



**Information and Privacy
Commissioner/Ontario**
**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-1295

Appeal MA-990205-1

City of Thunder Bay



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NATURE OF THE APPEAL:

The appellant submitted a request to the City of Thunder Bay (the City) under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for copies of all correspondence, including e-mails and interoffice memoranda, regarding parking violations on a named residential street in the City. The time span for the request was October, 1998 to May, 1999.

The City identified 68 pages of responsive records, consisting of correspondence, memoranda, meeting minutes, e-mails and by-laws. The City granted access in full to 14 pages, partial access to 12 pages and denied access to the remaining 42 pages in their entirety. For those records to which access was denied either in whole or in part, the City claimed the following exemptions under the Act:

- advice or recommendations - section 7(1);
- law enforcement - section 8(1)(a) and 8(2)(a);
- confidential source - section 8(1)(d); and
- invasion of privacy - sections 14(1) and 38(b).

In deciding that disclosure of the records would be an unjustified invasion of personal privacy, the City relied on the “presumed unjustified invasion of personal privacy” in sections 14(3)(b) & (g) of the Act and the factors listed under sections 14(2)(f), (h) & (i) of the Act.

The appellant appealed the City's decision.

During mediation, the City disclosed additional information on one of the pages (page 51) and the appellant narrowed the scope of the appeal to 48 pages (7 pages in part and 41 pages in full). The following 11 pages are duplicates of other pages at issue: pages 24 (duplicate of 19); 37 (duplicate of 19); 38 to 40 (duplicates of 25 to 27); 53 (duplicate of 7); 54 (duplicate of 9); 58 (duplicate of 55); 59 (duplicate of 56); 61 (duplicate of 49); and 65 (contained in 64). Accordingly, these duplicate pages are not at issue.

I initially provided a Notice of Inquiry to the City. After reviewing the City's representations, I sent the Notice to the appellant, together with the City's representations in their entirety. The appellant submitted representations in response to the Notice which was sent to him.

In reviewing the City's original representations, I decided that the City did not make a prima facie case with respect to Records 55 - 59 and portions of Records 51, 60, 62 and 66 on the basis of its section 7(1) and/or 8 exemption claims. On this basis, I decided it was not necessary to move this inquiry to stage three and seek reply representations from the City.

RECORDS:

There are 37 pages of records remaining at issue in this appeal, consisting of pages 7, 8, 43, 49, 51 in part and pages 9, 12, 13, 14, 18, 20 - 23, 25 - 36, 41, 55 - 57, 60, 62, 63, 64, 66 - 68 in their entirety. They include memoranda, correspondence and e-mails.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and 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.

The records at issue in this appeal were all created in the context of complaints made under the City's parking by-law. The City indicates that the complaints were made in relation to "several occurrences of illegal parking on [a named] Cul-De-Sac". The City submits that Records 7, 8, 9, 12, 13, 14, 19, 20, 21, 22, 23, 25, 26, 27, 28 - 36, 41, 43, 51, 60, 62 - 66 and 67 - 68 all contain the personal information of individuals other than the appellant. Many of these records consist of correspondence between named individuals and the City. The remaining records consist of memoranda or e-mails which refer to these individuals and their concerns. The records contain the names, addresses, in some cases telephone numbers and reflect the personal views and opinions of the individuals in respect of the conflict in the neighbourhood surrounding parking in the Cul-De-Sac and the enforcement of the City's parking by-law. I find that all of these records contain the personal information of individuals other than the appellant.

The City notes that none of the records refers to the appellant by name. However, given the nature of some of the records and the small size of the neighbourhood, the City submits that the appellant and other individuals would be identifiable through disclosure of them.

The appellant believes that all of the records are about him and his family and complaints which have been made specifically about them. He outlines his belief regarding the nature of the information in the records and describes a number of non-parking related incidents involving his family and his neighbours

On reviewing the records, I accept the City's submissions in this regard and find that Records 7, 8, 9, 12, 13, 14 and 28 - 36 also contain the appellant's personal information. Accordingly, I will determine whether the discretionary exemption in section 38(b) applies to the personal information in these records. I will assess the application of the mandatory exemption in section 14(1) for the remaining records at issue in this discussion (Records 19, 20, 21, 22, 23, 25, 26, 27, 41, 43, 51, 60, 62 - 66 and 67 - 68).

INVASION OF PRIVACY

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 institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Where, however, the record only contains the personal information of other individuals, section 14(1) of the Act prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies. In the circumstances, the only exception which could apply is section 14(1)(f) which reads:

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.

In both these situations, sections 14(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the head to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 14(2) [John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767].

A section 14(3) presumption can be overcome if the personal information at issue falls under section 14(4) of the Act or if 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 16 exemption.

The City claims that the presumption in section 14(3)(b) applies to all of the personal information in the records as this information was compiled and is identifiable as part of an investigation into a possible violation of law. In this regard, the City states that the records relate to complaints about a by-law infraction which was and continues to be investigated by both the police and the City's by-law enforcement officers.

