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

ORDER MO-2171

Appeal MA06-341

City of Toronto

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NATURE OF THE APPEAL:

The City of Toronto (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the name of the complainant with respect to a by-law infraction that occurred at the requester's home address.

The City responded to the request by denying access to the information on the basis of the mandatory exemption found in section 14(1) (invasion of privacy) of the *Act*. The requester (now the appellant) appealed the City's decision to deny access to the information.

During the mediation stage of the appeal, the City identified that it was relying on the presumption in section 14(3)(b) and the factor in section 14(2)(h) to deny access under section 14(1) of the *Act*. Also during the processing of this file, the appellant indicated that she was taking the position that section 14(2)(d) was a relevant factor in this appeal that favoured the disclosure of the complainant's name. In addition, during mediation, the mediator identified that, as the record appears to include the personal information of the appellant, the possible application of the discretionary exemption in section 38(b) would be added as an issue in this appeal.

Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the City, initially, and the City provided representations in response. I then sent the Notice of Inquiry, along with a complete copy of the City's representations, to the appellant, who also provided me with detailed representations.

RECORD:

The responsive information is the name of the complainant, and is contained in the 4-page Complaint Log prepared by staff of the City's Bylaw Enforcement Unit.

DISCUSSION:

PERSONAL INFORMATION

Section 2(1) of the *Act* states, in part:

> "personal information" means recorded information about an identifiable individual, including,
>
> ...
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> ...
>
> (h) the individual's name if 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;

I have examined the record at issue, which is the Complaint Log maintained by the Bylaw Enforcement Unit. It contains the name and address of the appellant, as well as information about the contacts that have been made between the appellant and a bylaw enforcement officer with the City. In addition, the Complaint Log also contains the name and address of the complainant, as well as other information about the complainant. In my view, the record contains the personal information of the appellant, as well as the complainant, in accordance with paragraphs (d) and (h) of the definition of the term "personal information" in section 2(1) of the *Act* (Orders MO-1245, MO-1795).

INVASION OF PRIVACY

Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. 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 requester 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.

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

In determining whether the exemption in section 38(b) applies, sections 14(2), (3) and (4) of the *Act* provide guidance in deciding 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 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 under 14(3), 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].

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]

If none of the presumptions in section 14(3) applies, the institution must consider the application of the factors listed in section 14(2), as well as all other considerations that are relevant in the circumstances of the case.

Operation of the presumption in section 14(3)(b)

In this appeal, the City relies on the "presumed unjustified invasion of personal privacy" in section 14(3)(b) of the *Act*, which states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > 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;

As identified above, the requested information is contained in a Complaint Log that is maintained by the City's Bylaw Enforcement Unit. The City's representations refer to a number of previous orders which have confirmed that investigations of alleged violations of municipal bylaws fall within the scope of the presumption in section 14(3)(b). The City refers to Orders M-382, MO-1496 and MO-1845 in support of this position.

The City then states:

> The City submits that in the current appeal, the personal information at issue, i.e. the name of an individual who filed a complaint concerning the appellant's property, was compiled by the City as part of its investigation into an alleged contravention of a bylaw, specifically City of Toronto, Municipal Code, Chapter 313-2(A) - Streets and Sidewalks - Article II Prohibited or Regulated Activities: obstruction or fouling of streets or ditches prohibited.
>
> The City submits, therefore, that the presumption in section 14(3)(b) in the *Act* applies to exempt the personal information at issue from disclosure. The City further submits that neither section 14(4) nor section 16 of the *Act* applies.

Although the appellant's representations take issue with the law enforcement process used by the City, the appellant does not directly address the possible application of section 14(3)(b) to the records.

In my view, the information in the record was compiled and is identifiable as part of a law enforcement investigation undertaken by the Bylaw Enforcement Unit into a possible violation of the law, specifically, the bylaw referred to in the City's representations. As such, I find that the presumption in section 14(3)(b) applies to the personal information of the complainant contained in these records, to which the section 38(b) exemption has been applied. I am also satisfied that sections 14(4) and 16 have no application in this appeal.

