



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER MO-1760**

**Appeal MA-030331-1**

**City of Niagara Falls**



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## **NATURE OF THE APPEAL:**

The City of Niagara Falls (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to the burial of a named individual at a cemetery operated by the City. The City located a number of responsive records and provided the requesters with a decision letter dated April 15, 2003 in which it granted access to the records upon payment of a fee of \$33. The requesters paid the fee. On May 16, 2003, the City gave notice to an affected person whose rights may be affected by the disclosure of the information contained in the records under section 21 of the *Act*. The affected person objected to the disclosure of the majority of this information.

On June 16, 2003, the City issued a decision letter to the requesters and the affected person indicating its intention to disclose portions of five records and its decision to refuse to confirm or deny the existence of additional records under section 14(5) of the *Act*. The affected person appealed the City's decision to disclose some of the information in the five identified records and this office opened Appeal Number MA-030244-1 to address the appeal of that decision. The original requesters, now the appellants, appealed the City's decision to apply section 14(5) and the Commissioner's office opened Appeal Number MA-030331-1 to address this issue.

During the mediation stage of the appeal, the appellants indicated that they wished to appeal the amount of the fee which was paid at the outset of their request, the adequacy of the City's search for responsive records and its decision to refuse to confirm or deny the existence of additional records responsive to the request beyond the five records initially identified.

On February 16, 2004, I issued Order MO-1755 which addressed the affected person's appeal of the City's decision to disclose certain portions of Records 1 through 5. In Order MO-1755, I upheld the City's decision to disclose Records 1 and 4 in their entirety and the undisclosed addresses in Records 3 and 5. I did not uphold the City's decision to grant access to the information contained in the fourth line of Record 2 and the telephone number in Record 5.

## **RECORDS:**

Following my determination of the affected person's appeal in Order MO-1755, the only information remaining at issue in Records 1 through 5 consists of certain portions of Records 2 and 5, which are a Certificate and a Contract for Cemetery Services respectively. The City denied access to this information under the mandatory exemption in section 14(1) and refuses to confirm or deny the existence of additional records under section 14(5). For ease of discussion, I will state that the City has not established the requirements of section 14(5). Five additional records (Records 6 to 10) responsive to the request exist. A full discussion of section 14(5) will follow later in this order.

## **DISCUSSION:**

### **REFUSE TO CONFORM OR DENY THE EXISTENCE OF A RECORD**

#### **Introduction**

Section 14(5) reads as follows:

A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

A requester in a section 14(5) situation is in a very different position than other requesters who have been denied access under the *Act*. By invoking section 14(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases (Order P-339).

For this reason, in relying on section 14(5), the City must do more than merely indicate that the disclosure of the record, if it exists, would constitute an unjustified invasion of personal privacy. The City must establish that disclosing the mere existence or non-existence of the requested records would convey information to the requester, and that this disclosure would constitute an unjustified invasion of privacy (Orders M-328, M-1096, MO-1179, MO-1395 and P-808, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 1669, leave to appeal refused [1996] O.J. No. 3114 (C.A.)).

Before the City can exercise discretion to claim section 14(5), it must provide sufficient evidence to establish that:

1. Disclosing the records (if they exist) would constitute an unjustified invasion of personal privacy; and
2. Disclosing the fact that records exist (or do not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

(Orders MO-1179 and MO-1743)

### **Part 1: disclosure of the records (if they exist)**

#### ***Definition of Personal Information***

An unjustified invasion of privacy can only result from the disclosure of 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 the disclosure of the name would reveal other personal information about the individual (paragraph (h)).

Any record responsive to the appellant’s request would, by definition, contain information about the named deceased individual. I have reviewed the contents of both the undisclosed portions of those records originally identified by the City (Records 2 and 5), as well as those records to

which it had applied section 14(5) (Records 6 to 10) and find that they contain only the personal information of the affected person and the deceased individual. The records do not contain any personal information of either of the appellants. Therefore, I find that all of the remaining records, or parts of records, at issue contain information that is “about” both the deceased and the affected person in a personal sense, and that it falls within the scope of the definition of “personal information”.

### *Unjustified invasion of personal privacy*

Where a requester seeks personal information of another individual, 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. The only exception which could apply to the circumstances of this appeal 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.

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. Section 14(2) lists some criteria for the City to consider in making this determination; and section 14(3) identifies certain types of information, the disclosure of which is presumed to 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 14(2) (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.)).

In this case, the City has provided me with evidence to substantiate its position that disclosing the records would constitute an unjustified invasion of privacy under section 14(1). It submits that some of the information in the records is highly sensitive, given the context surrounding its creation, within the meaning of section 14(2)(f); that it was provided with an expectation that it would be treated confidentially as contemplated by section 14(2)(h) and that it relates to certain financial activities involving the affected person, thereby falling within the ambit of the presumption in section 14(3)(f).

The affected person also submits that the undisclosed information in Records 2 and 5, as well as Records 6 to 10, is highly sensitive; that it was provided to the City in confidence; and, in the case of Record 5, it represents the details of a financial transaction involving the affected person. I also received certain confidential representations from the affected person respecting the circumstances surrounding the burial of the deceased person and the ongoing dispute underway with the appellants. I find that these submissions serve to reinforce the affected person’s contention that the information is highly sensitive within the meaning of section 14(2)(f).

The appellants argue that they are simply attempting to determine whether the burial instructions left by the deceased person (their father) have been complied with by the affected person and the operators of the City's cemetery. The appellants point out that members of the public are entitled to inspect the cemetery records for any number of reasons and that they are being denied access to the records improperly.

