

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4589

Appeal MA23-00194

City of Hamilton

October 31, 2024

Summary: The city of Hamilton (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for records related to the receipt of social assistance by tenants at a particular address (where the requester is the landlord). The city decided that it could not confirm or deny whether there were responsive records [section 14(5) of the *Act*]. The adjudicator upholds the city's decision to do so and finds that there is no public interest in disclosure of the records, if they exist, under the "public interest override" (section 16 of 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(1)(a), 14(3)(c), 14(5), and 16.

OVERVIEW:

[1] This order resolves an appeal of an institution's decision to exercise its discretion to refuse to confirm or deny the existence of records requested under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] The City of Hamilton (the city) received a request under the *Act* for access to the following:

- A. Any information (e-mails, letters, forms) that list [the requester's] name and/or address, phone #, signature used for the purpose to determine eligibility and

confirmation on monthly shelter, rent allowance, housing stability benefit/rent ready request benefit/support programs, board & lodging allowance.

- B. Records of any reference letters, communications, confirming that program recipients live in [a particular home owned by the requester].
- C. Any e-mails, notes/case files notes held in the department that contain [the requester's] name, [and a particular address].
- D. Any records of form Fe-001 "Landlord Information Request" that is on file containing [the requester's] name and/or address and/or signature.

[3] The requester's son dealt with the city and the Information and Privacy Commissioner of Ontario (IPC) on his father's behalf. He says that he later reduced the scope of the request to be for:

- A copy of the Ontario Standard Lease Agreement that is on file with the City of Hamilton that was filed on or before October 1, 2022, with the personal information of my dad [the requester's name].
- A copy of Form 0985E – Consent to disclose and Verify Personal Information for Ontario Works and ODSP.
- Any other documents, personal information that is registered against the property, [the requester's name] as the owner of [specified address].

[4] The city claimed section 14(5) (refuse to confirm or deny existence of record) of the *Act*.¹

[5] The requester (now the appellant) appealed the city's decision to the IPC.

[6] I conducted a written inquiry under the *Act* into the issues on appeal. The city provided written representations, which I shared with the appellant. The appellant provided representations in response. In his representations, he raised matters that are not the subject of this appeal (such as past disclosure that he says the city provided him) or not within the IPC's jurisdiction (such as whether the city should be verifying the authenticity of records), so I do not discuss these matters in this order.

[7] For the reasons that follow, I uphold the city's decision and dismiss the appeal.

¹ It also relied on section 4(1) (custody or control) of the *Act*, but later withdrew that claim during the inquiry.

ISSUES:

- A. If they exist would the records contain "personal information" as defined in section 2(1) and, if so, whose?
- B. Did the city properly apply section 14(5) of the *Act* when it refused to confirm or deny the existence of a record?
- C. Is there a compelling public interest in disclosure of the records (if they exist) that clearly outweighs the purpose of the section 14(5) exemption?

DISCUSSION:

Background information

[8] The city refused to confirm or deny whether any of the records requested exist. This appeal addresses whether, in the circumstances, the city was entitled to rely on the section of the *Act* that allows it to refuse to confirm or deny the existence of records responsive to the appellant's request.

[9] To better understand my decision in this appeal, it is important to keep in mind the underlying context: the appellant seeks access to records that he believes to exist regarding former tenants at a property that he owns (so he knows the names and a former address of these individuals). One of the records he seeks in his narrowed request is a consent form, giving consent to share information with Ontario Works (a government social assistance program). The appellant argues that the records would shed light on possible fraudulent use of that program, so there would be a public interest in disclosure as a result.

[10] Although the appellant now questions whether the city's search efforts were sufficient, I am not adding the issue of reasonable search to the scope of this appeal. Even if the appellant had added it earlier at IPC Mediation, given my finding below that the city properly applied section 14(5) of the *Act*, it would serve no useful purpose to determine whether the city conducted a reasonable search for records that would similarly be exempt from disclosure.

