of the date of this order, but not earlier than the thirtieth (30th) 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 in accordance with Provision 2, **only** upon request.

Original signed by: August 30, 1993
Holly Big Canoe
Inquiry Officer