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

INTERIM ORDER MO-2303-I

Appeal MA07-156

City of Guelph

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NATURE OF THE APPEAL:

The City of Guelph (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for:

> the "Non-Hazardous Waste Transfer Processing Inspection Report" and the "Air Facility Inspection Report" from the Ministry of the Environment to the Guelph Waste Resource Innovation Centre.

The City identified two records as responsive to the request. In the decision letter sent to the requester, the City denied access to these records in their entirety, citing "section 8(2)(a)(4) of the Act". The City's position appeared to be that the discretionary exemption in section 8(2)(a) (law enforcement report) of the *Act* applied to exempt the records, and that the mandatory exception at section 8(4) did not apply because the records were not prepared "during the course of routine inspections".

The requester, now the appellant, appealed the City's decision.

This office appointed a mediator to try to resolve the appeal. However, a mediated resolution was not possible and the matter was transferred to the adjudication stage of the appeals process where it was assigned to me to conduct an inquiry.

I sent a Notice of Inquiry setting out the facts and issues to the City, initially, to seek representations, which I received. It was necessary to resolve issues with respect to the sharing of the City's representations with the appellant, and this was done through a sharing decision issued by me on August 23, 2007.

Next, I sent a modified Notice of Inquiry to the appellant to invite her response to the City's submissions. I received brief representations from the appellant.

RECORDS:

Record 1 is the Non-Hazardous Waste Transfer Processing Inspection Report, dated November 1, 2005 (19 pages). Record 2 is the Air Facility Inspection Report, November 3, 2005 (9 pages). Both records were prepared by the Ministry of the Environment.

DISCUSSION:

LAW ENFORCEMENT

The City claims that section 8(2)(a) of the *Act* applies to give it the discretion to refuse access to the records at issue. Section 8(2)(a) states:

A head may refuse to disclose a record,

> that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law.

In order for a record to qualify for exemption under section 8(2)(a) of the *Act*, the City must satisfy each part of the following three part test:

1. the record must be a report; and

2. the report must have been prepared in the course of law enforcement, inspections or investigations; and

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law [see Order 200 and Order P-324].

With respect to the first part of the above three-part test, the word "report" is not defined in the *Act*. However, previous orders of this office have established that for the purpose of section 8(2)(a), the word "report" means "a formal statement or account of the results of the collation and consideration of information."

With respect to the second part of the test, in order for a record to qualify for exemption under this section, the matter to which the record relates must satisfy the definition of the term "law enforcement" found in section 2(1) of the *Act*. This section states:

> "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);

Section 8(4) of the *Act* provides a mandatory exception to the exemption in section 8(2)(a). This section states:

> Despite clause 2(a), a head shall disclose a record that is a report prepared in the course of routine inspections by an agency that is authorized to enforce and regulate compliance with a particular statute of Ontario.

The section 8(4) exception is designed to ensure public scrutiny of material relating to routine inspections and other similar enforcement mechanisms in such areas as health and safety legislation, fair trade practices laws, environmental protection schemes, and many of the other regulatory schemes administered by the government [Order PO-1988]. Generally, "complaint driven" inspections are not considered "routine inspections" for the purposes of the exception [Orders P-136, PO-1988].

Representations

The City's submissions on the application of the discretionary exemption in section 8(2)(a) are brief. The City submits that both of the records at issue are reports

> … prepared by the Ministry of the Environment in response to pollution incident reports to that Ministry concerning the City's organic waste processing facility. … [Record 1] contains inspection findings, recommendations and required actions. … [Record 2] contains inspection observations and actions required.
>
> The Ministry of the Environment and duly appointed Officers and Directors are responsible for inspection, investigation, enforcement and compliance under the *Environmental Protection Act*.

