

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3714

Appeal MA17-116

City of Ottawa

December 28, 2018

Summary: The appellant submitted a request to the City of Ottawa (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) seeking access to information involving five named individuals about an incident at a specified address. The city refused to confirm or deny the existence of records responsive to the request relying on section 14(5) (refusal to confirm or deny) of the *Act*. The appellant appealed the decision. In this order, the adjudicator upholds the city's refusal to confirm or deny the existence of responsive records because disclosure of the very fact of their existence or non-existence would itself convey information that ought to be withheld under the *Act*.

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), 14(3) and 14(5).

Orders and Investigation Reports Considered: Order M-615.

OVERVIEW:

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

Any and all emails, electronic communiques, messages (on any device) and any telephone messages, notes from telephone and in person conversations with [five specified individuals].

Regarding: any reference to activities, complaints, issues etc. on/around [specified road], and/or relating to [the requester], poisonings at [specified address] from 2012 to receipt of this request (date application received).”

[2] In response, the city issued an access decision refusing to confirm or deny the existence of any requested records pursuant to section 14(5) of the *Act*.

[3] The appellant filed an appeal of that decision with this office. As the issue on appeal could not be resolved at mediation, this file moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*.

[4] I invited the parties to provide representations during the inquiry. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

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

ISSUES:

- A. Does the record, if it exists, contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?
- B. Has the city properly applied section 14(5) of the *Act* in the circumstances of this appeal?

DISCUSSION:

Issue A: Does the record, if it exists, contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?

[6] The city has refused to confirm or deny the existence of records responsive to the request on the basis that section 14(5) of the *Act* applies because their disclosure, if they exist, would constitute an unjustified invasion of personal privacy. In order for an unjustified invasion of privacy to occur it must first be determined that the records, if they exist, would contain “personal information.”

[7] The term “personal information” is defined, in part, 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;

[8] 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.¹

Analysis and finding

[9] As section 14(5) can only apply if the records (if they exist) contain personal information, I will consider whether, based on the evidence before me, any responsive records would contain information that can be defined as "personal information." For the reasons that follow, I find that if responsive records exist, they would contain personal information.

¹ Order 11.

[10] In her request, the appellant seeks access to records that would provide confirmation that one or more of five named individuals contacted the city about a specified matter. I agree with the city that due to the narrow scope of the request for records of communication between certain persons, disclosure of the existence or non-existence of the requested records would reveal whether or not certain person(s) complained/raised a specific matter with the Ward Councillor. This constitutes the personal information of the individual(s) pursuant to the introductory wording of the definition.

[11] Considering the nature of the information that the appellant seeks and the types of records in which the information would be contained, I accept that any responsive records that might exist would contain the personal information of identifiable individuals. Specifically, responsive records, if they exist, would contain the personal information of one or more identified individuals who contacted the city relating to the specified event.

[12] Any responsive records that might exist would therefore contain the personal information of identifiable individuals other than the appellant of the type contemplated by paragraphs (a), (d), (e) and (h) of the definition of personal information in section 2(1) of the *Act*.

[13] I acknowledge that the appellant has indicated in her representations that she does not seek the names of any individuals identified in any responsive record that might exist. However, given that her request specifically seeks records relating to five named individuals regarding a specified event, disclosure of any responsive records that might exist would clearly reveal the personal information of those identifiable individuals (or at least one), even if their names were severed.

[14] Since I have found that the records, if they exist, would contain the personal information of named individuals, I will now consider whether that information is exempt under section 14(1) of the *Act*. I will also consider, for completeness, whether the records, if they exist, could also contain the personal information of the appellant and whether section 14(5) applies in that circumstance.

Issue B: Has the city properly applied section 14(5) of the *Act* in the circumstances of this appeal?

[15] 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.

[16] Section 14(5) gives an institution discretion to refuse to confirm or deny the existence of a record in certain circumstances.

[17] 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.²

[18] 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.

[19] 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*, (the provincial *Act* equivalent to section 14(5)), stating:

The Commissioner's reading of s. 21(5) requires that in order to 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.³

Representations

[20] In its representations, the city submits that it concluded that the appellant submitted a request that was of the nature and scope that would allow her to ascertain whether or not certain person(s) complained to or discussed with the office of the specified councillor, a highly contentious issue that affects a limited number of land-owners including the appellant.

[21] The city refers to the Court of Appeal decision in *Ontario (Minister of Health and Long Term Care) v. Ontario (Information and Privacy Commissioner)*⁴ where it upheld the two-part test under section 14(5) of the *Act* (set out above). In respect of the first part of the test, the city submits that disclosure of the requested record (regardless of

² Order P-339.

³ Orders PO-1809 and 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.

