



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

ORDER MO-2576

Appeal MA10-59

City of Mississauga



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NATURE OF THE APPEAL:

The City of Mississauga (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to any reports and/or documents relating to a fence, hot tub and deck at an identified municipal address pertaining to a “[r]equest for exemption on [the] fence at [the identified address].” With respect to the hot tub, the requester sought the following: “Electrical Safety Association certificate and pool enclosure certificate - City of Mississauga ‘grandfather’ certificate or documentation”.

The city identified responsive records and granted partial access to them, upon payment of a fee. The city relied on section 14(1) of the *Act* (invasion of privacy) to deny access to the portion it withheld.

The requester (now the appellant), did not pay the fee but appealed the city’s decision. In the Notice of Appeal, the appellant indicates that he only seeks access to six of the records set out in the city’s index of records.

Mediation did not resolve the matter and it was moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*.

I commenced the inquiry by seeking representations on the facts and issues set out in a Notice of Inquiry from the city. I also sought representations from other individuals (the affected parties) whose interests may be affected by disclosure of the requested information. As I was of the view that some of the records at issue contained the personal information of the appellant, I added the possible application of the exemption at section 38(b) (personal privacy) of the *Act* as an issue in the appeal. Both the city and the affected parties provided representations in response to the Notice. Their representations raised the possible application of section 13 (danger to safety or health) of the *Act*. As a result, I added the late raising of the discretionary exemption, and the possible application of section 13 as an issue in the appeal. I then sent a revised Notice of Inquiry to the appellant seeking representations in response. The appellant provided very short responding representations.

In his representations, the appellant states that he knows his neighbours and their occupation. He submits that he is requesting the records “regarding by-law issues because they affect my property” and that he is only interested in the by-law issues and not his neighbours’ personal information.

RECORDS:

The records at issue consist of an email, correspondence and Notices of Contravention identified as Records 2-2, 2-18, 2-23, 2-24, 2-25 and 2-26 in the City’s index of records.

DISCUSSION

PRELIMINARY ISSUE - LATE RAISING OF DISCRETIONARY EXEMPTION

As set out above, in its initial decision letter the city only claimed that the mandatory exemption at section 14(1) of the *Act* applied to the records at issue.

In its representations, the city raised the possible application of section 13 of the *Act* to Records 2-2 and 2-23. The affected parties' representations supported the application of the section 13 exemption to all the records at issue. In the Notice of Inquiry sent to the appellant, I sought his submissions on the application of section 13 to all the records.

The appellant made no submissions with respect to the raising of section 13 in the circumstances of this appeal by either the city or the affected parties.

Analysis and Findings

This preliminary issue has two components: whether the institution should be permitted to raise the application of a new discretionary exemption at this late stage to the two identified records; and whether I should consider the application of section 13 to the balance of the records at issue in the appeal.

Section 11.01 of this office's *Code of Procedure* provides:

In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

The purpose of this office's 35-day policy is to provide institutions with a window of opportunity to raise new discretionary exemptions, but only at a stage in the appeal where the integrity of the process would not be compromised and the interests of the requester would not be prejudiced. The 35-day policy is not inflexible, and the specific circumstances of each appeal must be considered in deciding whether to allow discretionary exemption claims made after the 35-day period (Orders P-658, PO-2113). The 35-day policy was upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg* (21 December 1995), Toronto Doc. 110/95, leave to appeal refused [1996] O.J. No. 1838 (C.A.).

Previous orders have held that in certain circumstances this office may consider the application of a discretionary exemption that is raised by an affected party [see in this regard Orders PO-1705 and PO-1787 and Reconsideration Order R-980015.]

In the circumstances of this appeal, I have decided to consider whether section 13 applies to all the records at issue in the appeal. I have reached this decision for the following reasons:

- section 13 involves an examination of issues surrounding the health and safety of an individual. The prejudice to the affected parties could be onerous if the possible application of this exemption is not examined as it relates to the health and safety of these individuals.
- allowing the city to rely on section 13 despite falling outside the time frame provided for in the Confirmation of Appeal is consistent with previous orders of this office regarding this exemption or its provincial equivalent in the *Freedom of Information and Protection of Privacy Act* [see in this regard, Orders MO-1593, P-1544, PO-1858 and PO-2113];
- in view of the concerns expressed by the affected parties, and my review of the records, I conclude that this is one of those rare and unusual circumstances where it is appropriate to consider whether section 13 applies to all the records at issue in this appeal.
- the appellant had the opportunity to address the application of section 13 in his representations;
- the prejudice to the affected parties in disallowing the consideration of section 13 would outweigh any prejudice to the appellant in allowing it.

