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

ORDER MO-1579

Appeal MA-010361-1

City of Pickering

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NATURE OF THE APPEAL:

The appellant submitted a request to the City of Pickering (the City) pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to details of complaints pertaining to the appellant at a specified address, for the period May 2001 through August 2001.

The City located responsive records and denied access to them on the basis of sections 14(2)(f), (h), (i) and 38(b) (invasion of privacy) of the *Act*. The City claimed in its decision letter that disclosure of complaint details would reveal highly sensitive personal information that has been supplied in confidence and if disclosed may unfairly damage the reputation of an individual, and ultimately, constitute an unjustified invasion of another person's personal privacy.

The appellant appealed the City's decision. In his letter of appeal, the appellant indicated that he needed the information requested for the purpose of supporting a criminal harassment charge against two individuals, thus raising the possible application of the factor in section 14(2)(d) (fair determination of rights) of the *Act*.

During the mediation stage of this appeal, the City issued a supplementary decision letter in which it claimed further exemptions under sections 8(1)(a), (b) and (g) (law enforcement) and section 8(1)(d) (confidential source) of the *Act*.

Also during mediation, the appellant explained to the mediator that he and his neighbours have been involved in a number of protracted disputes, including by-law enforcement issues and ultimately criminal charges relating to allegations of harassment and threatening that each has pursued against the other, respectively. In addition, the appellant indicated that he is an employee of the City. It appears that the City had informed the appellant that allegations of a "personal nature" had been made against him to the City, but would not provide any details of the allegations.

The appellant indicated during mediation that he was not seeking information related to by-law enforcement, but rather to records that may assist him in the criminal proceedings. The mediator confirmed with the appellant that he was, therefore, not interested in seeking access to one of the responsive records: City of Pickering Clerk's Division Municipal Law Enforcement – Complaint Form, dated June 15, 2001, regarding a complaint about a by-law enforcement issue at a specified address. This record is no longer at issue in this appeal. The City has indicated that, as a result, it is no longer relying upon sections 8(1)(a), (b), (d) and (g) of the *Act*. The City continues to rely upon sections 14(2)(f), (h), (i) and 38(b) in respect of the records remaining at issue.

Further mediation was not possible, and the appeal was forwarded to adjudication. This office first sought representations from both the City and the individuals affected by this appeal (the affected persons) and sent them a Notice of Inquiry setting out the facts and issues on appeal. Both the City and the affected persons submitted representations. In their representations, the affected persons indicate that they do not consent to the disclosure of their personal information. The non-confidential portions of the City's representations were provided to the appellant along with the Notice of Inquiry and he was asked to respond to the issues set out therein. The appellant did not submit representations in response.

RECORDS:

There are four pages of records at issue:

- One page City of Pickering - Customer Care Centre Complaint Report, dated August 24, 2001 (Record 1);
- One-page internal City e-mail communication, dated August 23, 2001, and response, dated August 24, 2001 (Record 2);
- One-page internal City e-mail, dated August 24, 2001 (Record 3);
- One-page internal City e-mail, dated October 15, 2001 (Record 4).

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1), "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 disclosure of the name would reveal other personal information about the individual [paragraph (h)].

Record 1 is a "Customer Care Centre Complaint Report". This is a form used for tracking purposes and contains particulars of the identity of the complainant and administrative details relating to how the complaint was handled by City staff, for example, to whom it was referred and actions taken. Taken alone, this record only contains information about the individual who contacted the Customer Care Centre. However, in the context of this request and appeal, Record 1 must be read with Records 2 and 3, which are e-mails exchanged amongst City staff relating to the complaint. All three of these records pertain to a complaint made by one of the affected persons against the appellant. In my view, these three records contain recorded information about the two parties identified therein.

It has been established in a number of previous orders that information provided by, or relating to, an individual in a professional capacity or in the execution of employment responsibilities is not "personal information" (Orders P-257, P-427, P-1412, P-1621, M-262). The appellant is an employee of the City. It is possible that these records were created because he is an employee, but they do not pertain to the execution of his employment responsibilities. Rather, in the circumstances of this appeal, I find that the records are about him in his personal capacity, as a party to a neighbour dispute.

Accordingly, I find that Records 1, 2 and 3 all contain the personal information of the appellant and the affected persons.

Record 4 is a record that was created after the appellant's access request was made. This record peripherally refers to the parties through context. I am not persuaded from reviewing this record that the parties would be identifiable if it were disclosed to an outsider who was unfamiliar with their dispute. However, as between the parties, and considered within the framework of the request, it is recognizable as pertaining to them. On this basis, I find that it contains the personal information of both parties.

