

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-2984

Appeal MA12-356

City of Ottawa

November 28, 2013

**Summary:** The appellant submitted a request to the City of Ottawa under the *Municipal Freedom of Information and Protection of Privacy Act* seeking access to all information relating to the fact that her name appears in another named individual's application for social assistance. The city refused to confirm or deny the existence of any such records under section 14(5) on the basis that disclosure of information of this type, if it existed, would fall within the ambit of the presumption in section 14(3)(c) (eligibility for social service) and would result in a presumed unjustified invasion of the applicant's personal privacy. The appellant appealed the decision and took the position that the factors at sections 14(2)(a) (public scrutiny), (d) (fair determination of rights), (e) (pecuniary harm) and (i) (damage to reputation) were relevant considerations weighing in favour of the disclosure of any responsive information. The adjudicator finds that responsive records, if they exist, would contain the personal information of the appellant, as well as the named individual, and that the disclosure of the information, or even the confirmation of its existence, would result in an unjustified invasion of the applicant's personal privacy under section 14(3)(c). As a result the city's reliance on section 14(5), as well as its exercise of discretion to apply that section, is upheld.

**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); 14(2)(a), (d), (e) and (i); 14(3)(c); 14(5); 38(b).

**Orders and Investigation Reports Considered:** Orders M-615 and MO-2891.

## **OVERVIEW:**

[1] The City of Ottawa (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

Je veux avoir accès aux informations me concernant figurant dans la demande d'aide sociale de [personne nommée]. Je risque d'être injustement lésée dans mes intérêts pécuniaires ou autres. L'exactitude et la fiabilité des renseignements fournis sont douteuses. Je l'ai parrainée alors j'en suis responsable.

[2] The city refused to confirm or deny the existence of records responsive to the request under section 14(5) of the *Act*.

[3] The requester, now the appellant, appealed the city's decision to this office.

[4] The appeal could not be resolved through mediation and it was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. I began my inquiry by seeking representations from the city, initially. The city provided representations in response confirming its position that section 14(5) of the *Act* applies in this appeal and that it appropriately refused to confirm or deny the existence of any records responsive to the request.

[5] The city's representations could not be disclosed to the appellant because they met the confidentiality criteria outlined in *Practice Direction No. 7*. The disclosure of the city's representations would reveal the existence or non-existence of any responsive records.

[6] I then sought submissions from the appellant, who submitted representations in response.

[7] In this order, I uphold the city's decision to refuse to confirm or deny the existence of records relating to the appellant's request pursuant to section 14(5) of the *Act*.

## **RECORDS:**

[8] The records at issue in this appeal, if they exist, are any records that contain information concerning the appellant that relate to a possible request for social assistance submitted by another individual.

## **ISSUES:**

- A. Do the records, if they exist, contain "personal information" as defined in section 2(1) of the *Act*, and, if so, to whom do they relate?
- B. Does the discretionary exemption at section 38(b), read in conjunction with section 14(5) of the *Act*, apply to the records, if they exist?
- C. If records exist, did the city properly exercise its discretion under section 14(5) or 38(b) to refuse to confirm or deny their existence? If so, should this office uphold the exercise of discretion?

## **DISCUSSION:**

### **A. Do the records, if they exist, contain "personal information" as defined by section 2(1) and, if so, to whom do they relate?**

[9] In order to determine whether section 14(5) of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) of the *Act* 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 if 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 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;

[10] 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.<sup>1</sup>

[11] 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.<sup>2</sup>

[12] 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.<sup>3</sup>

[13] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>4</sup>

### ***Representations***

[14] The city takes the position that any responsive records, if they exist, would contain the "personal information" of the individual identified in the appellant's request.

[15] The appellant submits that she is asking for information that contains her own personal information and that she has the right to know what accusations are being made against her and what the city was told by the applicant.

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<sup>1</sup> Order 11.