On the subject of the mandatory exception in section 8(4), the City points out that the records were prepared in response to pollution incident reports. According to the City, the resulting investigations were not considered to be routine inspections. In support of its position, the City submits that:

> the Supreme Court of Canada in [*Comité paritaire de l'industrie de la chemise*] *v. Potash* [1994] 2 S.C.R. 406 (at 421) ["*Potash*"] has determined this type of investigation to be a law enforcement procedure prompted by a complaint and <u>not</u> a routine inspection. As noted by La Forest, J.:
>
> > It may be that in the course of inspections, those responsible for enforcing a statute will uncover facts that point to a violation, but this possibility does not alter the underlying purpose behind the exercise of the powers of inspection. <u>The same is true when the enforcement is prompted by a complaint. Such a situation is obviously at variance with the routine nature of an inspection.</u> However, a complaint system is often provided for by the legislature itself as it is a practical means not only of checking whether contraventions of the legislation have occurred but also of deterring them. [Emphasis added by City].

The appellant's representations do not specifically address the discretionary law enforcement exemption in section 8(2)(a), or its mandatory exception in section 8(4).

Analysis and Findings

Based on my review of the records at issue and the representations provided by the City, I find that section 8(2)(a) of the *Act* applies to the records.

As noted previously, the word "report" is not defined in the *Act*, but previous orders have found that to qualify as a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. The title of a document is not determinative of whether it is a report, although it may be relevant to the issue [Order MO-1337-I]. Generally, results would not include mere observations or recordings of fact [Orders P-200, MO-1238, MO-1337-I].

A review of the records, which are both titled "Inspection Report", reveals that their purpose is to record the inspector's observations, including a review of past non-compliance issues and an evaluation of the progress made on earlier recommendations. The records also contain the inspector's findings on the current state of the facility, as well as his assessment of, and recommendations regarding, remedial actions required. In my view, the records qualify as reports for the purpose of the first part of the test for exemption under section 8(2)(a).

I am also satisfied that the inspector who prepared the reports, as an Environmental Officer employed by the Ministry of the Environment, is a "law enforcement officer" within the meaning of section 8 of the *Act*. Finally, I am also satisfied that the Ministry of the Environment is an agency that is responsible for monitoring compliance with the *Environmental Protection Act* and for associated enforcement activities. Since all three parts of the test for exemption under section 8(2)(a) are met, I find that this exemption applies to the records.

As to the mandatory exception to section 8(2)(a) found in section 8(4) of the *Act*, I note that it was the City that raised its possible relevance by referring to it in its decision letter. The City appears to be disputing the application of the exception based on the fact that the records were generated as a consequence of public complaints about the facility in question, and not in the course of routine inspection as required under that section.

In Order PO-1988, Adjudicator Sherry Liang considered the exception in section 14(4) (the provincial equivalent of section 8(4)) in relation to records created by the Ministry of Natural Resources (the predecessor to the Ministry of the Environment) in the course of inspections carried out on a hydroelectric facility. Adjudicator Liang described the legislative history of the exception in the following manner:

> The inclusion of section 14(4) in the *Act* followed from a recommendation in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980*, vols. 2 and 3 (Toronto: Queen's Printer, 1980) (the Williams Commission Report). The drafters of that Report recommended that information gathered for regulatory enforcement purposes be treated the same as information gathered for criminal law

enforcement, for the purposes of the law enforcement exemption. However, they were concerned that such an exemption not be too broadly construed:

> …if the notion of material relating to civil and regulatory enforcement is too broadly construed, much that should be made accessible under a freedom of information law would be brought within the exemption. In particular, it would be inappropriate to withhold routinely from public scrutiny all material relating to routine inspections and other similar enforcement mechanisms in such areas as health and safety legislation, fair trade practices laws, environmental protection schemes, and many of the other regulatory schemes administered by the government.
>
> Under the U.S. act, it has been accepted that routine material of this kind **not gathered for the purpose of investigating a particular offence** is not exempt from the general rule of access merely because it relates to the enforcement of law. [Emphasis added.]

Consistent with the above discussion, orders interpreting section 14(4) of the *Act* have found that "complaint driven" inspections are not "routine inspections" (see, for instance, Order 136). Former Commissioner Sidney B. Linden considered section 14(4) in Order 136. At page 9 of that order, he stated that it is the nature of the inspection itself which should be considered in deciding whether it falls within the scope of section 14(4). In his view, complaint-driven inspections could not be said to be routine, since the components of these types of inspections would necessarily vary depending on the nature of the information supplied by the complainant. As far as "complaint driven" inspections (such as the one that generated the records at issue in this appeal) are concerned, the components of these types of inspections would necessarily vary depending on the nature of the information supplied by the complainant, and, in my view, they could not be said to be "routine".

