

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4297

Appeal MA21-00354

City of Hamilton

December 13, 2022

Summary: This order relates to a request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Hamilton (the city) for the name of an animal rescue organization found in a record related to the city's handling of a dog that was found. The city withholds the name under the discretionary law enforcement exemption at section 8(2)(a) (law enforcement report). An affected party supports this, and also proactively claims the discretionary exemption at section 8(2)(c) (disclosure would expose person to civil liability) and the mandatory exemption at section 10(1) (third party information). In this order, the adjudicator finds that neither section 8(2)(a) nor section 10(1) apply, and that even if the affected party were allowed to claim section 8(2)(c), that exemption would not apply. As a result, the adjudicator allows the appeal and orders the city to disclose the name at issue to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O 1990, c. M.56, as amended, sections 8(2)(a), 8(2)(b), and 10(1).

Orders Considered: Orders MO-1238 and MO-2484

Cases Considered: *Broda v. Law Society of Alberta*, [1993] A.J. No. 90 (Q.B.).

OVERVIEW:

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

- a. All records relating to dogs matching [named dog] description, and
- b. All records relating to animals surrendered by [a named person] or any person with the surname [named surnames].

[2] In response to the request, the city issued a decision granting partial access to the records. Access to the withheld information was denied under a number of exemptions, including the discretionary exemptions at sections 8(1)(a) (interference with a law enforcement matter) and 8(2)(a) (law enforcement report) of the *Act*.

[3] The requester, now the appellant, appealed the city's decision to the Information and Privacy Commissioner of Ontario (IPC).

[4] The IPC appointed a mediator to explore resolution. Mediation resulted in the narrowing of issues. The appellant also clarified that she was only seeking access to the name of the rescue organization to which the dog was surrendered.

[5] As mediation could not resolve the dispute, the appeal moved to the adjudication stage, where an adjudicator may conduct an inquiry. In this appeal, I received representations from a party whose interests may be affected by disclosure (an affected party), the appellant, and the city.¹ The affected party added the issues of the mandatory exemption at section 10(1) (third party information), and the discretionary exemption at section 8(2)(c) (disclosure would expose person to civil liability). The city advised that it was no longer claiming section 8(1)(a), so that issue is no longer within the scope of the appeal.²

[6] For the following reasons, I allow the appeal and order the city to disclose the information at issue to the appellant.

RECORD:

[7] The only information at issue is the rescue organization to which the appellant's dog was surrendered, which is found in a portion of record 3. This is a one-page record entitled "Case Information."

ISSUES:

- A. Do the discretionary exemptions at sections 8(2)(a) and/or 8(2)(c) related to law enforcement activities apply to the record?

¹ Portions of the affected party's representations were withheld for confidentiality concerns, under *Practice Direction 7* (which addresses the sharing of representations) of the IPC's *Code of Procedure*.

² Although the affected party supported the city's claim over section 8(1)(a) in its representations, since the city withdrew its claim of this exemption, and the appeal is from the city's decision, the exemption is no longer at issue.

- B. Does the mandatory exemption at section 10(1) for third party information apply to the information at issue?

DISCUSSION:

Background information

[8] In this appeal, the appellant and the affected party discuss at great length background and existing circumstances relating to the creation of the record and the specific information at issue (the name of the animal rescue organization). They also discuss at great length the effect of disclosure or non-disclosure on them, respectively. While I have considered all of the parties' representations, this appeal must be decided on the basis of whether the specific sections of the *Act* that have been claimed apply. Therefore, what is relevant for that purpose is the following brief description of how the records responsive to the request (most of which have been disclosed to the appellant) were generated, as set out below.

[9] The city's Animal Services received a service call regarding a dog that was at large without any identification tags. As a part of its process, Animal Services retrieved the dog, housed it at the city's facilities, and assessed the dog for its health and temperament. The city states that this assessment consisted of a visual exam, a veterinary exam, medical tests, and a temperament test. Animal Services gathered the dog's health and temperament information from this assessment and considered such information to determine how best to care for the dog. Considering various factors, such as the dog's condition, age, and personality, the Animal Services decided whether the dog could be adopted, transferred to a rescue organization, or euthanized. Here, Animal Services used the information to conclude that the dog could be transferred to a rescue organization. The city states that it set out that determination in record 3, which contains the information at issue in this appeal (the name of the rescue organization).