The appellant has made lengthy representations in support of her view that the factor in section 14(2)(d) applies in the circumstances. That factor reads:

> 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 is relevant to a fair determination of rights affecting the person who made the request;

The appellant's representations focus on the circumstances surrounding the manner in which the bylaw investigation was conducted. The records indicate that a complaint was lodged with the City regarding the appellant's hedge, and that it was apparently contravening the identified bylaw. After a number of contacts between the City and the appellant, the City eventually requested the appellant to remove the portion of the hedge that the City determined was in contravention of the bylaw, and the appellant did so. The appellant takes the position that these actions by the City, which she states arose out of the complaint, constitute "vandalism by proxy", and that the complainant is to blame. On that basis, the appellant states:

> It is also my contention that the indiscriminate application of the presumption of confidentiality violates my fundamental right to face my accuser, and of *audi alterem partem*. … I must resort to asserting my property rights, and the determination thereof under section 14(2)(d), specifically the right to launch a civil suit against the complainant to recover removal, disposal and landscaping costs and to seek compensation for the loss of privacy in our garden and for the psychological distress the complainant's actions have caused.

Previous orders have established that, for section 14(2)(d) to apply, 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

[Order PO-1764; see also 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.)].

Although the appellant takes the position that the failure of the City to disclose the complainant's name to her affects her rights, it is not clear to me what legal right, drawn from the concepts of common law or statute law, is being asserted. The appellant refers generally to her right to "face her accuser" and to "hear the other side". The appellant also refers to her right to launch a civil suit against the complainant to recover removal, disposal and landscaping costs and to seek compensation for the loss of privacy in her garden and for psychological distress.

In my view, many of the rights asserted by the appellant, if they were found to apply in the context of this bylaw infraction process, would apply to the process used by the City rather than against the complainant. In complaint-driven processes such as the one resulting in the records in this appeal, a complainant makes a complaint, and then it is up to the City's bylaw enforcement unit to determine whether the complaint has validity, to pursue compliance with the bylaw, and to determine what actions must be taken to comply with the bylaw. Other than filing the complaint, the complainant is no longer involved in the process. Accordingly, the rights asserted by the appellant, and the concerns expressed by her about the process, relate to the actions of the City, rather than those of the complainant.

In any event, it is not necessary for me to make a determination on this issue. As noted above, as a result of the decision in *John Doe*, it has been well-established that a presumption under section 14(3) cannot be rebutted by any of the factors under section 14(2), either alone or taken together. Accordingly, even if the factor in section 14(2)(d) were to apply, I find that the disclosure of the personal information of the complainant contained in the record would constitute a presumed unjustified invasion of the personal privacy of this individual. Those portions of the record are, therefore, exempt from disclosure under section 38(b).

The appellant also argues that she ought to have access to the name of the complainant through the *Act* because previous orders have stated that the names of individuals may, in certain circumstances, be accessed through court proceedings. Although the appellant's arguments on this point are made in the context of section 14(2)(d), because the presumption under section 14(3) cannot be rebutted by any of the factors under section 14(2), I will review the appellant's arguments on this point under my review of the City's exercise of discretion, below.

EXERCISE OF DISCRETION

General principles

The section 38(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In these cases this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

In support of its decision to exercise its discretion not to disclose the name of the complainant to the appellant in this appeal, the City states that it considered the following factors:

- the wording of the exemption in section 38(b) in conjunction with sections 14(1)(f), 14(3)(b) and 14(2)(d);
- that individuals should have the right to access their own personal information but in this case, the appellant is also requesting access to the identity of the complainant;
- that the privacy of individuals should be protected, and that the name of the complainant has been supplied to the City in confidence;
- that the appellant has not provided any compelling or sympathetic reason for access to the personal information at issue;
- that the personal information at issue is the type of information that the City has historically protected. The City states:

> … the names … of complainants regarding alleged bylaw infractions are always kept confidential. Members of the public are thus able to file complaints without fear of repercussions including unwanted contact or harassment by those they have complained about. The information provided by complainants is often of great assistance to the City for the purposes of its investigations to ensure compliance with the City's various bylaws. If personal information were to be disclosed, such assistance may not be forthcoming from those who do not wish their identities to

> be known. Since complainants are advised that their personal information will be kept confidential, they have an expectation that the City will not subsequently be disclosing their identities to third parties. Disclosure of such information, therefore, could reasonably cause them excessive distress.

The City then states:

> In summary, the City submits that in denying access to the personal information at issue, the City has exercised its discretion in good faith and for a proper reason. The City has taken into account all relevant factors and no irrelevant ones. The City submits that therefore its exercise of discretion should be upheld.