I agree with the reasoning of Adjudicator Liang regarding the exception in section 8(4) of the *Act*, and I adopt it for the purposes of this order.

The City referred me to *Potash, supra,* to support its submission that the environmental inspection which led to the creation of the records at issue is not a "routine" inspection for the purposes of section 8(4). In my view, however, this case does not advance the City's position as intended given the quite different context and the circumstances of the *Potash* decision. In that case, the Supreme Court was considering the constitutionality of a compulsory document inspection power under Quebec's *Act respecting Collective Agreement Decrees, R.S.Q., c. D-2.* The Court was required to determine whether the inspection power provided for by the statute was "sufficiently circumscribed" to attain the purpose behind the statute, while at the same time respecting the value enshrined in section 8 of the *Charter,* that is, protection against

unreasonable search or seizure. As I understand it, the portion of the reasons excerpted by the City was intended to acknowledge that inspection powers serve as a practical means of encouraging observance of standards in such areas as health, safety, and the environment, and that both complaint-driven and routine inspections may represent a valid manifestation of the same inspection power. As such, I do not read the reasons of Mr. Justice La Forest to suggest that either of these two types of inspections are mutually exclusive, or that a particular type of regulatory inspection, such as an environmental one, necessarily fits into one category or the other.

Returning to the treatment of section 8(4) in previous orders of this office, I note that these orders have concluded that the existence of a discretion to inspect or not to inspect is an important factor in deciding whether an inspection is "routine" [Orders P-480 and P-1120]. In other words, if the official or agency is not given the power to decide whether or not to carry out the inspection, as in the case of mandated monthly inspections, these types of inspections would most likely be considered "routine." However, it has also been observed that because this discretion can take different forms and may be of varying significance within a given scheme of regulatory enforcement, discretion cannot be the determining factor, and the nature of the inspection itself must be assessed [Orders P-136 and PO-1988].

In the present appeal, the Ministry's officers completed reports in a format that would seem to be standard for the type of enforcement or compliance activities engaged in by many government agencies in fulfilling a regulatory mandate. It is clear from the content of the reports that through these inspections, the Ministry's officers were reviewing whether the terms and conditions of the facility's Provisional Certificate of Approval were being followed. In addition, the records imply that other, possibly routine, monitoring activity had taken place.

However, these reports are distinguishable from the kind of routine inspections and enforcement activities discussed in the Williams Commission Report for the reason put forth by the City: the inspections leading to the reports were complaint-driven. Both reports clearly identify in their introductory section that the Ministry was reacting to a series of ongoing complaints from the community about, among other issues, a persistent odour problem. To paraphrase the Williams Commission Report, the information in these records appears to have been "gathered for the purpose of investigating a particular offence" and, hence, ineligible for the exception. Furthermore, as I interpret it, it is implicit in the reference to the number and time period of the complaints that the timing of the inspections was discretionary. In light of these various considerations, I conclude that the mandatory exception in section 8(4) does not apply to the records.

In the specific circumstances of this appeal, I find that the records fall within the ambit of section 8(2)(a) and do not qualify for the exception in section 8(4). Accordingly, subject to my findings on the City's exercise of discretion below, the records are exempt from disclosure under the *Act*.

EXERCISE OF DISCRETION

As already noted, the City had the discretion under section 8(2)(a) of the *Act* to disclose the records even if they qualified for exemption. This is the essence of a discretionary exemption.

On appeal, an adjudicator 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. In doing so, I may find that the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose, takes into account irrelevant considerations, or fails to take into account relevant considerations. In these cases, I may send the matter back to the institution for an exercise of discretion based on proper considerations (Order MO-1573). However, I may not substitute my own discretion for that of the institution.

In response to the question posed in the Notice of Inquiry regarding what factors the City considered in exercising its discretion to deny access to the record, the City submits the following:

> The records clearly meet the definition of "law enforcement" as provided in the *Act*, as they include information relating to investigations or inspections that have lead to proceedings in a court or tribunal where a penalty or sanction could be imposed in those proceedings. The Ministry of the Environment laid charges against the City of Guelph … under the *Environmental Protection Act* with respect to the organic waste processing facility. Copies of the charges are appended hereto. As the City is currently in the pre-trial stage of responding to the eight charges laid against it, the disclosure could reasonably be expected to interfere with that law enforcement matter as it could tend to compromise the City's ability to present a full answer and defence in those legal proceedings and at trial.