The appellant believes that the records pertain to one individual in particular and describes the nature of his dispute with this person. The appellant also believes that because this is a neighbourhood dispute and all of the individuals involved know each other, disclosure of the information in the records cannot constitute an unjustified invasion of privacy.

Previous orders of the Commissioner have determined that a municipality's by-law enforcement process qualifies as a "law enforcement" matter for the purposes of section 2(1) of the Act (Orders M-16 and M-582). I agree with the reasoning in those orders and adopt their findings for the purposes of this appeal. The records at issue concern alleged infractions of the City's by-law relating to parking and the actions taken by the City to enforce the by-law and I find, therefore, that they relate to a law enforcement matter. More particularly, the records relate to the City's investigation into a possible violation of law.

Accordingly, I find that the personal information in the records was compiled and is identifiable as part of an investigation into a possible violation of law, that is, the City's parking by-law and its disclosure would constitute a presumed unjustified invasion of personal privacy.

I find that neither section 14(4) nor 16 applies to the personal information in the circumstances of this appeal. Accordingly, I find that, with certain exceptions which I will discuss below, Records 19, 20, 21, 22, 23, 25, 26, 27, 60, 62 - 66 and 67 - 68 and the withheld portions of Records 41, 43 and 51 are exempt under section 14(1) of the Act.

Exercise of discretion under section 38(b)

The City recognizes that the parking issues relating to the Cul-De-Sac are part of an on-going neighbourhood dispute. The City points to a number of the records which support an expectation of confidentiality with respect to complaints and individual views on the issues. In this regard, the City states that its policy has always been to protect the identity of complainants in by-law enforcement matters because:

It is, in most situations, a benefit to the community as a whole to ensure that By-laws are enforced. Similar to the Crime Stoppers Program, if the anonymity policy is not followed the process would be impeded.

As I indicated above, the City also notes that the appellant is not mentioned by name in the records. However, it recognizes that these are particularly sensitive issues within a small neighbourhood and is concerned about the identification of individuals in this context. Although the appellant is not mentioned by name, it is clear that some of the records pertain to him. That being said, however, I am satisfied that the City's exercise of discretion in withholding access to the personal information under section 38(b) was based on proper considerations and should not be disturbed. Therefore, I find that the personal information in Records 7, 8, 9, 12, 13, 14 and 28 - 36 is exempt under section 38(b).

The City has also claimed sections 7(1) and 8(1) for portions of the records at issue in this discussion. In particular, it has claimed the application of sections 7(1) and 8(1)(a) and (d) for Record 60 and has added section 8(2)(a) for Records 62 and 66. The personal information in these records is severable from the remaining portions of them. I will, therefore, consider the application of sections 7(1) and 8 to the remaining portions of Records 60, 62 and 66 as well as to Records 49 and 55 - 57. None of these records contain the appellant's personal information.

ADVICE OR RECOMMENDATIONS

Section 7(1) provides:

A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

This exemption is subject to the exceptions listed in section 7(2).

A number of previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as “advice” or “recommendations”, the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process [Order P-363, upheld on judicial review in Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner), Toronto Doc. 721/92 (Ont. Div. Ct.).] Information that would permit the drawing of accurate inferences as to the nature of the actual advice or recommendation given also qualifies for exemption under section 13(1) of the Act (Order P-233).

The “advice or recommendations” exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making or policy-making [Orders 94 and M-847]. Put another way, its purpose is to ensure that:

... persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head’s ability to take actions and make decisions without unfair pressure [Orders 24 and P-1363].

With respect to the application of this section, the City states:

[O]ften before a course of action is taken the advice of a supervisor is sought. In this instance, the advice provided relates to determination of an intended communication/course of action.

It is not unusual for an employee to speak to a supervisor prior to taking a particular action. In my view, it is often done for the purpose of confirming that the proposed action is acceptable or simply for the purpose of keeping the supervisor apprised of the situation. In reviewing the records at issue in this discussion (Records 49, 55 - 57, and the remaining portions of Records 60, 62 and 66) I find that Records 60 and 62 are of this nature. In my view, these two records are informational rather than advisory in nature and the purpose of the communications is to notify the recipient of the actions that the employee intends to take. Therefore, the remaining portions of Records 60 and 62 are not exempt under section 7(1)

I find that Records 49 and 66 which are e-mails from the City Manager and the City Engineer, respectively, to the Manager of the parking Authority are directional, ie. on how to proceed or an action to be taken, rather than of an advisory nature. In my view, they do not contain any advice or recommendations, nor would their disclosure reveal information of an advisory nature (Order P-363). Therefore, I find that Record 49 and the remaining portions of Record 66 are not exempt under section 7(1).

Finally, Records 55 - 57, which consist of correspondence between the City and a security company relating to the enforcement of the City’s parking by-law are not advisory in nature in any sense of the word. Rather, they are communications relating to the City’s expectations regarding enforcement or are directional in nature. Therefore, Records 55 - 57 are not exempt under section 7(1).

LAW ENFORCEMENT

The City claims the exemptions in sections 8(1)(a) and (d) for Records 55 - 57, 60, 62 and 66 and the exemption in section 8(2)(a) for Records 62 and 66. These sections state:

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

(a) interfere with a law enforcement matter;

...

