



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2272

Appeal MA06-391

Peterborough County & City Health Unit



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NATURE OF THE APPEAL:

The Peterborough County and City Health Unit (the Health Unit) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a copy of a complaint made to the Health Unit about the requester's septic tank.

The requester also sought access to the curriculum vitae of two named employees of the Health Unit and the name and address of the Health Unit's legal counsel.

The Health Unit issued a decision letter denying access to the letter of complaint in accordance with the discretionary exemption at section 8(1)(d) (confidential source) of the *Act*.

The Health Unit did not provide copies of the curriculum vitae of the two named employees, but confirmed that both employees are Certified Public Health Inspectors.

The Health Unit also advised that it does not have a specific legal counsel but that it uses local legal counsel on an "as needed" basis.

The requester, now the appellant, appealed the Health Unit's decision, specifically with request to the complaint letter. The appellant confirmed that he is not pursuing access to the curriculum vitae of the two named employees or the name and address of the legal counsel used by the Health Unit.

During mediation, the Health Unit issued a revised decision letter granting partial access to the requested complaint letter. All information that the Health Unit deemed would identify the complainant was severed from the record. In its revised decision letter, the Health Unit advised that in addition to its previously identified claim of section 8(1)(d), it was now also relying on the mandatory exemption at section 14(1) (invasion of privacy) of the *Act*.

The mediator suggested that because the record might contain the personal information of the appellant, the discretionary exemption at section 38(a) (discretion to refuse the requester's own information) might apply in conjunction with section 8(1)(d), and the discretionary exemption at section 38(b) (invasion of privacy) might apply in conjunction with section 14(1). The Health Unit advised that it did exercise its discretion under sections 38(a) and 9(b) before deciding to withhold access to the severed portions of the record.

The appellant advised that he wished to continue to pursue access to the severed portions of the complaint letter, in particular the identity of the complainant.

As further mediation was not successful, the file was transferred to the adjudication stage of the appeal process.

I decided to begin my inquiry by sending a Notice of Inquiry to the Health Unit, seeking representations on the application of section 38(a), read with section 8(1)(d) and section 38(b), read with section 14(1). The Health Unit provided representations in response and agreed to share the non-confidential portions with the appellant.

As the record contains information belonging to the complainant, I also sent a copy of the Notice of Inquiry to him. The complainant made brief submissions and requested that his information not be disclosed due to confidentiality concerns.

I then sought representations from the appellant and included with a Notice of Inquiry a copy of the non-confidential representations submitted by the Health Unit. Portions of the Health Unit's representations were severed due to confidentiality concerns. The appellant responded with representations.

RECORD:

There is one record at issue, a complaint letter sent to the Health Unit by the complainant. The specific information at issue includes his identity.

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1). Paragraph (h) of the definition is particularly relevant. It reads:

"personal information" means recorded information about an identifiable individual, including,

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;

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

I have examined the record at issue. It contains the name of the appellant as well as details about the complaint relating to his property.

In my view, the record contains the personal information of the appellant, within the meaning of the definition of that term in paragraph (h) of section 2(1) of the *Act*.

Although the record also contains information about the complainant, as a result of my findings below, for the purposes of this appeal it is not necessary for me to determine whether or not the complainant's information qualifies as "personal information".

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/CONFIDENTIAL SOURCE

Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

Under section 38(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information.

In this case, the Health Unit relies on section 38(a) read in conjunction with section 8(1)(d).

Section 8(1)(d) reads:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

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;

The term "law enforcement" is used in section 8(1)(d), and is defined in section 2(1) as follows:

"law enforcement" means,

- (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)

The term "law enforcement" has been found to apply in a municipality's investigation into a possible violation of a municipal by-law [Orders M-16, MO-1245].

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

Where section 8(1)(d) uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy*

Commissioner), [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Turning to this case, in order to establish that information in the record qualifies for exemption under section 8(1)(d), the Health Unit must establish a reasonable expectation that the identity of the source or the information given by the source would remain confidential in the circumstances [Order MO-1416].

Representations

The Health Unit states that it has denied the requester access to that part of the record which would identify a confidential source of information in respect of a law enforcement matter in accordance with section 8(1)(d). It submits:

In this case, a complaint was made to the Health Unit about an alleged condition on the requester's property which could constitute a violation of the *Health Protection and Promotion Act* or a violation of Section 8 of the *Ontario Building Code* under the *Building Code Act*. The Health Unit is the agency responsible for the enforcement of the requirements found in both of these pieces of legislation.