Issue A: Do the discretionary exemptions at sections 8(2)(a) and/or 8(2)(c) related to law enforcement activities apply to the record?

[10] Section 8 contains several exemptions from a requester's right of access, mostly related to the context of law enforcement.

[11] The city claims section 8(2)(a), and the affected party submits that this exemption applies. The affected party claims that section 8(2)(c) also applies; the city states that it makes no representations about this claim by the affected party.

[12] Sections 8(2)(a) and 8(2)(c) state:

(2) A head may refuse to disclose a record,

(a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

(c) that is a law enforcement record if the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability[.]

What is the definition of "law enforcement"?

[13] The IPC has found that "law enforcement" can include a municipality's investigation into a possible violation of a municipal by-law.³ The city states that its Animal Services responded to a service call regarding a possible by-law infraction (specifically, the city's Responsible Animal Ownership By-law No. 12-031), and that this is considered law enforcement for the purposes of the *Act*.⁴ The parties in the appeal do not dispute this.

[14] I will begin by assessing the affected party's claim that section 8(2)(c) applies.

Section 8(2)(c): exposure to civil liability

[15] Section 8(2)(c) provides an exemption for a law enforcement record if its disclosure could reasonably be expected to expose its author (or anyone who has been quoted or paraphrased in the record) to civil liability. The purpose of this exemption is to protect individuals who have provided information or created a record during a law enforcement investigation, which may expose them to civil liability (payment of monetary damages or other penalties as a result of a civil lawsuit). The exemption is not intended to protect a police officer's routine recordings of observations and actions.⁵

Representations

[16] As mentioned, the city did not claim section 8(2)(c), and makes no representations about it, having had a chance to review the affected party's position on it.

[17] The affected party's representations set out at some length why it should be

³ Orders M-16 and MO-1245. In contrast, the IPC has found that the following situations are not "law enforcement": an internal investigation by the institution under the *Training Schools Act*, where the institution lacked the authority to enforce or regulate compliance with any law [see Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.)]; and a Coroner's investigation or inquest under the *Coroner's Act*, which lacked the power to impose "sanctions" or penalties (see Order P-1117).

⁴ The city cites Orders M-16 and MO-1245.

⁵ Order MO-1192.

allowed to claim this discretionary exemption, even though the city could have done so but chose not to. Essentially, the affected party's representations set out the types of harms that the affected party believes would ensue from disclosure of the information at issue; these harms include costly court proceedings, which would be unfair in the circumstances, in the affected party's view.

[18] The appellant submits that the affected party should not be entitled to claim this exemption, and that in any event, the affected party has not sufficiently established that this exemption would apply.

Analysis/findings

[19] The IPC has previously considered the question of whether a third party is permitted to claim a discretionary exemption when the institution has not done so.⁶

[20] It is important to distinguish between the two types of exemptions in the *Act*: mandatory and discretionary exemptions. If a record qualifies for mandatory exemption, the head of an institution must withhold it from disclosure ("A head shall refuse to disclose. . ."). In contrast, exemptions such as the section 8 exemptions are discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so. By choosing the word "may" in the wording of discretionary exemptions, "the Legislature expressly contemplated that the head of the institution retains the discretion to claim such an exemption to support its decision to deny access to a record."⁷

[21] In general, discretionary exemptions in the *Act* are designed to protect various interests of the institution to which the freedom of information request was made. Given this purpose, the IPC has long held that "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."⁸ Despite the general rule that an institution has the responsibility of determining which discretionary exemptions, if any, should apply to a record, the IPC has recognized that there may be "rare occasions" when an affected party can claim a discretionary exemption not originally claimed by an institution.⁹

[22] Having considered the parties' positions and the record itself, it is not necessary to decide whether these are "rare and exceptional" circumstances such that the affected party should be allowed to claim a discretionary exemption when the city has chosen not to do so. That is because even if such circumstances exist, the exemption

⁶ See, for example, Orders P-257, M-430, P-1137, PO-3917 and PO-3979.