⁴ Cited above.

whether a record exists) would constitute an unjustified invasion of personal privacy. It submits that the city's default practice is that the identity of any person who contacts the city in a personal capacity is to be held in confidence. The city refers to several past IPC orders that it submits supports the city's position that the identity of such persons constitutes their personal information and that disclosure would constitute an unjustified invasion of personal privacy.

[22] The city also submits that the information, if it were to exist, would be deemed to be highly sensitive and the factor at section 14(2)(f) (highly sensitive) would apply.

[23] With respect to the second part of the test, the city submits that disclosure of the fact that a record exists (or does not exist) would in itself convey information to the requester and the nature of the information conveyed is such that this disclosure would constitute an unjustified invasion of personal privacy. The city submits that due to the narrow scope of the request for records of communication between certain persons, disclosure of the existence or non-existence of the requested records would reveal whether or not certain person(s) complained/raised a specific matter with a specified councillor resulting in an unjustified invasion of privacy.

[24] The city refers to the scope and nature of the request in this appeal, noting that it ordinarily receives a broad request for records pertaining to an issue rather than only records pertaining to an issue that was brought to the attention of a specified individual at the city by named individuals. The city submits that the appellant's request was limited to records that disclose any communications between a specified councillor, including his two assistants, with five specified individuals, noting that three of the specified individuals share the same family name as do two of the other individuals.

[25] The city submits that in addition to the request only pertaining to communication between what appears to be three households and a specified councillor, the subject matter of the request was very specific, being "any reference to activities, complaints, issues etc. on/around a rural road allowance that runs adjacent to the Appellant's property including records pertaining to an alleged poisoning at the address." The city submits that in the context of this highly contentious matter involving a limited number of parties, the appellant, in limiting the scope of her request, was essentially requesting information as to whether certain neighbour(s) had provided opinions or made complaints to the specified councillor in respect of the road allowance and poisoning issues.

[26] In her representations, the appellant submits that the original request was meant to obtain information regarding incidents on a city-owned road and was not meant to be focused nor dependent on the disclosure of specific individuals and proposes that any information regarding the incident and reported to the city and the specified councillor, be released with the names of individuals and/or personal information redacted. The appellant submits that the advice provided by the city was to explicitly describe the information being requested and in an effort to be clear on the scope of the request the five individuals were specified.

[27] The appellant submits that the incidents detailed in the request relate to community concerns and public safety and parallel the necessity to maintain transparency where matters of public interest fall within the institution mandate and should supersede the arguments for non-disclosure. The appellant submits that the request is focused on records that relate to "city business" and not personal information.

[28] The appellant submits that the value of the records relating to the specified incidents may influence negotiations, spending and/or decisions related to the city's mandate and functions. The appellant reiterates that the subject matter of the request is related to city business and submits that it necessitates transparency as stated in section 4 of the *Act*. The appellant submits that she formed her request to be as detailed and precise as possible in order to comply with the instructions on the form. She submits that the city should have redacted and/or excluded information, while providing the foundational information that was requested.

Analysis

[29] For the following reasons, I accept that the city is entitled to apply section 14(5) to refuse to confirm or deny the existence of records responsive to the appellant's request.

[30] Part one: Would disclosure of the record (if it exists) be an unjustified invasion of personal privacy?

[31] Under part one of the section 14(5) test, the city must demonstrate that disclosure of a 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. As set out above, I have found that any records responsive to the request, if they exist, would contain the personal information of identifiable individuals, other than the appellant.

[32] In order to determine whether the disclosure of personal information can be considered to be an unjustified invasion of personal privacy, the factors and presumptions in sections 14(2), (3), and (4) provide guidance. Section 14(2) provides some factors for the city 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; and section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

[33] The city does not refer to any presumptions under section 14(3) that would apply. However, it does submit that the factors at section 14(2)(f) (highly sensitive) and (h) (supplied in confidence) are relevant in this appeal. The appellant point to the factors at section 14(2)(a) (public scrutiny) and section 14(2)(b) (public health and safety) as being relevant.

14(2)(a) (public scrutiny)

[34] This section contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.⁵ In her representations, the appellant submits that “the value of these records relating to incidents may influence negotiations, spending and/or decisions . . . related to the City’s mandate and function.” I do not agree. In my view, records (if they exist) that would be responsive to the request could not reasonably be expected to subject the activities of the city to public scrutiny given that they would be records related to a specified event on private property. Therefore, I do not give any weight to the factor at section 14(2)(a).

14(2)(b) (public health and safety)

[35] This section contemplates disclosure if access to the personal information would promote public health and safety. In her representations, the appellant submits that the incidents detailed in her request are related to specific community concerns and public safety and parallel the necessity to maintain transparency where matters of public interest fall within the city’s mandate and should supersede the arguments for non-disclosure.