<sup>2</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>3</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

<sup>4</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

### ***Analysis and finding***

[16] Having considered the parties' representations as well as the nature of information that any responsive records, if they exist, would reveal, I accept that they would contain the "personal information" of identifiable individuals as that term is defined in section 2(1) of the *Act*.

[17] The appellant is requesting access to records that include information concerning her which are contained in a possible application for social assistance made by an identified individual. To be responsive to this request, any records would necessarily contain both the personal information of the appellant and the individual named in the request.

[18] With respect to the appellant, based on her representations which suggest that she is concerned about inaccurate information or accusations being made against her, the responsive records would contain her name, together with the views or opinions of the individual named in the request about the appellant as contemplated by paragraph (g) of the section 2(1) definition of personal information.

[19] With respect to the individual named in the request who may possibly have filed an application for social assistance, any responsive records, if they exist, would reveal her name together with other "personal information" about her as contemplated by paragraph (h) of the definition of that term at section 2(1) of the *Act*. Typically, such applications would also contain a great deal of "personal information" listed in the section 2(1) definition, possibly including information about the applicant's race, national or ethnic origin, age, sex, marital or family status (paragraph (a)), about their education or the medical, psychiatric, psychological, criminal or employment history or the individual or information relating to financial transactions in which the individual has been involved (paragraph (b)), identifying numbers or other particulars assigned to the individual (paragraph (c)), and the individual's address and telephone number (paragraph (d)).

[20] Therefore, I find that any responsive records, if they exist, would contain the personal information of both the appellant and the individual named in the request.

### **B: Does the discretionary exemption at section 38(b), read in conjunction with section 14(5) of the *Act*, apply to the records, if they exist?**

[21] Under the *Act*, different exemptions may apply depending on whether or not a record contains the personal information of the requester. Where records contain the requester's own personal information, access to the records is addressed under Part II of the *Act* and the discretionary exemptions at section 38 may apply. Where the records contain the personal information of individuals other than the requester but not

that of the requester, access to the records is addressed under Part I of the *Act* and the exemptions at section 14(1) may apply.

[22] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exceptions to this right.

[23] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the requester.

[24] If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester’s right of access to his or her own personal information against the other individual’s right to protection of their privacy.

[25] Section 38 contains no parallel provision to section 14(5). Since I have found that if any responsive records exist, they would contain the appellant’s personal information as well as that of an identifiable individual, the question arises whether the city can rely on section 14(5) in this case. Previous orders have established that it can. Specifically, in Order M-615, former Senior Adjudicator John Higgins stated:

Section 37(2) provides that certain sections from Part I of the *Act* (where section 14(5) is found) apply to requests under Part II (which deals with requests such as the present one, for records which contain the requester’s own personal information). Section 14(5) is not one of the sections listed in section 37(2). This could lead to the conclusion that section 14(5) cannot apply to requests for records which contain one’s own personal information.

However, in my view, such an interpretation would thwart the legislative intention behind section 14(5). Like section 38(b), section 14(5) is intended to provide a means for institutions to protect the personal privacy of individuals other than the requester. Privacy protection is one of the primary aims of the *Act*.

Therefore, in furtherance of the legislative aim of protecting personal privacy, I find that section 14(5) may be invoked to refuse to confirm or deny the existence of a record if its requirements are met, even if the record contains the requester’s own personal information.

[26] Senior Adjudicator Higgins' reasoning was followed by Adjudicator Laurel Cropley recently in Order MO-2891. Adjudicator Cropley considered section 38(b) when she upheld the London Police Services Board's decision to refuse to confirm or deny the existence of records that were subject to the law enforcement presumption at section 14(3)(b) and contained information relating to the requester, as well as that of another identifiable individual.

[27] I agree with both Senior Adjudicator Higgins' and Adjudicator Cropley's analysis and findings. Accordingly, I will consider whether section 14(5) may be invoked in the circumstances of this appeal.