⁷ Order PO-4084.

⁸ Order P-1137.

⁹ Order P-257.

cannot apply.

[23] As noted, the purpose of the exemption at section 8(2)(c) is to protect one of two types of individuals which may be exposed to civil liability through disclosure: individuals who have provided information or created a record during a law enforcement investigation. Since the affected party did not "provide" the information at issue to the city or create the record during a law enforcement investigation (the city did), the exemption at section 8(2)(c) would not apply. Therefore, in the circumstances, I find that disclosure of the record could not reasonably be expected to expose the author of the record or any person whose statements are in the record to civil liability.

Section 8(2)(a): law enforcement report

[24] Many of the exemptions listed in section 8 apply where a certain event or harm "could reasonably be expected to" result from disclosure of the record, but the exemption at section 8(2)(a) is not one of them. Certain law enforcement records which consist of a formal statement or account of the results of the collation and consideration of information qualify for exemption under section 8(2)(a), regardless of the potential for harm from disclosure.¹⁰

[25] For a record to be exempt under section 8(2)(a), it must be

1. a report,
2. prepared in the course of law enforcement, inspections or investigations, and
3. prepared by an agency that has the function of enforcing and regulating compliance with a law.¹¹

What is a "report"?

[26] During the inquiry, the parties were all provided with the following long-standing summary of the jurisprudence on what a "report" is:

A report is a formal statement or account of the results of the gathering and consideration of information. "Results" do not generally include mere observations or recordings of fact.¹² The title of a document does not determine whether it is a report, although it may be relevant to the issue.¹³

¹⁰ See, for example, Orders MO-1192 and MO-1238.

¹¹ Orders P-200 and P-324.

¹² Orders P-200, MO-1238 and MO-1337-I.

¹³ Order MO-1337-I.

Representations

[27] The city states that its Animal Services “used the [dog’s] health and temperament assessment to evaluate and conclude that the dog can be transferred to a rescue organization and set out that determination in record 3.” The city also says:

Record 3 contains more than mere observations of the dog or factual information such as medical test results. The city states that record 3 is a culmination of all information that Hamilton Animal services gathered and considered to determine how best to care for the dog and sets out the end result that the best care for the dog was to transfer her to the named rescue organization. It is a formal account of the results of the gathering and consideration of information, and as such, record 3 qualifies as a report.

[28] The affected party submits that the record requested is:

. . . an account of the result arrived at through the city’s consideration of information, including the failure of the owners to come forward to claim the dog during the redemption period, the dog’s medical and behavioural needs, the city’s limited physical and budgetary capacity in its adoption program, and the willingness of the rescue organization to accept the dog for the purposes of vetting and adoption.

[29] Pointing to long-standing jurisprudence about what a “report” is,¹⁴ the appellant submits that the affected party’s definition is only one of many possible definitions of the term. The appellant also relies on the IPC’s consideration, in Order MO-1238, of the court’s rationale in *Broda v. Law Society of Alberta*,¹⁵ as reflecting what a “report” is (or is not):

... The purpose of requiring a “report” is to give . . . the benefit of the Secretary’s *considered, experienced and rational views as to what the facts are and why it may be argued that* the member’s conduct constitutes conduct deserving of sanction. Merely delivering the Society’s file on the member does not constitute a “report.” [Emphasis mine.]

[30] The appellant submits that, further to the above characterization of a “report,” the city disclosed a report to her (which is not at issue). The appellant states that Hamilton Animal Control wrote a report regarding the condition and adoptability about the dog that was found, and that this was disclosed to her through her representatives’

¹⁴ The appellant cites Orders MO-1238 and paragraph 24 of Order MO-3276, which itself contains the standard language and citations I sent to the parties in the inquiry, as set out in paragraph 25 of this order.

¹⁵ [1993] A.J. No. 90 (Q.B.)

initial inquiries with the city.¹⁶ The appellant states that the report provides “considered, experienced, and rational views as provided by experience, as witness in the assessment of [the dog’s] temperament,” which would be acceptably characterized as a report.”

