

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4549

Appeal MA21-00511

City of Hamilton

July 17, 2024

Summary: An individual requested, under the *Act*, records relating to a fire inspection complaint made about her property. The city disclosed some information in the records but withheld other information saying that it was not responsive to the request. The individual appealed the city's access decision because she believes that the non-responsive information had some connection to her property. In this order, the adjudicator upholds the city's decision not to disclose the remaining information finding that it is not responsive to the request.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, sections 17(1) and 17(2); *Canadian Charter of Rights and Freedoms*, Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), sections 2(c) and 2(d); and *Constitution Act*, Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), section 52(1).

OVERVIEW:

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

Record of complaint made (sic) [named inspector], Hamilton Fire Department which led to Inspection Order of [specified date], [File number]. If no complaint is on record, I need a statement to that effect.

[2] The city granted partial access to the records. It withheld information pursuant to

a number of exemptions¹ and redacted some information on the basis that it is non-responsive to the request because it relates to other properties.

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

[4] During mediation, the appellant confirmed that she was only seeking access to the information in the records that the city had denied as non-responsive to the request. Accordingly, in this order I will not consider the information withheld under the exemptions claimed by the city.

[5] Also during mediation, the appellant objected to the individual who had processed her access request also participating in the mediation of the appeal. This was added as an issue to be considered on appeal.

[6] As mediation did not resolve the appeal, it was moved to the adjudication stage of the appeal process in which an adjudicator may conduct an inquiry. The adjudicator sought and received representations from both parties.²

[7] The appeal was then transferred to me to complete the inquiry and issue an order. I reviewed the parties' representations and determined I did not need to hear from them further before making a decision.

[8] In the discussion that follows, I find that the portions of the records at issue are not responsive to the request and uphold the city's decision to withhold them.

RECORDS:

[9] The information at issue in this appeal consists of the withheld information within the handwritten notes of site visits relating to various properties found on pages 2, 3, and 4 of the records.

PRELIMINARY ISSUE:

[10] During mediation, the appellant stated that she objects to the city's Privacy Officer being involved in the IPC appeals process. She argues that because the Privacy Officer was both the redactor and "the person assigned by the [city] to review her own redaction work," this makes the Privacy Officer "anything but impartial."

[11] The city notes that its Privacy Officer being the individual who engages in mediation of an appeal before the IPC is standard practice, both for the city and other

¹ The exemptions claimed were sections 14(1) (personal privacy), and 8(1)(d) and 8(2)(a) (law enforcement).

² These representations were shared with the parties in accordance with the IPC's *Code of Procedure*.

institutions subject to the *Act*.

[12] I acknowledge the appellant's concern. However, there is nothing in the *Act* that suggests that it is inappropriate for the Privacy Officer to be involved in the appeal. Indeed, it is a common practice at the IPC for privacy officers to act as the contact person for institutions during appeals.

[13] Regardless, this appeal is at the adjudication stage and I am the one making the decision in this appeal, not the city's Privacy Officer. It is therefore not necessary for me to further address any concerns by the appellant about the Privacy Officer's participation or previous involvement in the file.

DISCUSSION:

[14] The sole issue in this appeal is whether the information identified by the city is not responsive to the request. Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

(1) A person seeking access to a record shall,

(a) make a request in writing to the institution that the person believes has custody or control of the record, and specify that the request is being made under this Act;

(b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[15] The city states that as no address was specified in the request, city staff reached out to the appellant and confirmed that the request relates to a specified property, owned by the appellant (the property). The city states that the information it withheld as non-responsive is "unrelated to the specifics of the property" and contains personal information of identifiable individuals related to other property addresses, gathered during the fire inspector's investigations.

[16] The appellant states that she received orders from the city's Fire Department relating to her property. She states that prior to these orders, a fire inspector had visited her neighbour's property and told them that he had the wrong address. The appellant states that she made her access request based on her suspicion that the wrong property

address had been named in the orders from the city's Fire Department.

[17] The appellant disagrees that notes related to inspections of other municipal property investigations by the fire inspector are unrelated to her property. She states that from the information available to her, she is aware that addresses have been redacted from the records she received. Her position is that fire orders for other properties would relate to similar issues as the ones she faces. To that end, the appellant states "[it] is likely that there is some connection or [the fire inspector] would not have included those address (sic) in the Fire Order intended for me."

[18] The remainder of the appellant's representations address matters unrelated to the scope of the request. This includes a proposal that the city pass on a letter she had written to the other building owners. This letter included her name and contact details, so that those owners may contact her if they wish to do so. I will not address these arguments further, as they are not relevant to the issue of the scope of the request, and whether the withheld information is responsive to the request.

[19] To be considered responsive to the request, records must "reasonably relate" to the request.³ Institutions should interpret requests liberally, in order to best serve the purpose and spirit of the *Act*. Generally, if there is ambiguity in the request, this should be resolved in the requester's favour.⁴

[20] Section 17(2) of the *Act* places an obligation on an institution to contact the requester to clarify the request in cases where the request does not sufficiently describe the record sought. In this case, the appellant requested a record of a complaint leading to a specified order. The city then contacted the appellant to confirm that the address involved was that of her property.

[21] The records themselves are an inspector's notes. The entries occur in the order that the inspector dealt with them during the day and are not grouped by complaint. The city's position is that the redacted information was gathered during fire investigations of other properties and is "unrelated to the specifics of the property."