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.

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 institution to consider in making this determination. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy.

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

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 14 exemption [Order PO-1764].

The City relied on the factors in sections 14(2)(f), (h) and (i) as the basis for finding that disclosure of the personal information in the records would constitute an unjustified invasion of privacy. As I indicated above, the appellant implicitly raised the application of the factor in section 14(2)(d), which is a factor favouring disclosure. In the Notice of Inquiry, the parties were also asked to address whether the presumption in section 14(3)(b) was also applicable in the circumstances. These sections provide:

> (2) 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,
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

Section 14(3)(b)

The City does not make specific representations on the possible application of the presumption in section 14(3)(b) to the records, stating that the criminal matters are between the parties. The other representations do not refer to this section of the *Act*.

The City's initial involvement in the matters involving the two parties in this appeal appears to be connected to its by-law enforcement function. Previous orders of this office have consistently found that records pertaining to the by-law enforcement role performed by municipalities qualifies as "law enforcement" and that the disclosure of personal information compiled and identifiable as part of the investigations into these matters would constitute a presumed unjustified invasion of privacy under section 14(3)(b) of the *Act* (Orders M-16, M-582 and MO-1295, for example).

The appellant has indicated that he does not wish to pursue access to by-law enforcement records, and on this basis one of the records identified by the City was removed from the scope of the appeal. Looking at the remaining records, I note that Records 1, 2 and 3 relate indirectly to by-law enforcement matters involving both the appellant and the affected persons. However, it does not appear that they were compiled, nor would they be identifiable as part of the City's "investigation" into these by-law matters. Rather, they seem to be related more generally to the on-going disputes between the parties, which incidentally includes the by-law matters. In the absence of representations on this issue, I am not prepared, on the basis of the records

themselves, to conclude that the personal information in Records 1, 2 and 3 falls within the presumption in section 14(3)(b).

Record 4 was created in response to, and pertains to, the appellant's access request and is not related to the by-law enforcement issues in any way. Accordingly, the presumption in section 14(3)(b) is not applicable to this record.

Sections 14(2)(f) and (h)

The focus of the City's representations is that the personal dispute between the parties has been on-going and is of a "potentially volatile nature". The City is concerned that disclosure of the records at issue might "exacerbate a troublesome situation and create more difficulty". The City takes the position that, because of this situation, the information in the records should be considered highly sensitive (section 14(2)(f)). Moreover, in these circumstances, the City states that it is reasonable for the affected persons to have an expectation that information they provided to the City would be held in confidence (section 14(2)(h)).

In Order MO-1340, Adjudicator Sherry Liang commented on the manner in which the term "highly sensitive" in section 14(2)(f) has been interpreted by this office:

> In previous decisions, it has been said that for information to be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause excessive personal distress to the subject individual: see, for instance, Orders M-1053, P-1681 and PO-1736. Prior decisions have also found that the personal information of complainants, witnesses or suspects in police matters is highly sensitive: see, for instance, Order P-1618. In other contexts, the identity of complainants under environmental legislation (Order PO-1706) and workplace harassment policies (Order P-1245) has also been found to be highly sensitive. This does not mean that such information is necessarily exempt from disclosure. Each case must be assessed on its own facts, and in some cases, there may be other factors which favour disclosure, even where the information is highly sensitive.

In order to find the factor in section 14(2)(h) to be relevant, the evidence must demonstrate that the supplier of the information, in this case the affected persons, provided it to the City in confidence. Further, this expectation of confidentiality must be reasonable (Order M-780).

In Order MO-1453, I considered the application of a number of factors, including sections 14(2)(f) and (h) as well as certain unlisted considerations relating to the manner in which the record found its way into the custody of the institution, in regard to a record that described the details of a personal dispute between a Township employee and a local business owner. In that case, the business owner sent the record to the Township following an incident at this person's place of business which involved the Township employee in her personal capacity. After considering all of the circumstances in that case, I made the following observations and conclusions:

The issues between the appellant and the affected person, while obviously personal, have resulted in a record coming into the custody of an institution under the *Act*. Once there, and once a request is made for it under the *Act*, the *Act* governs the decision of whether or not it is disclosed.