(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;

(2) A head may refuse to disclose a record,

(a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

An institution relying on the section 8(1) exemption bears the onus of providing sufficient evidence to substantiate the reasonableness of the expected harm by virtue of section 53 of the Act (Order P-188).

For a record to qualify for exemption under any of these three sections, the matter or report must first satisfy the definition of “law enforcement”, which is a term found in section 2(1) of the Act.

This section defines “law enforcement” to mean (a) policing, (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and (c) the conduct of proceedings referred to in clause (b).

As I indicated above, previous orders of this office have found that municipal by-law enforcement activities fall within the definition of law enforcement as defined in section 2(1) (Orders M-16 and M-582). I agree, and find that the City has met the threshold for claiming the section 8(1)(a), (d) and 8(2)(a) exemptions.

Section 8(1)(d)

The City does not specifically refer to this section in its representations. Records 55 - 57 do not contain any information relating to the identity of a confidential source, nor would their disclosure reveal information that could only have been provided by an identifiable source. I found above that all of the personal information in the remaining records is exempt under section 14(1). Therefore, any information in the records pertaining to identifiable individuals has already been protected. In my view, the remaining information in Records 60, 62 and 66 could not possibly identify any individual involved in the neighbourhood dispute, and in particular, any complainant. On their face, the portions of the records at

issue in this discussion do not refer to, nor would they reveal any information relating to any other confidential source. On this basis, I find that the City has not provided sufficient evidence to substantiate the reasonableness of the harm in section 8(1)(d). Therefore, I find that this section does not apply.

Section 8(1)(a)

The purpose of the exemption in section 8(1)(a) is to provide the City with discretion to deny access to records in circumstances where disclosure could reasonably be expected to interfere with an on going law enforcement matter. The City bears the onus of providing evidence to substantiate that a law enforcement matter is on going, and that disclosure of the records could reasonably be expected to interfere with the matter.

The City's complete representations on this issue are as follows:

With respect to the application of Section 8, this has and continues to be an enforcement issue involving the police and by-law enforcement officers or their respective agents. Fines have and can be issued related to the issue surrounding these records. The matter is ongoing and is potentially volatile. The [police], a separate institution covered under the Act is currently involved in this unresolved matter.

The words "could reasonably be expected to" appear in the preamble of section 8(1), as well as in several other exemptions under the Act, dealing with a variety of anticipated "harms". Previous orders of this office have found that in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373 and Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 and 40 (Div. Ct.)].

I accept that the issues relating to the enforcement of the City's parking by-law are current and on-going. However, in my view, the City has failed to provide detailed and convincing evidence to establish a reasonable expectation that disclosure of the records at issue in this discussion would interfere with this matter. In reviewing the records, I find that they pertain to actions which the City has already taken in addressing this matter. Although the actions which have been taken may have some future consequence or application, there is nothing in the records which would support the City's position in this regard. Consequently, I find that the City has not provided sufficient evidence to substantiate the reasonableness of the harm in section 8(1)(a) and this section does not apply.

Section 8(2)(a)

Only a report is eligible for exemption under this section. The word "report" is not defined in the Act. For a record to be a report, it must consist of a formal statement or account of the results of the collation and consideration of information (Order P-200). Generally speaking, results would not include mere observations or recordings of fact (Order M-1048).

The City has claimed that Records 62 and 66 are exempt under section 8(2)(a). In this regard, the City states:

Where Section 8(2)(a) exemption is claimed, the reports are that of a decision making process and determination of course of action to be taken with respect to the law enforcement matters which had occurred and which might ensue.

Records 62 and 66 are e-mails between the City Manager and the City Engineer, respectively, and the Manager of the Parking Authority relating to certain actions to be taken with respect to the issues relating to the parking by-law complaints. These two pages taken individually and as a package along with the other records in this group (which I have found to be exempt under section 14(1) above), are not a formal statement or account of the results of the collation and consideration of information. Rather, the information in these records is more appropriately described as directional and/or "recordings of fact". Therefore, these two records do not qualify as "law enforcement reports" and section 8(2)(a) does not apply to them.

Summary

As a result of the above, I find that Records 49, 55 - 57 and the remaining portions of Records 60, 62 and 66 are not exempt from disclosure under the Act and should therefore be disclosed to the appellant. The remaining records and parts of records are exempt under sections 14(1) or 38(b). For greater clarity, I have highlighted the portions of Records 60, 62 and 66 which contain personal information and which I have found to be exempt under section 14(1) on the copies of these pages which are being sent to the City's Freedom of Information and Privacy Co-ordinator with a copy of this order.

ORDER:

1. I order the City to provide the appellant with a copy of Records 49, 55 - 57 and the portions of Records 60, 62 and 66 which have **not** been highlighted by sending him a copy of these pages and parts of pages on or before May 17, 2000.
2. I uphold the City's decision to withhold the remaining records and parts of records, including the highlighted portions of Records 60, 62 and 66 from disclosure.
3. In order to verify compliance with the provisions of this order, I reserve the right to require that the City provide me with a copy of the records and parts of records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Laurel Cropley
Adjudicator

April 27, 2000