

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2792

Appeal MA12-64

City of Toronto

September 21, 2012

Summary: The requester made a request to the city for access to the building permit drawings and plans of a property. The city decided to grant full access to the information. The appellant, the owner of the property, opposed disclosure of the records on the basis that the records contained his personal information and thus the mandatory personal privacy exemption in section 14(1) applied. The appellant also argued that disclosure of the records could reasonably be expected to endanger the security of his property such that section 8(1)(i) applied. The records are found not to contain personal information within the meaning of section 2(1) of the *Act*, and the appellant is not permitted to claim the discretionary exemption. The city's decision is upheld and the appeal is dismissed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 8(1)(i).

Orders Considered: Order 23, MO-2695, PO-1705.

BACKGROUND:

[1] The requester made a request to the City of Toronto (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

...view and obtain a copy of the replacement building permit drawings, plans, specifications and documents filed for the Subject Property. [The requester] has made efforts to view and/or obtain copies of the building

permit drawings, however, that request has thus far been refused by the city.

[2] The city responded to the requester with the following:

(a) The records search did not include building plans as they are not required to be processed as a formal access request and requests for building plans are processed under the Toronto Building Division's Routine Disclosure policy.

(b) Access was granted in part to the records found by Toronto building staff. Access was denied to the remainder of the records under section 14(1) of the *Act*.

(c) Page numbers 1 and 2 of the records were removed because they were not responsive to the request.

[3] The city also set out its fee for the responsive records.

[4] The requester notified the city that she objected to the building plans not being included in its access decision, as her earlier request, made directly to the building division had been denied.

[5] The city responded to the requester with the following:

...access to the plans for active building permits is provided under the Division's Routine Disclosure Policy. However, as permitted by the policy, the permit applicant has filed an objection to the disclosure of the records to members of the public. The applicant has been given the opportunity to provide written evidence of the security risk posed by the disclosure of the plans.

[6] The city gave notice to two affected persons (individuals whose interests may be affected by the outcome of the appeal) regarding the possible disclosure of the records.

[7] The city subsequently issued a decision to grant the requester partial access to the records. The city granted access to the survey, exterior elevation, and structural plan drawings. The city denied access to the interior plan drawings on the basis of section 8(1)(i) (law enforcement). In its decision letter, the city advised the requester that it had notified the affected persons.

[8] The city also provided the affected persons with the same final decision.

[9] The requester appealed the city's decision to deny access to the interior plan drawings and appeal file MA11-409 was opened.

[10] One of the affected persons appealed the city's decision to grant access to the survey, exterior elevation, and structural drawings. Accordingly, this appeal file was opened.

[11] During mediation, the requester advised the mediator that she was seeking access to all of the responsive records.

[12] The affected person agreed to disclose the exterior elevation drawings with the dimensions redacted and prepared a copy that was sent to the city. The city provided these records to the requester who, after viewing the records, continued to seek access to the records in full.

[13] The requester confirmed that she was not pursuing access to the portions of the records withheld under section 14(1) nor did she want the information identified as not responsive to her request.

[14] Prior to the file being moved to adjudication, the city issued a revised decision granting full access to the interior plan drawings, survey, exterior elevation drawings and structural plan drawings. As a result of the revised decision, appeal file MA11-409 was closed.

[15] However, the affected person, now the appellant in this appeal, continues to object to the disclosure of the interior plan drawings as well as the survey, exterior elevation drawings and the structural plan drawings. The appellant submits that in addition to the section 8(1)(i) exemption originally claimed by the city, he believes that disclosure of the record would result in an unjustified invasion of his privacy under section 14(1) of the *Act*.

[16] During my inquiry I sought representations from the city and the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[17] In this order, I dismiss the appeal and uphold the city's decision to disclose the records.

RECORDS:

[18] The records at issue consist of the interior plan drawings, survey, exterior elevation drawings and structural plan drawings for the new building at the specified address.

ISSUES:

- A. Should the appellant be allowed to raise the application of the discretionary exemption in section 8(1)(i)?
- B. Do the records contain "personal information" as defined in section 2(1)?

DISCUSSION:

A. Should the appellant be allowed to raise the application of the discretionary exemption in section 8(1)(i)?

[19] The *Act* contains both mandatory and discretionary exemptions. A mandatory exemption indicates that a head "shall" refuse to disclose a record if the record qualifies for exemption under that particular section.

[20] A discretionary exemption uses the permissive "may". In other words, the legislature expressly contemplates that the head of the institution is given the discretion to claim, or not claim, these exemptions. While the city originally claimed the application of section 8(1)(i), it has since withdrawn its claim of this exemption and granted full disclosure of the records. However, the appellant continues to argue that disclosure of the records at issue could reasonably be expected to endanger the security of a building within the meaning of the exemption in section 8(1)(i). Section 8(1)(i) states:

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

endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

[21] In Order PO-1705, former Assistant Commissioner Mitchinson dealt with an affected party raising the possible application of discretionary exemptions in the context of the *Freedom of Information and Protection of Privacy Act (FIPPA)*, the provincial equivalent of the *Act*. He wrote:

During mediation, the third party raised the application of the sections 13(1) and 18(1) discretionary exemption claims for those records or partial records Hydro decided to disclose to the requester. The third party also claimed that Hydro had improperly considered, or neglected to consider, these discretionary exemptions in making its access decision.