[28] Section 14(5) reads:

A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

[29] This section gives an institution the discretion to refuse to confirm or deny the existence of a record in certain circumstances.

[30] A requester in a section 14(5) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 14(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases.<sup>5</sup>

[31] Before an institution may exercise its discretion to invoke section 14(5), it must provide sufficient evidence to establish both of the following requirements:

1. Disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy; and
2. Disclosure of the fact that the record exists (or does not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[32] The Ontario Court of Appeal has upheld this approach to the interpretation of section 21(5) of the *Freedom of Information and Protection of Privacy Act*, which is identical to section 14(5) of the *Act*, stating:

The Commissioner's reading of s. 21(5) requires that in order to

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<sup>5</sup> Order P-339.

exercise his discretion to refuse to confirm or deny the report's existence the Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy.<sup>6</sup>

***Part one: disclosure of the record (if it exists)***

*Definition of personal information*

[33] Under part one of the section 14(5) test, the institution must demonstrate that disclosure of the record, if it exists, would constitute an unjustified invasion of personal privacy. An unjustified invasion of personal privacy can only result from the disclosure of personal information.

[34] I have found above that any records responsive to the request, if they exist, would contain the personal information of both the individual named in the request and the appellant.

*Unjustified invasion of personal privacy*

[35] Sections 14(1) to (4) provide guidance in determining whether disclosure of the records (if they exist), would or would not be an "unjustified invasion of personal privacy" under section 14(5).

[36] After considering the representations submitted by the city and the appellant, I am satisfied that sections 14(1) and (4) do not apply to any records, if they exist, that would be responsive to the request. Therefore, in determining whether the disclosure of the personal information in the responsive records (if they exist), would be an unjustified invasion of personal privacy pursuant to section 38(b), I must consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.<sup>7</sup>

Section 14(3) presumptions against disclosure

[37] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b).

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<sup>6</sup> Orders PO-1809, PO-1810, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813 (C.A.), leave to appeal to S.C.C. dismissed (May 19, 2005), S.C.C. 30802.

<sup>7</sup> Order MO-2954.



[38] The city takes the position that personal information contained in any records responsive to the request, as framed, would by definition fall within the ambit of the presumption in section 14(3)(c) which states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

relates to eligibility for social service or welfare benefits or to the determination of benefit levels;

[39] The city submits that any responsive records, if they exist, would contain information that would confirm whether the individual named in the request applied for social assistance and also whether or not assistance was given. The city submits that this information falls squarely within the presumption at section 14(3)(c) of the *Act* and would constitute an unjustified invasion of the personal privacy of the individual that the appellant has named in her request.

[40] The appellant does not specifically address whether or not disclosure of the records, if they exist, would give rise to the presumed unjustified invasion of personal privacy as contemplated by section 14(3)(c).

[41] Having considered the wording of the request and the submissions of the city, I accept that records that are responsive to the request, if they exist, would fall clearly within the ambit of the presumption in section 14(3)(c). As the request is framed, the appellant clearly seeks information about herself that might appear in any records that might exist in relation to the determination of another specified individual's eligibility for social assistance benefits. As a result, I conclude that the records sought, if they exist, would contain information whose disclosure is presumed to constitute an unjustified invasion of personal privacy under section 14(3)(c).

#### Section 14(2) factors for and against disclosure

[42] Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.<sup>8</sup> The list of factors under section 14(2) is not exhaustive. The institution must also consider any other factors that are relevant in the circumstances of the case, even if they are not listed under section 14(2).<sup>9</sup>

[43] In its representations, the city does not raise the possible application of any of the factors at section 14(2) of the *Act*. The appellant's representations however suggest that she takes the position that a number of factors favouring the disclosure of the responsive information (if it exists), apply. Specifically, she appears to takes the position

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<sup>8</sup> Order P-239.