I will accordingly, examine the application of section 13 to all the records at issue in the appeal.

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply it is necessary to decide whether a record contains “personal information” in accordance with section 2(1) of the *Act* and, if so, to whom it relates.

Section 2(1) of the *Act* defines “personal information,” in part, as follows:

“personal information” means recorded information about an identifiable individual, including,

- (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 the individual that is implicitly or explicitly of a private or confidential nature,

and replies to that correspondence that would reveal the content 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.

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

I have carefully reviewed the records at issue and find that Records 2-18, 2-24, 2-25 and 2-26 contain the personal information of one of the affected parties in accordance with section 2(1) of the *Act* and that Records 2-2 and 2-23 contain the personal information of the appellant and both affected parties.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION

Section 38(a) states as follows:

A head may refuse to disclose to the individual to whom the information relates personal information,

- (a) if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, **13** or 15 would apply to the disclosure of that personal information [emphasis added]

Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information [Order M-352].

As set out above, I have determined that I should consider whether section 13 of the *Act* and section 38(a) in conjunction with section 13, apply to all the records at issue in the appeal.

HEALTH AND SAFETY

Section 13 states:

A head may refuse to disclose a record whose disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

In the case of section 13, the institution must provide evidence to establish a reasonable basis for believing that harm will result from disclosure. In other words, the institution must demonstrate

that the reasons for resisting disclosure are not frivolous or exaggerated. However, while the expectation of harm must be reasonable, it need not be probable [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.) (*Ontario Ministry of Labour*)].

A person's subjective fear, while relevant, may not be sufficient to establish the application of the exemption [Order PO-2003].

Representations on Section 13

In their confidential representations, which I can not reproduce in this order, both the city and the affected parties explain the factual foundation for their concerns. The appellant makes no submissions on the application of section 13 of the *Act*.

Analysis and Findings on Section 13

In Order PO-1940, Adjudicator Laurel Cropley found that the equivalent provision to section 13 in the *Freedom of Information and Protection of Privacy Act* applied to deny records to an appellant who was deemed to be "angry and potentially dangerous" after having engaged in a pattern of abusive and intimidating correspondence with the institution. In that order, she stated:

[I]t is noteworthy to add (in response to the appellant's assertions that he would not physically attack anyone) that a threat to safety as contemplated by section 20 is not restricted to an "actual" physical attack. Where an individual's behaviour is such that the recipient reasonably perceives it as a "threat" to his or her safety, the requirements of this section have been satisfied. As the Court of Appeal found in *Ontario (Ministry of Labour)*:

It is difficult, if not impossible, to establish as a matter of probabilities that a person's life or safety will be endangered by the release of a potentially inflammatory record. Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes [sections] 14(1)(e) or 20 to refuse disclosure.

I agree with the reasoning of Adjudicator Cropley and find it applicable to the current appeal.

In the current appeal, based on the confidential representations of the city and the affected parties, I conclude that there is a reasonable basis for concern about the appellant's behaviour and that the reasons for resisting disclosure are not frivolous or exaggerated. I find that the evidentiary standard set out in *Ontario (Ministry of Labour)* for establishing the application of section 13 has been met in this appeal.

The information at issue in this appeal, therefore, qualifies for exemption under section 13 or section 38(a) in conjunction with section 13, as the case may be. As I have found this

information to be exempt, it is not necessary for me to consider whether it is also exempt under sections 38(b) and/or 14(1) of the *Act*.

Finally, in all the circumstances, I am satisfied that the city appropriately exercised its discretion in withholding the records at issue.

ORDER:

I uphold the city's decision to deny access to the records and dismiss the appeal.

Original signed by: _____
Steven Faughnan
Adjudicator

December 6, 2010 _____