[36] Although the records requested would have to do with poisoning at a specified address, I do not conclude that disclosure of any personal information in the records (if any exist) would promote public health and safety. Given the narrow scope of the request, the appellant has not established that disclosure of the personal information would promote public health and safety. Therefore, I do not give this factor any weight.

14(2)(f) (highly sensitive)

[37] In order for personal information to be considered highly sensitive in the manner contemplated by section 14(2)(f), I must be satisfied that disclosure of the information could reasonably be expected to cause significant personal distress to the affected party.⁶

[38] Based on the actual request and the city’s representations, I accept that disclosing the information in the records (if any exist) could reasonably be expected to cause significant personal distress to the individuals named in the request. Therefore, I find that the factor at section 14(2)(f) applies to the individuals’ personal information and on that basis give this factor significant weight.

⁵ Order P-1134.

⁶ Order PO-2518.

14(2)(h) (supplied in confidence)

[39] The relevance of the factor in section 14(2)(h) is determined by an evaluation of whether the personal information was supplied by an individual in confidence. The city submits that its default practice is that the identity of any individual who contacts the city in a personal capacity is kept confidential. I agree that this factor is relevant in this appeal. In my view, for an individual contacting the city for the purpose set out in the request, it would be reasonable to expect some level of confidentiality regarding the disclosure of his or her own personal information. I give this factor moderate weight.

Conclusion

[40] After considering the various factors that apply in this appeal, I conclude that there are no factors weighing in favour of the disclosure of the affected parties personal information (if records exist). However, in view of my finding that the factors at section 14(2)(f) and (h) are relevant, I conclude that disclosure of the record (if they exist) to the appellant would constitute an unjustified invasion of the individuals' personal privacy under section 14(1) and therefore the city has satisfied the first part of the section 14(5) test.

Would disclosure of the fact that a record exists (or does not exist) in itself convey information to the appellant, and is the nature of the information conveyed such that disclosure would constitute an unjustified invasion of personal privacy?

[41] I must now determine whether disclosure of the fact that a record exists (or does not exist) would constitute an unjustified invasion of privacy of individuals other than the appellant.

[42] Under this part of the section 14(5) test, the city must demonstrate that disclosure of the fact that records exist (or do not exist) would itself convey information to the appellant, and that the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[43] Based on all of the information before me, including the actual request, I am satisfied that disclosure of the fact that records exist (or do not exist) would in itself convey information to the appellant. Further, for reasons similar to those set out above, I find that the nature of the information conveyed is such that its disclosure would constitute an unjustified invasion of privacy.

[44] Accordingly, I find that the city has established the second of the two requirements that must be met for section 14(5) to apply. In addition, I find that none of the exceptions in section 14(4) applies in the circumstances of this appeal.

[45] Section 14(5) is a discretionary exemption. I must therefore review the city's exercise of discretion in deciding to rely on this section to refuse to confirm or deny the existence of records, if they exist. On appeal, this office may review the city's decision

in order to determine whether it exercised its discretion and, if so, whether it erred in doing so.

[46] I may find that the city erred in exercising its discretion and send the matter back for a re-exercise of discretion based on proper consideration if it is determined that it has exercised its discretion in bad faith or for an improper purpose, it took into account irrelevant considerations, or it failed to take into account relevant considerations.

[47] In the circumstances of this appeal, based on the representations of the city and the nature of the information that any responsive records that might exist would contain, I am satisfied that the city considered relevant considerations and did not act in bad faith or for an improper purpose.

[48] Accordingly, I conclude that the city exercised its discretion appropriately in relying on section 14(5) to refuse to confirm or deny the existence of records responsive to the appellant's request and I will uphold their decision to do so.

[49] In its representations, the city takes the position that the records, if they exist, would not contain the personal information of the appellant. For the sake of completeness, I will also examine if section 14(5) applies even if the record were to contain the personal information of the appellant.

[50] Even if the records (if they exist) contained personal information that belonged to the appellant, which is not submitted by the city or the appellant, orders from this office suggest that the city would still be able to rely on section 14(5) when the analysis is under section 38(b) of the *Act*. Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

[51] Section 38 contains no parallel provision to section 14(5). If the record, if one exists, contains the appellant's personal information, the question arises whether the city can rely on section 14(5) in this case. 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.

[52] I agree with the senior adjudicator's analysis and findings. Accordingly, I find that section 14(5) may be invoked even if the appellant's personal information appears in the records, if they exist, and section 38(b) applies.

[53] Accordingly, I find that the city may refuse to confirm or deny the existence of records that might be responsive to the appellant's request.

ORDER:

The appeal is dismissed.

Original signed by: _____

Alec Fadel
Adjudicator

December 28, 2018 _____