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

ORDER MO-2301

Appeal MA07-176

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*) from an individual who operates a dog walking business for access to records pertaining to complaints received by the City about her and/or her business. The request was framed in the following way:

> [I] require [a] copy or ability to view complaints lodged against me by [identified services] regarding dog related complaints against me/my business by individuals at [location]. The accusations are false and defaming my reputation, by several individuals who are slandering my name and business. I would like access to all complaints from [particular time] to present with names and full details of the complaints.

The City identified two records responsive to the request and granted partial access to them. The City relied on the mandatory exemption in section 14(1) of the *Act* (personal privacy) to deny access to the portion it withheld from both records.

The requester (now the appellant) appealed the decision.

At mediation, the appellant took the position that the information in the severed portion of the records is relevant to a fair determination of her rights, thereby raising the possible application of the factor in section 14(2)(d) of the *Act*.

Mediation did not resolve the matter and was transferred to the adjudication stage of the appeal process.

I commenced my inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the City, initially. The City provided representations in response to the Notice. As the records appeared to contain the personal information of the appellant, along with that of other identifiable individuals, the City provided me with submissions on the application of the discretionary exemption at section 38(b) (personal privacy) of the *Act*. The City asked that a portion of its representations be withheld due to confidentiality concerns. A Notice of Inquiry, along with the non-confidential representations of the City, was then sent to the appellant. The appellant provided representations in response to the Notice. The appellant also asked that a portion of its representations not be shared with the City. As the appellant's representations raised issues that I determined the City should be given an opportunity to address, I sent a letter inviting their reply representations, along with the appellant's severed representations. The City provided representations in reply.

RECORDS:

The records the City identified as responsive to the request are two documents entitled "Activity Cards". At issue are the withheld portions of the records.

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.

Section 2(1) of the *Act* defines "personal information" as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by an individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) 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.

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.)].

As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621], but even if information relates to an individual in a professional, official or business capacity, it may still qualify as "personal information" if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225, PO-2435].

In my view, the records at issue contain the personal information of the appellant. This information qualifies as her personal information because it includes her address and telephone number (paragraph (d)), as well as her name along with other personal information about her (paragraph (h)). The record also contains the personal information of other identifiable individuals. This severed information qualifies as their personal information because it contains their addresses and telephone numbers (paragraph (d)), or contains their names, along with other personal information about them, or disclosure of their name would reveal other personal information about them (paragraph (h)).

PERSONAL PRIVACY

If a record contains the personal information of the appellant along with the personal information of another individual, section 38(b) of the *Act* applies to render the information exempt from disclosure, at the discretion of the City.

Section 38(b) of the *Act* reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

Accordingly, under section 38(b) where a record contains personal information of both the appellant and another identifiable individual, and disclosure of that information would "constitute an unjustified invasion" of that other individual's personal privacy, the City may refuse to disclose that information to the appellant.

Despite this, the City may exercise its discretion to disclose the information to the appellant. This involves a weighing of the appellant's right of access to her own personal information against the other individual's right to protection of their privacy.

The factors and presumptions in sections 14(1) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold under section 38(b) is met.

If the information fits within paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt from disclosure under section 38(b).

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; and 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 section 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 (*John Doe*)] though it 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 exemption [See Order PO-1764].

Section 14(1)(b)

The appellant submits that section 14(1)(b) applies in the circumstances of this appeal.

Section 14(1)(b) reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > in compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates.

The appellant submits that the requested information pertains to her health and safety and states that she has been "repeatedly harassed by a specific individual" who also operates a dog walking business. The appellant explains that "in an attempt to curtail the harassment" she entered into a "peace bond" with this individual. The peace bond was not provided to me, nor was the other party to the bond identified. Nevertheless, the appellant submits that access to the withheld information is required to support the "peace bond process" and to allow her to seek other legal remedies. She further submits that the "false" complaints resulted in an attendance by by-law officers at her place of business, which has damaged her reputation. She believes that her safety is at risk.

The City asserts that the appellant has failed to establish the "compelling" circumstances required to engage the application of section 14(1)(b). They submit that if the appellant has concerns "that the conditions of the peace bond have been broken, there are remedies available to her, including contacting the police."

In Order PO-2541, Senior Adjudicator John Higgins addressed the equivalent provision under the *Freedom of Information and Protection of Privacy Act*. In that appeal, the Archives of Ontario had received a request for two correctional centre files relating to a named individual believed to be the requester's birth father. The request was made for medical reasons. The medical profession had been unable to isolate the reason for the requester's daughter (the named individual's grand-daughter) loss of the function of her arm and suggested that a medical history might provide essential information. Senior Adjudicator Higgins determined that "this is precisely the sort of situation contemplated in [the Provincial equivalent of section 14(1)(b)]", and the "compelling" threshold was met.

I have carefully considered the contents of the records, and the representations on this issue. I find that the appellant has not provided sufficient evidence to demonstrate that the circumstances of this appeal qualify as "compelling circumstances affecting her health or safety" under section 14(1)(b). At issue are the names of individuals who complained to the City. The request is not made for medical reasons, and the appellant has already consulted the police and taken steps to obtain a peace bond to ensure her safety with respect to an individual. As an aside, because this individual is not identified, I am also unable to determine if this is one of the individuals who are mentioned in the records. In all the circumstances, therefore, I am not satisfied that this is the type of situation contemplated in section 14(1)(b) that would meet the "compelling" threshold. Accordingly, I find that the exception in section 14(1)(b) does not apply.