Issue A: If they exist would the records contain "personal information" as defined in section 2(1) and, if so, whose?

[11] To decide which sections of the *Act* may apply to a specific case, the IPC must first decide whether the record (if it exists) would contain "personal information," and if so, to whom the personal information relates.

[12] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual." Information is "about" the individual when it refers to

them in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official, or business capacity is not considered to be “about” the individual.² Under section 2(2.1) of the *Act*, the name, title, contact information, or designation of an individual that identifies the individual in a business, professional, or official capacity is not “personal information.” Information is about an “identifiable individual” if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.³

[13] Based on my review of the request and the parties’ representations, the request relates to the whether tenants received social assistance while living at a particular address.

[14] In my view, the issue of whether the responsive records, if they exist, would contain personal information is essentially acknowledged by the appellant in terms of the records containing, at a minimum, the names, contact information, and financial information of relating to the former tenants. (These types of information are listed as examples of “personal information” in the definition of that term in section 2(1) of the *Act*.)

[15] The appellant also repeatedly says that the records contain his own personal information. However, I find no basis for accepting that this would be the case if the records exist. In response to the request, any mention of the appellant in the records, if they exist, would be in his capacity as the landlord of the property, not in his personal capacity. I am not satisfied that the records requested, if they exist, would reveal something of a personal nature about the appellant such that any information about him might still be “personal information” despite the landlord context.⁴

[16] Since I have found that the records, if they exist, would contain the personal information of identifiable individuals, but not of the appellant, I must assess any right of access that the appellant may have to the records, if they exist, under section 14(5) of the *Act*.

Issue B: Did the city properly apply section 14(5) of the *Act* when it refused to confirm or deny the existence of a record?

[17] Section 14(5) of the *Act* gives an institution the discretion to refuse to confirm or deny the existence of a record if confirming or denying the record’s existence would be an “unjustified invasion of personal privacy.” For the reasons that follow, I uphold the city’s discretion to claim section 14(5) in response to the request.

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

³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

⁴ Orders P-1409, R-980015, PO-2225, and MO-2344.

[18] While section 14(5) gives an institution this discretion, it should be used only in rare cases.⁵ By claiming that it can choose to rely on its section 14(5) powers, the institution is denying the requester the right to know whether a record even exists or not. This is very different from the usual case, where even if the institution denies access to a record, the requester is at least told whether or not there is a record.

[19] For section 14(5) to apply, it must be the case that:

1. disclosure of the record (if it exists) would be an unjustified invasion of personal privacy, and
2. disclosure of the fact that the record exists (or does not exist) would in itself give some information to the requester, and disclosure of that information would be an unjustified invasion of personal privacy.

[20] The appellant appears to object to the requirements of the test (objecting to the city's decision and saying that what is unjustifiable is to refuse his request, which he again describes as being for his information). However, the Ontario Court of Appeal has upheld the above approach and two-part test.⁶

Part one: disclosure of the record (if it exists) would be an unjustified invasion of personal privacy

[21] Under part one of the section 14(5) two-part test, the institution must show that disclosure of the record, if it exists, would be an "unjustified invasion of personal privacy." This can only happen if it is *personal* information that would be disclosed if the institution granted the request for information. Above, under Issue A, I found that the records, if they exist, would contain personal information.

[22] Sections 14(1) to (4) are relevant in deciding if disclosure of the information would be an "unjustified invasion of personal privacy" under section 14(5).

The exceptions to the exemption at sections 14(1)(a) to (e) and 14(4) do not apply

[23] The city submits that none of the *exceptions* to the exemption at sections 14(1)(a) to (e) and section 14(4) are relevant.

[24] The appellant does not cite any of the exceptions at sections 14(1)(a) to (e) and 14(4). He submits that one of the records that he seeks is a form that contains consent to disclose information to Ontario Works *for the purpose of* verifying past, ongoing, and future eligibility for Ontario Works. However, this is not consent for disclosure *to the appellant* under the *Act*, which is what the appellant is seeking here, and would be

⁵ Order P-339.