This raises the issue of whether the third party should be permitted to raise discretionary exemptions not claimed by the institution. This issue has been considered in a number of previous orders of this Office. The leading case is Order P-1137, where former Adjudicator Anita Fineberg made the following comments:

The *Act* includes a number of discretionary exemptions within sections 13 to 22 [of *FIPPA*, the equivalent of sections 6 to 16 of the *Act*] which provide the head of an institution with the discretion to refuse to disclose a record to which one of these exemptions would apply. These exemptions are designed to protect various interests of the institution in question. If the head feels that, despite the application of an exemption, a record should be disclosed, he or she may do so. In these circumstances, it would only be in the most unusual of situations that the matter would come to the attention of the Commissioner's office since the record would have been released.

The *Act* also recognizes that government institutions may have custody of information, the disclosure of which would affect other interests. Such information may be personal information or third party information. The mandatory exemptions in sections 21(1) and 17(1) of the *Act* respectively are designed to protect these other interests. Because the Office of the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme, the Commissioner's office, either of its own accord, or at the request of a party to an appeal, will raise and consider the issue of the application of these mandatory exemptions. This is to ensure that the interests of individuals and third parties are considered in the context of a request for government information.

Because the purpose of the discretionary exemptions is to protect institutional interests, it would only be in the most unusual of cases that an affected person could raise the application of an exemption which has not been claimed by the head of an institution. Depending on the type of information at issue, the interests of such an affected person would usually only be considered in the context of the mandatory exemptions in section 17 or 21(1) of the *Act*.

[22] I agree with the reasoning in Order PO-1705 and apply it here. Order PO-1705 was applied in Order MO-2635 and the appellant was provided with a copy of that order and asked to provide representations on the circumstances that exist that would permit the extraordinary measure of permitting someone, other than the head, to claim a discretionary exemption. The appellant did not address this issue directly but instead provided representations on the actions of his neighbours which he perceives as the harassment of his family and the threat posed by these individuals.

[23] Based on my review of the records at issue and the circumstances in this appeal, I find the present appeal is not "the most unusual of cases" where the appellant could raise the application of a discretionary exemption. The city has exercised its discretion against claiming the exemption in section 8(1)(i) to withhold the information from disclosure. Further, I find the appellant's concerns about the security of his family being compromised by the disclosure of the information at issue are addressed through the consideration of the application of whether the records at issue are personal information for the purposes of section 2(1). Accordingly, I will not consider the application of the section 8(1)(i) discretionary exemption raised by the appellant.

[24] In any event, even if I had allowed the appellant to rely on the section 8(1)(i) discretionary exemption, I would have held that it did not apply. The appellant has not provided detailing and convincing evidence to establish that disclosure of the records at issue could reasonably be expected to endanger the security of his home.

B. Do the records contain "personal information" for the purposes of section 2(1) of the *Act*?

[25] In order to determine which section of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. Under section 2(1), "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information about relating to the individual or whether disclosure of the name would reveal other personal information about the individual [paragraph (h)].

[26] The appellant submits that the details of his house design, and in particular, the interior plan drawings, structural plan drawings should be regarded as personal information since disclosure of the information could endanger the security of his family. The appellant states:

The drawings and plans in question illustrate with great precision the layout of our future home. They show where our children will sleep, where valuable possessions are kept (e.g. home theatre equipment), where critical utilities are located, where key structural elements are located, and the exact location of openings such as windows and doors.

This is sensitive information that could be used for malicious acts such as theft or bodily harm. No private individual should expect that the details of their personal living space be available to the public unless it is in the public interest to know such details.

[27] The city submits that it considered whether the records at issue contained personal information and in doing so considered the application of the finding in Order 23. The city states:

In that Order, former Commissioner Sidney B. Linden raised the issue of distinguishing between "personal information" and information concerning residential properties. Mr. Linden considered the introductory wording of section 2(1) of the Act, which defines "personal information" as "...any recorded information about an identifiable individual..." Former Commissioner Linden concluded that the information in that appeal, a plan, was information about a property and not about an identifiable individual.

[28] The city went on to cite Order MO-2081 where permit drawings were found not to contain "personal information" within the meaning of section 2(1) of the *Act*. The city submits that, in regard to the records at issue, it has no basis to believe that the particulars of this specific residential property would reveal anything of a personal nature "about" the appellant. The city submits that these building plans reveal information only about the property and do not address information "about" the individual owners' of the property.

[29] The reasoning in Order 23 has been applied in numerous orders of this office and most recently, in Order MO-2695, where I found that the building plans were not "personal information" for the purposes of the *Act*.

[30] The appellant was given the opportunity to address the issue of whether the records at issue contain recorded information about an identifiable individual, but did not do so. His main argument is that because the information at issue would disclose information about his property, it is his personal information.

[31] Based on my review of the records at issue, I find that the recorded information is not about an individual and is instead about the appellant's property only. The records contain copies of correspondence, drawings and plans for the appellant's property. The records at issue do not include recorded information about the appellant and thus solely relate to the property. Accordingly, I find that the records do not contain "personal information" within the meaning of section 2(1) of the *Act*.

[32] I have carefully reviewed the appellant's submissions about his concerns regarding his neighbours. I appreciate that the appellant would prefer not to have this

information disclosed to his neighbours. That being said, I am unable to withhold disclosure of information where an exemption does not apply.

[33] As the mandatory exemption in section 14(1) can only apply to personal information and no other mandatory exemptions apply to the information at issue, I find that the records should be disclosed.

ORDER:

I uphold the city's decision and dismiss the appeal.

Original Signed by: _____
Stephanie Haly
Adjudicator

_____ September 21, 2012