Section 14(1)(e)

The appellant submits that she requires the severed information for "research purposes" to identify if a person who complained is the same one that is subject to the "peace bond". The appellant specifically references section 14(1)(e)(ii) in this regard.

Section 14(1)(e) reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> (e) for a research purpose if,
>
> (i) the disclosure is consistent with the conditions or reasonable expectations of disclosure under which the personal information was provided, collected or obtained,

> (ii) the research purpose for which the disclosure is to be made cannot be reasonably accomplished unless the information is provided in individually identifiable form, and
>
> (iii) the person who is to receive the record has agreed to comply with the conditions relating to security and confidentiality prescribed by the regulations.

Research is defined as "the systemic investigation into and study of materials, sources, etc., in order to establish facts and reach new conclusions, and as an endeavour to discover new or to collate old facts etc., by the scientific study or by a course of critical investigation" [Orders P-666, P-1493, PO-1741].

In my opinion, the appellant has not satisfied the requirements of the section. The information is not being sought for a "research purpose" as has been defined in the previous orders of this office set out above. I therefore find that the exception in section 14(1)(e) does not apply.

Section 14(3)(b)

Section 14(3)(b) reads as follows:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where 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.

Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law [Order PO-1849].

Relying on previous orders of this office (Orders M-382, MO-1598 and MO-2147), the City submits that the personal information at issue was compiled by the City as part of its investigation into an alleged contravention of a City of Toronto by-law, specifically Municipal Code 349 – Animals (formerly by-law 28-99), as well as the *Dog Owner's Liability Act*. The City states that a Notice of Violation was issued to the appellant as a result of the City's complaint investigation.

Analysis and Findings

I find that the records at issue contain information pertaining to the City's enforcement of one of its by-laws. In my view, it is clear that the severed personal information in the records which relates to individuals other than the appellant, was compiled and is identifiable as part of an investigation into a possible violation of the City's by-laws. Therefore, I find that the presumption in section 14(3)(b) of the *Act* applies to the severed personal information pertaining to the identifiable individuals other than the appellant in these records.

Although the appellant makes extensive submissions on the application of the factors set out in sections 14(2)(a), (d), (e), (f), (g), (h) and (i), it is not necessary for me to make a determination on their application. 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 factors in sections 14(2)(a), (d), (e), (f), (g), (h) and (i) were to apply, I find that the disclosure of the personal information of the complainants contained in the record would constitute a presumed unjustified invasion of the personal privacy of these individuals because of the application of the presumption in section 14(3)(b).

Section 14(4) does not apply and the appellant did not raise the possible application of the public interest override at section 16 of the *Act*.

Accordingly, subject to my discussion on the absurd result principle and the exercise of discretion below, I find that the disclosure of the withheld personal information contained in the information severed from the records would constitute an unjustified invasion of another individual's personal privacy and it is exempt under section 38(b).

ABSURD RESULT

Where the appellant originally supplied the information, or she is otherwise aware of it, the information may be found not exempt under section 38(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

The appellant suggests that the absurd result principle should apply in the circumstances of this appeal. However, she provided no evidence to demonstrate that she supplied the information, or is otherwise aware of it. Her representations demonstrate the opposite, in fact. I find that the absurd result principle does not apply in the circumstances of this appeal.

EXERCISE OF DISCRETION

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under the *Act*. Because section 38(b) is a discretionary exemption, I must also review the City's exercise of discretion in deciding to deny access to the information

they withheld. On appeal, this office may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.

I may find that the City erred in exercising their discretion where, for example:

- they do so in bad faith or for an improper purpose
- they take into account irrelevant considerations
- they fail to take into account relevant considerations

In these cases, I may send the matter back to the City for an exercise of discretion based on proper considerations [Order MO-1573].

The appellant submits that the City erred in exercising its discretion by failing to consider that the requester has a sympathetic and compelling need to receive this information because of her personal safety and the damage to her reputation. She submits that disclosing the identity of complainants will increase public confidence and reduce false complaints.

In its initial representations, the City set out a multiplicity of factors it considered in exercising its discretion not to disclose the withheld information. These included the wording of the exemption, the nature of the information and the extent to which it is sensitive to the individuals involved, as well as the historic practice of the institution with respect to similar information. In its reply submissions the City states that it also considered the factors raised by the appellant in her submissions. The City submits that it weighed the appellant's right of access to her own personal information against the other individuals right to protection of their privacy, and in good faith exercised its discretion not to disclose the personal information remaining at issue.

I find that the City has properly taken relevant factors into consideration in exercising its discretion to withhold the personal information at issue and, therefore, I uphold its exercise of discretion.

Therefore, I conclude that the exercise of discretion by the City to withhold the information that I have not ordered to be disclosed was appropriate given the circumstances and nature of the information. Accordingly, the personal information severed from the records is exempt from disclosure under section 38(b) of the *Act*.

ORDER:

I uphold the City's decision.

Original Signed By: May 14, 2008
Steven Faughnan
Adjudicator