Balancing the appellants' right of access against the privacy interests of the affected person and the deceased individual, I make the following findings:

- The undisclosed information contained in Record 2 was provided to the City by the affected person with an expectation that it would be treated confidentially, as contemplated by section 14(2)(h). In addition, I find that in the circumstances of this appeal, this information is also highly sensitive within the meaning of section 14(2)(f). These are significant factors weighing against the disclosure of this information.
- The undisclosed information in Record 5 relates to a financial transaction in which the affected person was involved, thereby falling within the ambit of the presumption in section 14(3)(f).
- The information in Records 6 to 10 is also highly sensitive within the meaning of section 14(2)(f) and was supplied by the individual to whom it relates, the affected person, in confidence (section 14(2)(h)). Again, these are significant considerations weighing strongly against the disclosure of Records 6 to 10.
- The factors favouring disclosure referred to by the appellants are not sufficient to override the application of the presumption and the listed considerations in sections 14(2)(f) and (h).

Accordingly, I find that disclosing the remaining records, and parts of records, at issue would constitute an unjustified invasion of the personal privacy of the deceased person and the affected person. Therefore, this information is exempt from disclosure under section 14(1) and the first part of the test for exemption under section 14(5) has been established.

**Part 2: disclosure of the fact that records exist (or do not exist)**

Under part 2, the City must demonstrate that disclosing the fact that records exist (or do not exist) would in itself convey information to the appellant, and the nature of the information conveyed is such that disclosing it would constitute an unjustified invasion of personal privacy.

In my view, disclosing the fact that records do or do not exist would not convey information sufficient to establish an unjustified invasion of privacy. If records did not exist, then the deceased individual and the affected person's privacy would clearly not be unjustifiably invaded. I find that the nature and scope of the appellants' request is broad enough to capture records

whose disclosure would not result in an unjustified invasion of personal privacy. This is evidenced by the fact that I have found in my decision in Order MO-1755 that certain records and parts of records responsive to the request do not qualify for exemption under section 14(1). In these circumstances, I find that simply disclosing the existence of the additional five records responsive to the request would not in itself disclose information that would constitute an unjustified invasion of personal privacy.

Accordingly, I find that the City has failed to establish the requirements of section 14(5) for Records 6 to 10. However, in my discussion above, I have found that the undisclosed portions of Records 2 and 5 and Records 6 to 10 in their entirety qualify for exemption under section 14(1).

### **IS THE CITY ENTITLED TO CHARGE A FEE?**

In its decision letter to the appellants dated April 15, 2003, the City indicated to the appellants that access to the requested records would be granted upon payment of a fee of \$33. The decision letter did not set forth a breakdown as to how this amount was calculated. The appellants paid the requested fee. As a result of the third party appeal in Appeal Number MA-030244-1 that concluded with the issuance of Order MO-1755, access to some of the requested information will be granted by March 22, 2004.

In their appeal letter, the appellants state that “[I]f we do not receive the documents, we expect to receive a full refund”. During mediation, the appellants maintained that the City ought not to be able to charge a fee if access to the requested records was not granted.

In the Notice of Inquiry provided to the City, I requested that it provide representations in support of its decision to charge a fee and to justify the amount based on the provisions of section 45 and sections 6 to 9 of Regulation 823. The City did not provide me with any representations in response to this part of the Notice. In the absence of any submissions on this point, I am unable to determine whether the fee calculated by the City was in accordance with the requirements of section 45 and Regulation 823.

As a result, I will order the City to refund to the appellants the sum of \$31.80 representing the fee originally paid by the appellants less the photocopying charges for the six pages of records ordered disclosed, in whole or in part.

### **REASONABLENESS OF SEARCH**

The appellants took the position in mediation that additional records beyond those originally identified by the City ought to exist. In particular, the appellants argued that additional correspondence between the City and the affected person should exist. The City applied the exemption in section 14(5) to Records 6 to 10, which included the correspondence sought by the appellants. Because the City refused to confirm or deny the existence of such a record, the appellants were not aware that the record they sought was, in fact, part of the records at issue in Appeal Number MA-030331-1.

Neither the appellants nor the City made any representations respecting this issue at the inquiry stage of the appeal process. In my view, the appellants concerns about the existence of additional records have been addressed in my discussion of section 14(5) and I will dismiss that part of the appeal.

**ORDER:**

1. I do not uphold the City's decision to refuse to confirm or deny the existence of records.
2. I uphold the City's decision to deny access to the undisclosed portions of Records 2 and 5 and Records 6 to 10 in their entirety under section 14(1).
3. In this order, I have confirmed the existence of additional records responsive to the appellants' request beyond those initially identified by the City. I have released this order to the City and the affected person in advance of the appellant in order to provide the City or the affected person with an opportunity to review the order and determine whether to apply for judicial review.
4. If I have not been served with a Notice of Application for Judicial Review by **March 12, 2004**, I will release this order to the appellant by **March 19, 2004**.
5. In accordance with the requirements of section 43(4) of the *Act*, I will give the appellants notice of the issuance of this order by a separate letter, concurrent with the issuance of the order to the City and the affected person.
6. I order the City to reimburse the appellants in the amount of \$31.80 by **March 19, 2004**.
7. I find that the City conducted a reasonable search for responsive records and dismiss that portion of the appeal.

Original signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

February 27, 2004 \_\_\_\_\_