⁶ 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.

covered by the exception to the exemption section 14(1)(a), if such a responsive record exists.

[25] Considering the parties' representations and the type of records that the appellant is seeking, I find that none of the exceptions to the exemption at sections 14(1)(a) to (e) and 14(4) would apply, if the records exist.

A section 14(3) presumption against disclosure applies

[26] Sections 14(3)(a) to (h) outline several situations in which disclosing personal information is *presumed* to be an unjustified invasion of personal privacy. If one of these presumptions applies, the personal information, if it exists, cannot be disclosed *unless* one of the section 14(4) exceptions apply (and, as mentioned, none of them do here), or there is a "compelling public interest" under section 16 that means the information should nonetheless be disclosed (the "public interest override").⁷

[27] The presumption at section 14(3)(c) is a presumption that covers information related to an individual's eligibility for social service or welfare benefits or a determination of their benefit level.

[28] The city provided examples of records that would be responsive to the request, if they exist. These examples are posted on the city's public website.

[29] In addition, the city submits, and I find, that due to the wording of the request and the types of records that would be responsive to it, that the presumption at section 14(3)(c) would apply to the records, if they exist.

[30] Since a section 14(3) presumption would apply to responsive records, if they exist, I do not need to consider whether the section 14(2) factors apply.⁸

Part two: disclosure of the fact that the record exists (or does not exist) would be an unjustified invasion of personal privacy

[31] Under part two of the section 14(5) two-part test, the city must show that:

- disclosure of just the fact that a record exists (or does not exist) would in itself disclose some personal information to the requester, and
- that this would be an unjustified invasion of personal privacy (considering sections 14(1) to 14(4) of the *Act*).

[32] I find that the city has shown that this two-part test is met.

[33] Regarding the first point, the city submits, and I find, that disclosure of the fact

⁷ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

⁸ *Ibid.*

that a record exists (or does not exist) *itself* discloses personal information and disclosure of that fact constitutes an unjustified invasion of personal privacy: confirming a record exists would reveal that individuals are applying for (or applied for), or are receiving (or received), social assistance, and confirming that a record does *not* exist would reveal that the individuals are not (or did not) do so. The city submits, and I find, that individuals would be easily identifiable as tenants known to an appellant who was their landlord.

[34] Regarding the second requirement, the city submits, and I find, that it would be an unjustified invasion of personal privacy for the city to confirm or deny the existence of records responsive to the access request. I find that this is the case because confirming or denying an application or receipt of public assistance is personal information related to an individual's eligibility for social service or welfare benefits or a determination of their benefit level, under the presumption at section 14(3)(b) of the *Act*.

[35] For these reasons, I uphold the city's decision to claim section 14(5), subject to my review of its exercise of discretion.

Did the city exercise its discretion under section 14(5)? If so, should the IPC uphold the exercise of discretion?

[36] Section 14(5) is discretionary. An institution must exercise its discretion, and it is undisputed that the city exercised its discretion here.

[37] On appeal, the IPC 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, and
- it fails to take into account relevant considerations.

[38] The IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.⁹ The IPC may not, however, substitute its own discretion for that of the institution.¹⁰

Relevant considerations

[39] Relevant considerations may include some of those listed below, but additional unlisted considerations may be relevant.¹¹ The city explains that it carefully considered the following factors as in deciding to claim section 14(5):

⁹ Order MO-1573.

¹⁰ Section 43(2).

¹¹ Orders P-344 and MO-1573.