<sup>9</sup> Order P-99.

that the factors at section 14(2)(a), (d), (e) and (i) are relevant in the circumstances. Those sections state:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm; and
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[44] The appellant submits that the responsive records exist and contain her own personal information. She submits that the non-disclosure of this information would amount to an unjustified invasion of her own personal privacy. Specifically, the appellant submits:

- [L]a non-divulgence du document représenterait une atteinte injustifiée à ma vie privée et encouragerait la fraude puisque [personne nommée] a raconté des mensonges pour obtenir l'aide sociale.
- La divulgation est souhaitable car elle permet au public de surveiller de près les activités de l'institution.
- Les renseignements personnels ont une incidence sur la juste détermination de mes droits. J'ai le droit de me défendre des fausses accusations dont je suis victime....
- Je risque d'être injustement lésée dans mes intérêts pécuniaires ou autres car ... je vais devoir rembourser l'aide sociale qu'elle touche suite aux mensonges qu'elle a racontés....
- Je veux obtenir les informations qu'elle a dites à mon sujet pour m'en défendre en cour comme tout citoyen a le droit d'être justement traité. Ces mensonges ont déjà affecté ma réputation au travail....[J]e dois me défendre de ces accusations qui risquent d'affecter encore plus ma

réputation au travail et de m'entraîner de lourdes conséquences financières.

14(2)(a): public scrutiny

[45] The objective of section 14(2)(a) of the *Act* is to ensure an appropriate degree of scrutiny of government and its agencies by the public.

[46] I have considered the type of information that might appear in any records responsive to the request, if they exist, and in my view disclosing the subject matter of the personal information in any such responsive records would not result in the greater scrutiny of the city or its oversight of social assistance programs. From the appellant's representations, it appears that her interest in the disclosure of any information that might be responsive is private in nature and does not extend to the public in general.

[47] In the circumstances of this appeal, I find that I have not been provided with sufficient evidence to demonstrate that the disclosure of any responsive records, if they exist, would be desirable to subject the activities of the city to public scrutiny. Accordingly, I find that the factor at section 14(2)(a) is not a relevant consideration in the current appeal.

14(2)(d): fair determination of rights

[48] For section 14(2)(d) to apply, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.<sup>10</sup>

[49] Although the appellant states that she has the right to defend herself against false accusations and requires the information to defend herself in court, she has not

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<sup>10</sup> Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

provided any evidence to establish that any of the above-mentioned four requirements have been met. Accordingly, I find that the factor at section 14(2)(d) has no application in the current appeal.

14(2)(e): pecuniary or other harm

[50] The factor at section 14(2)(e) is a factor weighing against disclosure. However, the appellant seems to take the view that it should be applied as a factor in favour of disclosing the information to her.

[51] In order for this section to apply, the evidence must demonstrate that the damage or harm envisioned by the clause is present or foreseeable, and that this damage or harm would be "unfair" to the individual involved.

[52] In my view, I have not been provided with sufficient evidence to establish that the factor at section 14(2)(e) is relevant in the current appeal.

14(2)(i): unfair damage to reputation

[53] The applicability of this section is not dependent on whether the damage or harm envisioned by the clauses is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved.<sup>11</sup>

[54] Although the appellant submits that her reputation at her place of employment has already been damaged by the person named in her request, the factor at section 14(2)(i) is actually a factor weighing against disclosure. There is no evidence before me to establish that this is a relevant factor in the circumstances of this appeal.

Part one: conclusion

[55] I have found that the presumption at section 14(3)(c) operates so that disclosure of any responsive records that might exist is presumed to constitute an unjustified invasion of personal privacy of the individual named in the request. I have also found that no factors in section 14(2) weighing in favour of disclosure of any responsive information (if it exists), apply. Accordingly, I find that the first part of the section 14(5) test has been established.

