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

ORDER MO-2578

Appeal MA10-64

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 access to an identified Municipal Licensing and Standards Division file.

The city identified records responsive to the request and granted partial access to them. The city relied on section 14(1) (personal privacy) to deny access to the portion it withheld.

The requester (now the appellant) appealed the city's decision.

At mediation the appellant advised that he is only seeking access to a one page email at page 22 of the responsive records, which the city withheld in full. As a result, the other information the city withheld is no longer at issue in the appeal. Also at mediation the city clarified that it is relying on section 14(1), with particular reference to the presumption at 14(3)(b) and the factor at section 14(2)(h) to deny access to the email.

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*. Based on my preliminary review of the record at issue, I determined that the discretionary exemption at section 38(b) may be applicable in the circumstances of this appeal. Accordingly, the possible application of that section was added as an issue in the appeal.

I commenced the 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 of Inquiry. I then sent a Notice of Inquiry along with the city's non-confidential representations to the appellant. The appellant decided not to provide responding representations.

RECORDS:

At issue in this appeal is a one page email.

DISCUSSION:

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the 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,
>
> …

> (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) of section 2(1) may still qualify as personal information [Order 11].

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.)].

Sections (2.1) and (2.2) also relate to the definition of personal information. These sections state:

> (2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

To qualify as personal information, the information must be about the individual in a personal capacity. 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 and PO-2225]. 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 and PO-2435].

Based on the circumstances of this appeal, I find that it is reasonable to expect that the personal information of the appellant and two other identifiable individuals may be revealed if the information is disclosed. I am therefore satisfied that the record at issue contains the personal

information of the appellant as well as two other identifiable individuals in accordance with section 2(1) of the *Act*.

PERSONAL PRIVACY

If a record contains the personal information of the requester along with the personal information of another individual, section 38(b) of the *Act* applies.

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.

Despite a finding that information falls within the scope of section 38(b) the city may exercise its discretion to disclose the information. This involves a weighing of the appellant's rights of access to his own personal information against the other individuals' right to protection of their privacy.

Sections 14(1) to (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. If the personal information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). Section 14(2) also 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 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].

The City's representations address the presumption at section 14(3)(b) and the factor at section 14(2)(f).

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 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 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 MO-2235]. The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn [Orders MO-2213 and PO-1849].

Section 14(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law [Orders M-734 and PO-1819].

The presumption can apply to a variety of investigations, including those relating to by-law enforcement [Order MO-2147].

The City submits that the personal information at issue was compiled and is identifiable as part of the City's investigation into a by-law complaint made by the appellant. The City submits that at the time of the appellant's access request the investigation of his by-law complaint was "active and ongoing."

Analysis and Findings

I find that the record at issue contains personal information pertaining to the city's enforcement of one of its by-laws. In my view, it is clear that the personal information in the record 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 information pertaining to the identifiable individuals in the record.

I find that the disclosure of the personal information of the identifiable individuals 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 exercise of discretion below, I find that the disclosure of the withheld personal information contained in the record would constitute an

unjustified invasion of the identifiable individuals' personal privacy and it is exempt under section 38(b).

SEVERANCES

Section 4(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. However, no useful purpose would be served by the severance of records where exempt information is so intertwined with non-exempt information that what is disclosed is substantially unintelligible. The key question raised by section 4(2) is one of reasonableness. Where a record contains exempt information, section 4(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information. A head will not be required to sever the record and disclose portions where to do so would reveal only "disconnected snippets," or "worthless," "meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed [Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.)]. With these principles in mind, I have concluded that it is not practicable to sever the record at issue.

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 withheld information. 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:

- it did so in bad faith or for an improper purpose
- it took into account irrelevant considerations
- it failed 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].

In the circumstances of this appeal, I conclude that the exercise of discretion by the city to withhold the personal information in the record was appropriate, given the circumstances and nature of the information.

ORDER:

I uphold the decision of the city and dismiss the appeal.

Original signed by: December 8, 2010
Steven Faughnan
Adjudicator