- the purposes of the *Act*, including the principle that the privacy of individuals should be protected,
- the wording of the section 14(5) exemption and the interests it seeks to protect (the protection of the personal privacy of individuals),
- whether the requester is seeking his or her own personal information (he is not),
- whether the requester has a sympathetic or compelling need to receive the information (the city determined that he does not),
- whether the requester is an individual or an organization (the requester is acting as a landlord),
- whether disclosure will increase public confidence in the operation of the institution (the city concluded that it would not because this matter is primarily of a private nature between a landlord and their tenants),
- the nature of the information and the extent to which it is significant and/or sensitive to the city, the requester or any affected persons (the city determined that these types of records, if they exist, would be highly sensitive), and
- the historic practice of the city with respect to similar information (it historically refuses to confirm or deny the existence of these types of records in response to access requests).

[40] These are all factors that the IPC has historically recognized as possibly relevant in the exercise of discretion. I find that they are all relevant considerations in the circumstances of this appeal, given the type of records requested. The city submits, and I accept, that it has not taken into account any irrelevant considerations. The city submits that it acted in good faith and for an appropriate purpose, and I have no reason to find otherwise. The appellant's bald assertion that the city acted in bad faith is not enough to establish that it has. As a result, I uphold the city's exercise of discretion.

[41] In conclusion, I find that the city properly applied section 14(5) of the *Act*.

Issue C: Is there a compelling public interest in disclosure of the records (if they exist) that clearly outweighs the purpose of the section 14(5) exemption?

[42] In his representations, and for the first time, the appellant raised the public interest override at section 16 of the *Act*. For the reasons that follow, I find that there is no public interest in the records, if they exist,, so section 16 does not apply to override section 14(5) of the *Act*.

[43] Section 16 of the *Act*, the "public interest override," provides for the disclosure of records that would otherwise be exempt under another section of the *Act*. It states:

An exemption from disclosure of a record under sections 7, 9, 9.1, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[44] For section 16 to apply, two requirements must be met:

- there must be a compelling public interest in disclosure of the records and
- this interest must clearly outweigh the purpose of the exemption.

[45] The *Act* does not state who bears the onus to show that section 16 applies. The IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure that clearly outweighs the purpose of the exemption.¹²

Public interest

[46] In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*’s central purpose of shedding light on the operations of government.¹³ In previous orders, the IPC has stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.¹⁴

[47] A “public interest” does not exist where the interests being advanced are essentially private in nature.¹⁵ However, if a private interest raises issues of more general application, the IPC may find that there is a public interest in disclosure.¹⁶

[48] In arguing that section 16 should override section 14(5), he reiterates the argument (that I already rejected, above) about the consent form (if it exists) allowing for disclosure. He also makes several statements, including allegations about fraud and establishing trust in the city’s spending of taxpayers’ money. I will not set these statements out here, but in summary, I understand him to believe that the city is “encouraging” fraud and hampering accountability by claiming section 14(5) here. He also says the information “is being used to determine eligibility in Ontario Works,” for “verifying Ontario Works.” It is not clear to me whether he means that he would be verifying Ontario Works’ decisions (if any) or whether the records would reflect this. Regardless, I am not satisfied that the appellant has established that there is a public

¹² Order P-244.

¹³ Orders P-984 and PO-2607.

¹⁴ Orders P-984 and PO-2556.

¹⁵ Orders P-12, P-347 and P-1439.

¹⁶ Order MO-1564.

interest in disclosure of the records, if they exist.

[49] Rather, based on my review of the request and the appellant's representations, I find that the interests being advanced here are essentially private in nature, as between a landlord and former tenants. I am not persuaded by the appellant's general statements about accountability that this private interest raises issues of a more general application. In addition, the presence of a consent statement (to Ontario Works and a government ministry) does not establish that there is a public interest in the records, if they exist.

[50] Since I have found that there is no public interest in the requested records, if they exist, I do not need to consider whether such an interest would have been "compelling" and would clearly outweigh the purpose of the section 14(5) exemption.

[51] For these reasons, I uphold the city's decision and dismiss the appeal.

ORDER:

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

Original Signed by: _____
Marian Sami
Adjudicator

October 31, 2024 _____