***Part two: disclosure of the fact that the record exists (or does not exist)***

[56] Under part two of the section 14(5) test, the institution must demonstrate that disclosure of the fact that a record exists (or does not exist) would in itself convey

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<sup>11</sup> Order P-256.

information to the appellant, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[57] The city takes the position that the disclosure of the existence or the non-existence of the records (if they exist) is presumed to be an unjustified invasion of an identifiable individual's personal privacy pursuant to the application of section 14(3)(c). I have found that this presumption outweighs the factors raised by the appellant that weigh in favour of disclosure of the information, particularly because I find that those factors have not been established as relevant in the current appeal.

[58] Based on all of the information before me, I am satisfied that disclosing the fact that information responsive to the appellant's request exists or does not exist would in itself convey information, specifically, whether the person named in the request has ever applied or is eligible for social assistance, the disclosure of which would constitute a presumed unjustified invasion of personal privacy under section 14(3)(c). Accordingly, I find that the city has met the second requirement under section 14(5) of the *Act*.

### ***Conclusion***

[59] I am satisfied that both requirements of the test for the application of section 14(5) of the *Act* have been met. Consequently, subject to my consideration of its exercise of discretion, I find that the city has properly invoked section 14(5) in response to the appellant's request.

### **C. If records exist, did the city properly exercise its discretion under section 14(5) to refuse to confirm or deny their existence? If so, should this office uphold the exercise of discretion?**

[60] The exemptions at sections 38(b) and 14(5) are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[61] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[62] In either case this office may send the matter back to the institution for an exercise of discretion based on proper consideration.<sup>12</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>13</sup>

### ***Representations***

[63] The city submits that it exercised its discretion in the circumstances of this appeal appropriately and in good faith. It submits that it considered a number of factors, including the following:

- L'information en question, s'il existe, est très délicate étant donné qu'elle se rapporte à l'application et du besoin de la personne nommée pour de l'aide sociale. Cette information est protégée par l'article 14(3) c) et la divulgation de cette information est présumée créer une atteinte injustifiée à la vie privée de [la personne nommée].
- L'information en question, s'il existe, révèle les besoins de [la personne nommée].
- La nature des renseignements de des documents en question, s'il existe, est telle qu'ils sont sensible et personnels. Étant donné la relation familiale difficile, la Ville juge important de saufergarder la vie privée [de la personne nommée] dans les circonstances, et que cette protection l'emporte sur le droit que pourrait avoir l'appelante de recevoir les quelques renseignements qui lui concerne dans le dossier, s'il existe.

[64] The appellant submits that the city did not exercise its discretion appropriately. She submits that the information contained in any responsive records concerns her and that the city should have exercised its discretion to disclose it. She submits:

L'institution a erré dans l'exercice de son pouvoir discrétionnaire à des fins inappropriées. Elle n'a pas pris en considération les facteurs pertinents:

- l'information doit être accessible au public
- les particuliers doivent avoir le droit d'accéder aux renseignements personnels les concernant.

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<sup>12</sup> Order MO-1573.

<sup>13</sup> Section 43(2).

***Analysis and findings***

[65] Based on the information before me I am satisfied that confirmation that records responsive to the request exist would provide the appellant with information about an identifiable individual and her eligibility for social service of welfare benefits or about the determination of her benefit levels.

[66] After considering the evidence before me, I found that conveying the existence or non-existence of records responsive to the appellant's request would constitute an unjustified invasion of the personal privacy of the individual identified in the request. Accordingly, I found that the city is entitled to invoke section 14(5) and 38(b) to refuse to confirm or deny the existence of records responsive to the appellant's request.

[67] Considering the submissions made by the city regarding its exercise of discretion with respect to invoking these sections, I find that it took into account only relevant considerations and that their decision was made in good faith. On this basis, I am satisfied that the city has not erred in its exercise of discretion under sections 14(5) and 38(b) and I uphold it.

**ORDER:**

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

Original Signed By \_\_\_\_\_  
Catherine Corban  
Adjudicator

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November 28, 2013