[22] I note that the wording of the appellant's request does not limit the information she seeks to information regarding her own property. Rather, it specifically asks for records of a complaint that led to the investigation at her property. Based on the request, information about other properties could be "reasonably related" to the request, if that information included a complaint that led to the fire inspector's investigation of her property.

[23] However, I have reviewed the information redacted by the city from the inspector's notes and can confirm that the withheld information relates to fire investigations of other properties and does not relate to information about the complaint that led to the

³ Orders P-880 and PO-2661.

⁴ Orders P-134 and P-880.

inspection at the appellant's property.

[24] Based on this, I agree with the city that the information identified as not responsive does not reasonably relate to the appellant's request.

[25] Therefore, I uphold the city's decision to withhold the information marked as non-responsive in the records.

Other Issue – Constitutional Question

[26] In her representations, the appellant states that she and the owners of the properties whose addresses were redacted may have common interests. She further states that they "have the right of association if we choose to meet and discuss mutual concerns" and asserts that this right is guaranteed under sections 2(c) and 2(d) of the *Charter*.

[27] The IPC has the authority to decide constitutional issues, including those arising under the *Charter*⁵. The rules governing the raising of constitutional questions in appeals are set out in section 12 of the IPC's *Code of Procedure* (the *Code*)⁶ and *Practice Direction No. 9*,⁷ the latter of which states, in part, as follows:

Circumstances where notice required/to whom notice must be given

2. Where a party intends,

(a) to raise a question about the constitutional validity or applicability of legislation, a regulation or a by-law made under legislation, or a rule of common law, or

(b) to claim a remedy under the Canadian Charter of Rights and Freedoms (the "Charter"),

⁵ See Order PO-3686. In *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 at para. 3, the Court stated, in part: "Administrative tribunals which have jurisdiction — whether explicit or implied — to decide questions of law arising under a legislative provision are presumed to have concomitant jurisdiction to decide the constitutional validity of that provision. This presumption may only be rebutted by showing that the legislature clearly intended to exclude Charter issues from the tribunal's authority over questions of law." The Commissioner's powers at sections 39 through 44 of the *Act* clearly include the power to decide questions of law including, for example, the interpretation and application of the exemptions at sections 6-15 and section 38, and the interpretation and application of the exclusions in section 52. There is no evidence that the legislature intended to exclude Charter considerations from the Commissioner's mandate.

⁶ https://www.ipc.on.ca/sites/default/files/legacy/2004/10/code-nov_2021.pdf

⁷ <https://www.ipc.on.ca/en/resources-and-decisions/practice-direction-9-constitutional-questions>

the party shall serve a notice of constitutional question on the Attorneys General of Canada and Ontario and file the notice with the IPC.

Time limits

3. The IPC will consider a constitutional question raised by an appellant only if the appellant raises it at the time they file their appeal or within 35 days after filing their notice of appeal with the IPC.

4. The IPC will consider a constitutional question raised by any other party only if that party raises it within 35 days after receiving the notice of appeal with the IPC.

5. The adjudicator has the discretion to refuse to consider a constitutional question raised after the applicable time limit if the appeal proceeds to inquiry.

Form of notice

6. A notice of constitutional question shall be in the form attached to this *Practice Direction*, or in a similar form that contains the same information.

7. When filing the notice of constitutional question, the party shall also file proof of its service on the Attorneys General of Canada and Ontario (e.g. a copy of the fax cover sheet or cover letter sent to the Attorneys General) with the IPC.

[28] In addition, section 12.02 of the *Code* states that a party raising a constitutional question shall notify the IPC and the Attorneys General of Canada and Ontario of the question within the applicable 35-day time period.

[29] Based on my review of the file, it does not appear that the appellant raised this constitutional issue within a 35-day period after giving the IPC notice of her appeal, as required by section 3 of *Practice Direction No. 9*. There is no reference to this constitutional issue in the appeal form that she filed with the IPC. In addition, the mediator issued a report to the parties at the end of mediation that identified the responsiveness of the record as the sole remaining issue. There is no reference in the mediator's report to a constitutional issue raised by the appellant as a matter remaining at issue.

[30] There is no evidence in the file to show that the appellant provided the IPC with a notice of constitutional question in the form required by section 6 of *Practice Direction Number 9*, or in a similar form that contains the same information. There is also no evidence that she provided the Attorneys General of Canada or Ontario with a Notice of Constitutional Question, as required by section 12.02 of the *Code*.

[31] Section 5 of *Practice Direction No. 9* provides me with the discretion not to consider a constitutional question raised after the applicable 35-day time limit. In my view, an important factor to consider in exercising my discretion in such a manner is whether the constitutional question raised by a party has a reasonable prospect of success.

[32] I understand that the appellant believes that communicating with other property owners whose properties are mentioned in the records would benefit her and the other owners. However, it appears to me, without deciding the issue, that it is unlikely that the city's decision to withhold information not responsive to the request would reach the threshold of constituting a breach of her freedoms of peaceful assembly and association under sections 2(c) and 2(d) of the *Charter*.

[33] In these circumstances, I have decided to exercise my discretion not to consider the constitutional question raised by the appellant after the applicable 35-day time limit set out in section 3 of *Practice Direction No. 9*.

ORDER:

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

Original Signed By: _____
Jennifer Olijnyk
Adjudicator

_____ July 17, 2024