[31] However, the appellant argues that the location of the shelter where the dog was ultimately transferred to after the report was completed does not meet the definition of “report.” The appellant submits that there was no consideration and collection of unknown information or collection of assessments by an experienced individual, but merely a recorded update regarding where the animal in question was transferred.¹⁷

Analysis/findings

[32] Having considered the parties’ representations, the nature of the record itself and the document that was disclosed to the appellant (which the appellant refers to in her representations as a “report”),¹⁸ I do not uphold the city’s decision.

[33] At the outset, and as noted in Order MO-2484, section 8(2)(a) exempts “a report prepared in the course of law enforcement *by an agency which has the function of enforcing and regulating compliance with a law*” (emphasis added), rather than simply exempting a “law enforcement report.” This wording is not seen elsewhere in the *Act* and supports a strict reading of the exemption.¹⁹

[34] Taking this need to interpret section 8(2)(a) strictly, I have carefully considered the nature of record 3 itself, most of which has been disclosed to the appellant. The fact that most of it has been disclosed permits me to describe many aspects of it in this order, to explain my finding that the information at issue in it is not “a report,” and nor is record 3 itself.

[35] Based on my review of record 3, in my view, it can be described as a form with many pre-printed fields that can be filled with factual information such as the case number, type, name, contact information for where the dog is, and other factual details. While the title of record 3 (“Case Information”) is not determinative of its nature, in my view, it aptly describes this record. Fields that can be completed in record 3, under a section called “Case Details,” include pre-printed fields or boxes related to:

¹⁶ The appellant specifies the name and case number of the report in her representations, but I will not reproduce them in this public order.

¹⁷ The city had provided its representations late in this inquiry, and when given the opportunity to respond to the city’s representations, the appellant essentially reiterated her position, which included standard language found in the Notice of Inquiry that would have been sent to the city regarding the fact that, generally, “results” would not include mere observations or recordings of fact.” Since the city already had an opportunity to comment on the appellant’s position, and in any case, bore the onus of proof regarding its section 8(2)(a) claim, I did not go to the city for further comment.

¹⁸ As this record is not within the scope of this appeal, I make no findings about whether it is a “report” within the meaning of section 8(2)(a).

¹⁹ See Orders PO-2751 and MO-2484.

- the type and category of case (for example, "dog, stray"),
- the animal's breed, sex, age, and colour,
- whether the animal has a microchip in it, and
- whether it was in a shelter, sick, or at the veterinarian (here, the box for "In Shelter" is marked with an "X").

[36] Previous IPC orders have not upheld the claim of section 8(2)(a) when the records consisted of pre-printed forms with entries for factual information and which do not contain a formal statement or account of the results of the collation and consideration of the information by the individuals who prepared them.²⁰

[37] I agree with this approach, and I adopt it here.

[38] I find that record 3 is a pre-printed form containing entries for fields of factual information and does not contain a formal statement or account of the results of the collation and consideration of the individual who prepared it.²¹ In my view, record 3 is a one-page collection of facts summarizing the city's involvement with the dog, at a very high level. I find that such factual details relating to the case are recordings of fact and not "results," of a formal statement or account of the results of the gathering and consideration of information.

[39] While I appreciate that the name of the animal rescue organization appears in record 3 due to the city's assessment of the dog and its own resources, as well as the animal rescue organization's willingness to take the dog. However, this does not transform record 3 as a whole into a "report" within the long-standing meaning of that word, under section 8(2)(a) of the *Act*; nor does it make the name of the organization a "report." The name of this organization is not a formal statement or account of "results," for the same reasons that record 3 is not.

[40] As mentioned, there are three requirements to meet section 8(2)(a) of the *Act*, one of them being that the record is a "report." Given my finding that the record is not a "report," the exemption for section 8(2)(a) has not been established, and it is not necessary to consider whether the other two requirements are met, whether an exception to the exemption applies at section 8(4), and the city's exercise of discretion.

[41] For these reasons, I do not uphold the city's claim of section 8(2)(a) over the information at issue in record 3.

²⁰ See, for example, Orders M-364, MO-1238, and MO-2484.

