



Information and Privacy
Commissioner/Ontario

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

ORDER M-464

Appeal M-9400537

City of North York



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The City of North York (the City) received a request for access to a specific record wherein a named individual informed his superiors about a problem involving the requester. The requester also sought records relating to the named individual's direction to his staff to contact the police.

The City identified a two-page memorandum as being responsive to the first part of the request and denied access to it in its entirety. The City indicated that no records exist that are responsive to the second part of the request. The requester appealed the City's decision to deny access.

During mediation, the appellant confirmed that he was only appealing the decision to deny access to the two-page memorandum (the record).

The City relies on the following exemptions to withhold access to the record:

- solicitor-client privilege - section 12
- danger to health and safety - section 13
- invasion of privacy - section 14(1)

A Notice of Inquiry was provided to the appellant, the City and the named individual who is the author of the record (the affected person). Because the record appears to contain the personal information of the appellant and other individuals, the Notice of Inquiry raised the possible application of sections 38(a) and (b) of the Act.

The City advised that it was also relying on the discretionary exemptions provided by sections 7(1) and 8(1)(e) of the Act. I will address the late raising of these discretionary exemptions as a preliminary matter below.

Representations were received from the City and the affected person.

PRELIMINARY MATTER

THE RAISING OF ADDITIONAL DISCRETIONARY EXEMPTIONS LATE IN THE APPEALS PROCESS

On August 9, 1994, the Commissioner's office provided the City with a Confirmation of Appeal which indicated that an appeal from the City's decision had been received. The Confirmation of Appeal also indicated that, based on a policy adopted by the Commissioner's office, the City would have thirty-five days from the date of the confirmation (that is, until October 31, 1994) to raise any additional discretionary exemptions not claimed in the decision letter. No additional exemptions were raised during this period.

It was not until November 25, 1994, following the issuance of the Notice of Inquiry on November 15, 1994 but prior to the deadline for submitting representations, that the City indicated that it wished to rely on

sections 7 (the advice and recommendations exemption) and 8(1)(e) (the danger to life or safety exemption) of the Act to deny access to various portions of the memorandum.

Previous orders issued by the Commissioner's office have determined that the Commissioner or his delegate has the power to control the manner in which the inquiry process is undertaken (Orders P-345 and P-537). This includes the authority to set time limits for the receipt of representations and a limit on the time during which an institution can raise new discretionary exemptions not originally raised in its decision letter.

In Order P-658, Inquiry Officer Anita Fineberg concluded that the prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeals process. She noted that unless the scope of the exemptions being claimed is known at an early stage, it precludes a mediated settlement of the appeal under section 51 of the Act. Secondly, where additional discretionary exemptions are claimed after the Notice of Inquiry is issued, it requires a further notification of all parties and results in further delay. Finally, Inquiry Officer Fineberg pointed out the value of the information requested often diminishes with time, resulting in prejudice to the appellant. Based on the foregoing and after considering the circumstances of that appeal, she found that the Ministry had not provided any evidence of extenuating circumstances that required that the 35-day policy should not apply.

In its representations, the City states that the issue of raising additional exemptions was "inadvertently, not addressed until the Notice of Inquiry was received on November 18, 1994". The City provides no further explanation or arguments in support of its position.

In my view, in adjudicating the issue of whether to allow the raising of additional discretionary exemptions, I must weigh the balance between maintaining the integrity of the appeals process against the evidence of extenuating circumstances advanced by the City. I find that the City's explanation is not sufficient to remove this appeal from the parameters of the 35-day time limit established by the Commissioner. I will therefore, not consider the application of sections 7(1) and 8(1)(e) of the Act.

DISCUSSION:

INVASION OF PRIVACY

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.

In order to give effect to the legislature's intention to distinguish between requests for an individual's own personal information and other types of requests, the Commissioner's office has developed an approach for determining whether Part I or Part II of the Act applies. In that approach, the unit of analysis is the **record**, rather than individual paragraphs, sentences or words contained in a record.

Previous orders have established that where a record contains the personal information of the requester, the City's access decision should be made under Part II of the Act (Order M-352). This approach was also detailed in *IPC Practices*, October 1993, which was sent to all institutions and is in effect today, as follows:

Generally, an individual seeking access to a record that contains his or her personal information has a greater right of access than if the record does not contain any such information. ... Part II of the municipal Act oblige[s] institutions to **consider** whether records should be released to an individual, regardless of the fact that they may otherwise qualify for exemption under the legislation.

I have carefully reviewed the record and I find that it contains information that satisfies the definition of "personal information". In my view, the personal information relates to the appellant **and** other identifiable individuals. Therefore, the analysis of the record should be done under Part II of the Act.

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the City determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the City has the discretion to deny the requester access to that information.

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 personal privacy. Where one of the presumptions found in section 14(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 14(4) or where a finding is made that section 16 of the Act applies to the personal information.

If none of the presumptions contained in section 14(3) apply, the City must consider the application of the factors listed in section 14(2) of the Act, as well as all other considerations which are relevant in the circumstances of the appeal.

The City and the affected person state that the following factors under section 14(2) favour non-disclosure of the information in the record:

- the individual to whom the information relates will be exposed unfairly to pecuniary or other harm - section 14(2)(e)
- the information is highly sensitive - section 14(2)(f)
- the information has been supplied in confidence - section 14(2)(h)

For section 14(2)(e) to apply to the record, the City must show that the disclosure of the record will result in **unfair** pecuniary or other harm to the individual to whom the information relates.

In order for the City to successfully rely on section 14(2)(f) it must establish that disclosure of the information would cause excessive personal distress to the affected party (Order P-434).

For section 14(2)(h) to be considered, the City must provide evidence that the information in the record was supplied in confidence, explicitly or implicitly.

I have carefully reviewed the record together with the representations of the City and the affected person. I make the following findings:

- (1) There is not sufficient evidence before me to conclude that disclosure of the record would result in the individual to whom the information relates being exposed unfairly to pecuniary or other harm. The City has not established a sufficient connection between the release of the record and the possible pecuniary or other harms which the affected person might suffer. Therefore, section 14(2)(e) is not relevant in the circumstances of this appeal.
- (2) I am satisfied that the information in the record can be characterized as "highly sensitive" within the meaning of section 14(2)(f). This factor weighs in favour of non-disclosure of the personal information.
- (3) I find from a review of the record, that it was supplied in confidence explicitly and section 14(2)(h) also weighs in favour of non-disclosure of the record.
- (4) None of the factors which weigh in favour of disclosure apply to the personal information in the record in the circumstances of this appeal.
- (5) Disclosure of the personal information in the record would constitute an unjustified invasion of the personal privacy of the affected person and other identifiable individuals as contemplated by section 38(b). Therefore, the information should not be disclosed.

Because I have found the record to be exempt from disclosure under section 38(b) above, I do not need to address the application of sections 12 and/or 13 of the Act.

ORDER:

I uphold the decision of the City.

Original signed by: _____
Mumtaz Jiwan
Inquiry Officer

_____ February 15, 1995