The appellant takes issue with the City's exercise of discretion. The appellant's representations can be summarized as follows:

- although the names of complainants have been protected in the past, this ought to change in light of the *Canadian Charter of Rights and Freedoms*, which requires bylaw enforcement to follow due process and the rule of law;
- citizens of Toronto, Canada's largest municipality, have a right to expect fair, professional, impartial and reasonable by law enforcement;
- Toronto's tax dollars should not be used to "subsidize snitches";
- the trimming of hedges on "quiet streets" is not an effective way to ensure compliance with the bylaw. The appellant then identifies numerous other local infractions of the identified bylaw, and argues that the bylaw ought to be enforced in those instances;
- bylaw enforcement in these types of offences ought not to be complaint-driven;
- failure to provide the appellant with the complainant's name deprives the appellant of the "fundamental right to face [the] accuser".

The appellant also argues that she ought have access to the name of the complainant through the *Act* because previous orders have stated that the names of individuals may, in certain circumstances, be accessed through court proceedings. The appellant refers to previous orders which have confirmed that the Ontario *Rules of Civil Procedure* may provide alternate methods to access confidential information in circumstances where legal actions are commenced. The appellant then argues that this alternative access option "makes a mockery of confidentiality", as complainants' identities are available under alternative methods. As I understand the appellant's argument, she argues that she should not be required to spend the time and money necessary to commence legal proceedings, and that the names of complainants ought to be automatically available to requesters under the *Act*. In support of her position, the appellant relies to a large extent on the findings of Adjudicator Laurel Cropley in Order M-1146, in which an individual's address was ordered disclosed to a requester.

Finding

On my review of the representations of the parties, I find no reason to disturb the manner in which the City exercised its discretion to deny the appellant access to the name of the complainant.

Although the appellant lists numerous reasons why she believes she ought to have access to the information requested, the majority of these reasons are based on her view that the complaint-driven bylaw enforcement process is faulty, or are predicated on the assumption that the complainant is a particular individual. Although I accept the appellant's position that there may be some potential danger of false accusations resulting in improper prosecutions that are inherent in a complaint-driven process, as identified above, it is the prosecution process that would be subject to review in those instances, not necessarily the originating complaint nor the identity of the complainant. Furthermore, in my view, there also exists an obligation on those involved in bylaw enforcement to investigate the complaints for their veracity and validity, and to pursue them only if appropriate.

I note that the appellant's own representations support the position that, in law enforcement matters, individuals ought to be able to make complaints, as she identifies a number of obstructions in her immediate neighbourhood which she considers to be in non-compliance with the bylaw and ought to be investigated. In addition, I note that, in another section of the *Act* the legislature has clearly determined that the identity of a confidential source of information in respect of a law enforcement matter ought to be subject to protection (see section 8(1)(d)).

Regarding the appellant's arguments that, based on Order M-1146, she ought to have access to the information, I have carefully reviewed Order M-1146, and note that the circumstances of that appeal are quite different from those present in this appeal. In that appeal, the request was for access to a Health Unit Report pertaining to an incident in which a dog allegedly bit the requester, causing her injury. Adjudicator Cropley found that none of the presumptions under section 14(3) applied to the information, and that the only factor that applied to the information was the one favouring disclosure under section 14(2)(d), which she found applied in the specific circumstances after carefully reviewing the other steps taken by the requester to access the address.

Furthermore, with regard to the appellant's arguments that she could access this information through alternate means and, therefore, ought to have access to it through the *Act*, it appears to me that Order M-1146, relied on by the appellant, directly addresses this point. In that Order, Adjudicator Cropley specifically stated it is up to a court to determine whether information is available under the alternative access procedure, and that "it is by no means certain that the appellant will be able to obtain [the information] in this way". She also stated:

> … the fact that a person may be able to obtain access to information through court processes, while relevant in the context of section 38(b), should not, in and of itself, be determinative of whether access should be granted under the *Act*. This is

> reinforced by sections 51(1) and (2), which provide respectively that the *Act* does not impose any limitation on the information otherwise available by law to a party to litigation, and does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document. (See, for example, Orders 48, P-447 and P-689 which have interpreted these sections to mean that although the alternate means of obtaining information may be available to an appellant, its availability under the *Act* must be determined independently.)

I adopt this approach as set out in Order M-1146, and reject the appellant's argument that, because information may be available through the court process, the *Act* ought not to apply.

Based on all of the circumstances, I am satisfied that the City did not err in exercising its discretion to decide not to disclose to the appellant the information relating to the complainant's identity, and I uphold the City's decision to deny access to the record under section 38(b).

ORDER:

I uphold the decision of the City, and dismiss the appeal.

Original signed by: March 13, 2007
Frank DeVries
Adjudicator