²¹ I note that the name of the person who conducted an assessment is found in another much lengthier record that was disclosed to the appellant, a copy of which the IPC has on file.

Issue B: Does the mandatory exemption at section 10(1) for third party information apply to the information at issue?

[42] The purpose of section 10(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,²² where specific harms can reasonably be expected to result from its disclosure.²³

[43] The affected party claims that disclosure of the information at issue is very much against the public interest within the meaning of section 10(1)(b), and that sections 10(1)(c) and 10(1)(d) are also arguably applicable.

[44] Sections 10(1)(b), (c), and (d) say:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

(d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[45] For section 10(1) to apply, the party arguing against disclosure must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information;
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

²² *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

²³ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

Part 1 of the section 10(1) test: type of information

[46] The affected party raises two types of information in its representations: trade secrets and commercial information. The IPC has described these types of information that are protected under section 10(1) as follows:

Trade secret includes information such as a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:

- (a) is, or may be used in a trade or business;
- (b) is not generally known in that trade or business;
- (c) has economic value from not being generally known; and
- (d) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.²⁴

Commercial information is information that relates only to the buying, selling or exchange of merchandise or services. This term can apply to commercial or non-profit organizations, large or small.²⁵ The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.²⁶

[47] As noted, the city did not provide representations about section 10(1). The affected party and the appellant's arguments about section 10(1) mainly relate to the purpose of the exemption and part three of the test (harms). I summarize their positions about part one of the test, below.

[48] The affected party submits that while there does not appear to be caselaw on whether acceptance of an animal transfer from a municipal shelter could be considered a "trade secret" or "commercial" information within the meaning of section 10(1) of the *Act*, the purpose of section 10(1), broadly speaking, is to protect confidential information of third parties who are supplying such information to the institution. The affected party also notes that the IPC has repeatedly held that "commercial information" can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.²⁷

[49] The appellant submits that the affected party has not established that the information meets part one of the test, and therefore, section 10(1) cannot apply. The appellant rejects the notion that the name of an animal shelter organization is a "trade

²⁴ Order PO-2010.

²⁵ Order PO-2010.

²⁶ Order P-1621.

²⁷ The affected party cites Orders PO-2010 and MO-3335 as examples of such orders.

secret," or that it qualifies as "commercial information," either.

[50] Having reviewed the parties' representations and the affected party's affidavit evidence and supporting documentation, and considered the nature of the information at issue itself, I agree with the appellant that the name of an animal rescue organization is not a "trade secret" within the meaning of section 10(1) of the *Act*. The name cannot reasonably be said to be "information such as a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism."²⁸

[51] Likewise, having considered the evidence before me, I find that the affected party has not established that the name of the animal rescue organization is "commercial information" within the meaning of section 10(1). The affected party does not claim, and I see no basis for finding, that the information relates "only to the buying, selling or exchange of merchandise," in accordance with part of the definition of "commercial information" noted above. That leaves the question of whether the name of the animal rescue organization itself relates to the "exchange of services." In my view, there is insufficient evidence to establish that it does, and I do not accept that it does.

[52] I am satisfied that the name of the animal rescue organization does not qualify as any of the other types of information listed in section 10(1) of the *Act*.

[53] Since the information at issue does not meet part one of the test, it cannot be exempt under section 10(1) of the *Act* because to be exempt, it must meet all three parts of the test.

[54] In conclusion, for these reasons, I allow the appeal. I do not uphold the city's decision to withhold the information at issue under section 8(2)(a), and I do not accept the affected party's claim that the information is exempt under section 10(1). As a result, I will order the city to disclose the information at issue to the appellant.

ORDER:

1. I allow the appeal.
2. I order the city to disclose the information at issue to the appellant by January 17, 2023, but not before January 12, 2023.
3. In order to verify compliance with this order, I reserve the right to require the city to provide me with a copy of the record sent to the appellant, pursuant to paragraph 2 of this order.

²⁸ Accordingly, it is not necessary to consider whether the name of an animal rescue organization meets the other criteria noted above to be a "trade secret."

Original signed by: _____

Marian Sami
Adjudicator

December 13, 2022 _____