The City maintains, furthermore, that it took account all relevant factors and that it did not take into account any irrelevant factors.

Although the appellant did not specifically address the City's exercise of discretion in withholding the requested records, her representations allude to factors that she believes the City should have considered. The appellant refers to the proximity of her family's home to the organic waste processing facility and expresses concern about the physical and mental health of her family, friends and neighbours in the nearby community. The appellant describes the community's need to obtain access to the records, in order to dispel the longstanding anxiety about the facility. The appellant submits that the decision not to release the records is indicative of the City's failure to conduct itself transparently.

Analysis and Findings

Based on the City's representations and the information before me, I find that the City did not properly exercise its discretion because it considered irrelevant factors and failed to take into

account certain relevant factors. For the reasons that follow, therefore, I will order the City to re-exercise its discretion in relation to the two records at issue.

First, I note that in its representations on the exercise of discretion, the City has alluded to two additional law enforcement exemptions that were not claimed in this appeal, namely sections 8(1)(a) and (f). These exemptions seek to protect against certain other harms in the law enforcement context. For these two exemptions, the burden of proof would rest on the City to provide "detailed and convincing evidence" to show that disclosure could reasonably be expected to: (a) interfere with a law enforcement matter; or (f) deprive a person of the right to a fair trial or impartial adjudication.

However, as noted above, the City did not rely on these two other exemptions in denying access to these records. Accordingly, these exemptions were not before me, nor was the appellant provided with an opportunity to make submissions on their possible application. The City claimed only section 8(2)(a), which I have upheld. As outlined in the Notice of Inquiry provided to the City, the City's exercise of discretion is to be viewed in relation to the purpose of the exemption relied upon, not ones to which the City has merely alluded in its representations on the discretion issue. The discretionary exemption in section 8(2)(a) is intended to protect a certain category of record. A reasonable expectation of harm with disclosure is not a required element of proof in establishing its application. In these circumstances, I find that the City's reference to the other two law enforcement exemptions in explaining its exercise of discretion constitutes consideration of irrelevant factors.

Moreover, I am not satisfied that the City took into account certain factors that appear to be relevant in the exercise of discretion in this matter. There is no evidence before me to suggest that the City considered the need of the appellant to receive the information because the appellant, her family, and neighbours are all individuals affected by the facility in question. Given the nature of the information at issue, these are considerations one would expect to have factored into the exercise of discretion. Instead, the City's representations on the exercise of discretion refer only to law enforcement considerations, both claimed and not claimed. On my own view of it, this does not suggest any balancing of the appellant's and community's need to receive the information against the perceived sensitivity of the information.

In addition, I am aware that the circumstances surrounding the City's initial decision to deny access to these records have changed with the passage of time. I should emphasize that I would have ordered the City to re-exercise its discretion in relation to the two records notwithstanding this change in circumstances. However, developments with respect to the status of the charges against the City under the *Environmental Protection Act* since the receipt of representations in this appeal may have an impact on the perceived sensitivity of these records as far as the City is concerned. It is possible, therefore, that the City's re-exercise of discretion will be affected by these developments.

ORDER:

1. I order the City to re-exercise its discretion in accordance with the discussion of that issue above and to advise the appellant and this office of the result of this re-exercise of discretion, in writing. If the City continues to withhold all or part of the records, I also order it to provide the appellant with an explanation of the basis for exercising its discretion to do so and to provide a copy of that explanation to me.

   The City is required to send the results of its re-exercise, and its explanation to the appellant, with the copy to this office, **no later than June 16, 2008.** If the appellant wishes to respond to the City's re-exercise of discretion, and/or its explanation for exercising its discretion to withhold information, the appellant must do so within 21 days of the date of the City's correspondence by providing me with written representations.

2. I remain seized of this matter pending the resolution of the issue outlined in provision 1.

May 15, 2008

Daphne Loukidelis
Adjudicator