…

…In considering the manner in which the letter was sent to the Town Councillors, I do not accept that the affected person had any expectation of confidentiality with respect to it. The letter does not indicate that it was being submitted in confidence. The affected person in her representations states: "[i]f one sends a letter to council it would only be assumed that council would discuss it. The fact that it was discussed *in camer*a is clearly to protect all parties involved." I accept that the council moved *in camera* to discuss the matter because it related to personal matters. However, I do not interpret the council's decision to proceed in this manner as an indicator that she had any expectation that it would do so. Moreover, the affected person attended at the appellant's office and raised the matter publicly, apparently not concerned about who else was listening. I agree with the appellant that it is more likely than not that the affected person was unconcerned about her complaint being aired in public. This is inconsistent with an expectation of confidentiality and I find that this factor is not relevant in the circumstances.

…

… It is apparent that the representations of both parties, when read in context, suggest that the parties consider this to be a sensitive matter. This factor is typically considered to be one which favours non-disclosure of the personal information contained in a record.

Because the letter refers to a private dispute, I accept that there is some sensitivity with respect to what was said and to who was involved, particularly where, as is the case with the employee named in the letter, the person is unwittingly associated with the dispute by one of the other parties. However, the contents of the letter are to a large degree about the appellant, not the affected person and any concern or distress relating to its disclosure would more likely be felt by the appellant.

In the circumstances, I find that, as a factor favouring privacy protection, section 14(2)(f) carries very little weight insofar as the affected person is concerned…

…

The appellant indicates that her employer now knows more about her than she would like and that she was embarrassed by the situation. Further, even though no action was taken by her employer, there essentially remains a cloud over her. Although speculative, she indicates that because the letter must remain on file, there is a possibility that it will come back on her at some future time. She indicates that she was not given an opportunity to address the issues raised in the letter because her employer took the position that it did not concern Township business. In essence, the appellant asserts that her reputation has been tarnished because of the letter. I accept that the receipt of such a letter by an employer would be embarrassing for the employee. I also accept that it is very likely that it would have some impact on the way her employer perceives her. In my view, these considerations, all of which favour disclosure, are relevant in the circumstances. It appears, however, that their impact is likely more a matter of perception than a matter of fact and for this reason, I find that these considerations are of low weight.

Finally, in Order PO-1910, Senior Adjudicator David Goodis commented on the privacy expectations of individuals who provide information to a government institution about another individual. He stated:

> As I found above, the names of these individuals in the context of these records is personal information, because it reveals other personal information about these individuals, specifically that they provided information to the PGT about the appellant's guardianship application. In my view, on an objective assessment, neither the PGT nor the primary affected persons had a reasonable expectation that the names of the primary affected persons would be treated confidentially. This finding is supported by paragraphs (e) and (g) of the definition of personal information which read:
> "personal information" means recorded information about an identifiable individual, including,
>
> > (e) the personal opinions or views of the individual, except where they relate to another individual,
> >
> > (g) the views or opinions of another individual about the individual,
>
> In my view, these provisions suggest that there is a diminished privacy interest in the identity of an individual who provides a view or opinion about another individual. If the views or opinions of an identifiable individual about another person are not the opinion-holder's personal information, and can be disclosed, it is reasonable to expect that the opinion-holder's identity, standing

> alone, could attract only a minimal privacy expectation at best, barring exceptional circumstances.

In that case, the Senior Adjudicator was only addressing the disclosure of the identities of individuals who had provided information. In my view, however, the principle he applies is similarly applicable in the circumstances of this appeal. In this case, the appellant knows the identity of the affected person and has, in fact, read the letter, thus she knows the views and opinions that were expressed. As I indicated above, although the letter contains some personal information of the affected person, it primarily consists of her views and opinions of the appellant. Pursuant to the *Act*, this information is only the personal information of the appellant. Although the personal information of the affected person is intertwined with her views and opinions of the appellant, I find that there are no exceptional circumstances that would support a finding that the affected person had a reasonably held privacy expectation with respect to her personal information contained in the letter. Given the history of this matter and the manner in which the record came into the custody of the Township, this consideration carries a higher degree of weight in the circumstances of this appeal than the other factors and considerations noted above.

In this case, the complaint was made by one of the affected persons against an employee of the City. It is apparent that there is considerable personal animosity between the appellant and the affected persons. The records also relate to personal matters between the parties. In this, the circumstances are not dissimilar from those I addressed in Order MO-1453. The differences between these two cases, however, lie in the originating circumstances, which, in my view, render the current appeal distinguishable from Order MO-1453.