The report to the Health Unit indicated that the sewage system at the requester's property was malfunctioning, and that drainage tiles have been added to the system. The Health Unit investigated to determine:

- if the back-up of sewage of the drainage tiles which had been installed were depositing sewage on the ground surface, which would have been considered a Health Hazard under the *Health Protection and Promotion Act*, and would have also been a violation of the *Ontario Building Code*; or
- if the drainage tiles which had been added were connected to the sewage disposal system without a permit for the construction, which would have been a violation of the *Building Code Act*.

When our investigation reveals that a violation has occurred, the Health Unit's response can include the issuance of charges against the property owner and/or the responsible individual. Given this role, the Health Unit's activities do constitute law enforcement.

The Health Unit submits that disclosure of the complaint could reasonably be expected to reveal the identity of the complainant. It also explains that it relies on the public to report health hazards and Building Code violations. It states that it has repeatedly assured members of the public that their identity would not be revealed when making a complaint or report and that this assurance has been printed in brochures distributed by the Health Unit, local municipalities and

citizen organizations. The Health Unit attached an example of such a brochure to its representations.

The appellant's representations do not specifically address whether disclosure of the information at issue could reasonably be expected to reveal the identity of or information provided by a confidential source within the meaning of section 8(1)(d). However, in his representations, he provides the background of his request and takes position that he ought to have access to the requested information because of the circumstances of this particular complaint. He submits that he believes that the complaint was filed by the principals of a company with which he has had some conflict as a result of work that he alleges was improperly completed. He submits that the complaint was malicious and frivolous and argues that the *Act* should apply to protect individuals who make complaints but not to protect businesses with a clear conflict of interest. He also submits that the Health Unit should find a method to discern legitimate complaints about law enforcement matters from those that are malicious and frivolous in nature and argues that complainants that fall into the latter category should not have their identity protected.

Analysis and findings

I have reviewed the record and the representations of the parties and find that the Health Unit has provided sufficient evidence to establish that disclosure of any of the information at issue in this appeal could reasonably be expected to reveal the identity of a confidential source of information with respect to a law enforcement matter. Specifically, disclosure would reveal information given only by that source about the investigation into a possible violation of law by the Health Unit, the agency responsible for the enforcement of the *Health Protection and Promotion Act* and section 8 the *Ontario Building Code* under the *Building Code Act*. Additionally, I accept, based on the representations of the Health Unit and the complainant, that the complainant had a reasonable expectation that his identity would remain confidential in the circumstances.

Although the appellant provides representations in support of his position that he ought to be entitled to access the requested information, he does not argue that the information would not reveal the identity of a confidential source of information. He also does not argue that in law enforcement matters the identities of individual complainants should not be protected. Rather, his representations, which are predicated on his assumption that the complainant is a company, focus on his position that he ought to be granted access to the information because the complainant is a business not an individual.

Section 8(1)(d) of the *Act* is designed to protect the identity of complainants in law enforcement matters. In my view, the section does not require me to draw a distinction based on whether the complainant is a business or an individual.

Having found that the disclosure of the information at issue could reasonably be expected to reveal the identity of a confidential source of information in respect of a law enforcement matter within the meaning of section 8(1)(d), accordingly, I find that subject to my analysis of the Health Unit's exercise of discretion, this information qualifies for exemption under section 38(a).

As I have found section 38(a) applies to the record, it is not necessary for me to consider the possible application of section 38(b).

EXERCISE OF DISCRETION

As noted above, section 38(a) is a discretionary exemption. When a discretionary exemption has been claimed, an institution must exercise its discretion in deciding whether or not to disclose the record at issue. On appeal, the Commissioner may determine whether the institution failed to do so.

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 consideration,
- it fails to take into account relevant consideration.

In such circumstances, 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)].

The Health Unit submits that its exercise of discretion should be upheld for the following reasons:

- the [Health Unit] did act in accordance with the purpose of the *Act* by making information about the requester available to him;
- the [Health Unit] did act in accordance with the purpose of the *Act* by protecting the privacy of the person other than the requester, and;
- the denial of the information which was not provided to the information is supported by the exemption at section 38(a) read in conjunction with section 8(1)(d).

The appellant's arguments in support of his position that he ought to be able to access the information at issue have been outlined above and I have considered them in the circumstances of this appeal.

Based on all the circumstances, I am satisfied that the Health Unit did not err in exercising its discretion deny the appellant access to the complainant's identity. As a result, I will uphold the Health Unit's decision.

ORDER:

I uphold the decision of the Health Unit and dismiss the appeal.

Original Signed by: _____
Catherine Corban
Adjudicator

February 12, 2008 _____