As I noted above, it is possible that the affected person made the complaint (in the records at issue) only because the appellant is an employee with the City. However, there are clearly issues between them related to the by-law enforcement process. In reviewing the records at issue, it is apparent that they were made, if not in furtherance of the by-law issues, in connection with them.

I am satisfied that, in the circumstances as they relate to these two parties, disclosure of the personal information in Records 1, 2 and 3 would likely cause excessive personal distress to the affected persons. Moreover, given the extent to which these parties have taken their dispute, I find that this factor carries significant weight in favour of privacy protection.

Further, I find that the comments made by the affected persons must be considered within the overall dispute between the parties and the involvement of the City in by-law enforcement. Considering the records in this light, I find that the affected persons maintain a significant privacy interest in the information they provided to the City and thus had a reasonable expectation that they were providing the information in confidence. Similar to my findings above, I conclude that the factor in section 14(2)(h) weighs significantly in favour of privacy protection insofar as Records 1, 2 and 3 are concerned.

Record 4 is of a very different nature from the first three records. This record is relatively innocuous in content and relates primarily, and in a very general sense, to the manner in which the City was dealing with the appellant's access request. In my view, there is nothing sensitive about the information contained in this record and section 14(2)(f) is, therefore, not relevant. Moreover, this is a communication between two City staff relating to City business. In these circumstances, section 14(2)(h) has no relevance.

Section 14(2)(i)

The dispute between the parties is clearly acrimonious. In these circumstances, it is likely that comments and allegations made by both parties, viewed objectively, could reflect badly on either one, and may very well be harmful to their reputations. Other than to allege that his reputation has been damaged, the appellant has not submitted representations on this issue. Nor do the affected persons address this issue. In the absence of evidence on this issue, combined with the shared involvement of the parties in perpetuating the dispute, I am not prepared to conclude that any harm would be "unfair" as is required in order for this factor to be considered relevant. Therefore, I find the factor in section 14(2)(i) not to be relevant.

Section 14(2)(d)

Assistant Commissioner Tom Mitchinson stated the test for the application of section 21(2)(d) (the provincial *Act* equivalent to section 14(2)(d)) in Order P-312 [upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)]:

> In my view, in order for section 21(2)(d) to be regarded as a relevant consideration, the appellant must establish that:
>
> (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; **and**
>
> (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; **and**
>
> (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; **and**
>
> (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

As I noted above, the appellant indicated in his letter of appeal that he needed the information at issue for the purpose of supporting a criminal harassment charge. The City notes in its representations that "[b]oth the appellant and the affected persons have apparently laid charges in quasi-criminal proceedings against the other". I am satisfied that the information at issue has some bearing on the issues raised in the matter initiated by the appellant. Accordingly, I find that the first three parts of the section 14(2)(d) test have been met.

As previously noted, the appellant did not submit representations and has not explained how or why this information is required in order to prepare for the quasi-criminal proceeding or to ensure an impartial hearing. On this basis, I find that the appellant has not provided sufficient evidence to support a finding that the factor favouring disclosure in section 14(2)(d) is relevant.

Even if I were to find this factor to be relevant, it is likely that the appellant will be able to rely on the disclosure mechanisms that would be available to him in the litigation in order to prepare for the proceedings or in order to ensure a fair hearing. I therefore find that this factor, if relevant, carries little weight.

Balancing of the factors

With respect to Records 1, 2 and 3, in the absence of representations from the appellant on this issue, I find that the factor in section 14(2)(d), if relevant, carries insufficient weight to outweigh the factors referred to above that favour privacy protection. As a result, I conclude that disclosure of the information in Records 1, 2 and 3 would constitute an unjustified invasion of the privacy of the affected persons.

I found above that there are no factors that weigh in favour or against disclosure of Record 4. In the circumstances, as I noted above, since this record relates primarily to the appellant's access request, I find that its disclosure would not constitute an unjustified invasion of privacy and should be disclosed to him.

Exercise of Discretion

The City does not specifically explain its exercise of discretion in withholding the records from disclosure. However, it is apparent from their representations read in whole, that they considered the specific circumstances of this access request, including the fact that the appellant is a City employee. I am satisfied that the City's exercise of discretion took into account relevant considerations and should not be disturbed on appeal.

ORDER:

1. I order the City to disclose Record 4 to the appellant by providing him with a copy of this record by **November 22, 2002 but not before November 18, 2002**.

2. I uphold the City's decision to withhold the remaining records from disclosure.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the City to provide me with a copy of the record disclosed to the appellant pursuant to Provision 1.

Original signed by: October 18, 2002
Laurel Cropley
Adjudicator