



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER MO-1891**

**Appeal MA-030383-1**

**Regional Municipality of York**



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## **NATURE OF THE APPEAL:**

This appeal concerns a decision of the Regional Municipality of York (the Municipality) made pursuant to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) made a request for information regarding a petition against her signed by a group of residents of a named housing development that was submitted to the Municipality.

The Municipality identified one responsive record (the petition). It issued a decision letter in which it agreed to provide the appellant with partial access to the information requested. The Ministry granted access to page 1, which sets out the substance of the petition. It denied access to page 2, which sets out the petitioners' names, addresses and telephone numbers, pursuant to section 14 (personal privacy).

The appellant appealed the Municipality's decision.

The parties were unable to resolve the appeal during the mediation stage and the file was moved to the adjudication stage for an inquiry.

I commenced my inquiry by sending a Notice of Inquiry to the Municipality. The Municipality submitted representations and agreed to share the non-confidential portions with the appellant. In its representations the Municipality raised for the first time the application of section 8(1)(e) (endangerment to life or physical safety) to the information at issue. I will address the late raising of this discretionary exemption below.

I then sent a Notice of Inquiry to the appellant and provided the appellant with a copy of the Municipality's non-confidential representations. The appellant chose not to submit representations.

After further review of the Ministry's representations and the information at issue I determined that section 38(b) of the *Act* may apply since the record at issue may contain the personal information of the appellant and other individuals. Accordingly, I sent a supplementary Notice of Inquiry to the Municipality seeking representations on the application of section 38(b) and exercise of discretion. The Municipality submitted representations and agreed to share them with the appellant. I then sent another Notice of Inquiry to the appellant along with a complete copy of the Municipality's representations. Again, the appellant chose not to submit representations.

## **DISCUSSION:**

### **LATE RAISING OF A DISCRETIONARY EXEMPTION**

Section 8(1)(e) is a discretionary exemption that must be raised within 35 days of the issuance of the Confirmation of Appeal by this office. In this case, the Confirmation of Appeal is dated November 28, 2003. The Municipality was advised in the Confirmation of Appeal that it had until January 5, 2004 to raise any new discretionary exemptions. There is no indication in the

file that the Municipality ever raised the application of section 8(1)(e) prior to this date. On February 12, 2004, after the conclusion of the mediation stage, a Mediator's Report (the Report) was issued. Section 8(1)(e) is not listed as an issue in the Report. The parties were invited to review the Report and to contact the mediator by March 1, 2004 with any errors or omissions. The Municipality did not raise the absence of section 8(1)(e) from the Report.

The section 8(1)(e) exemption was first raised by the Municipality in its representations dated July 7, 2004, 188 days after the January 5, 2004 deadline. This raises an issue of whether or not I should consider this exemption, despite the fact that it was raised after the expiry of the 35-day time period.

This office's *Code of Procedure* (the *Code*) sets out basic procedural guidelines for parties involved in an appeal. Section 11 of the *Code* sets out the procedure for institutions wanting to raise new discretionary exemption claims. Section 11.01 is relevant to this issue and reads:

In an appeal from an access decision an institution may make a new discretionary exemption within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

In Order P-658, former Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary in order to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*. She also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, this could require a re-notification of the parties in order to provide them with an opportunity to submit representations on the applicability of the newly claimed exemption, thereby delaying the appeal. Finally, she pointed out that in many cases the value of information sought by appellants diminishes with time and, in these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

The objective of the 35-day policy established by this office is to provide government organizations with a window of opportunity to raise new discretionary exemptions, but to restrict this opportunity to a stage in the appeal where the integrity of the process would not be compromised or the interests of the appellant prejudiced. The 35-day policy is not inflexible. The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.

The Municipality did not submit representations regarding the late raising of section 8(1)(e).

In the circumstances, especially given how late section 8(1)(e) was raised, and the failure of the Municipality to provide any explanation for this delay, I am not persuaded that I should depart from this office's usual requirement that institutions raise new discretionary exemptions within

35-days of the issuance of the Confirmation of Appeal. Accordingly, I will not consider the application of the section 8(1)(e) exemption in this appeal.

## **PERSONAL INFORMATION**

### **What constitutes “personal information”?**

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

...

(d) the address, telephone number, fingerprints or blood type of the individual,

...

(g) the views or opinions of another individual about the individual,

(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;

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 (Order 11).

The Municipality takes the position that it need only assess to what extent the information at issue on page 2 of the record contains personal information. Based on this approach, the Municipality concludes that the record does not contain the personal information of the appellant. The Municipality submits that the information on page 2 of the record contains recorded information about other individuals in their personal capacity, specifically the names, addresses and telephone numbers of other individuals and, therefore, qualifies as personal information. The Municipality also states that it is entirely reasonable and likely that the named individuals listed on page 2 of the record could be identified if the appellant had access to this information.

I concur with the Municipality that the record does contain the personal information of other individuals, specifically the names, addresses and telephone numbers of those individuals who signed the petition. However, contrary to the Municipality’s view, I find that this record also contains the appellant’s personal information.

On my review, there is one record at issue. It is a two-page record and it is the well established approach of this office to conduct its analysis on a record-by-record basis. Accordingly, while the Municipality may have released page 1 of the record to the appellant “the record” remains at issue. The appellant’s personal information appears on page 1 of the two-page record and includes the appellant’s name and the views of other individuals about the appellant.

Therefore, I find that the record contains the personal information of both the appellant and other individuals. I must now consider the application of the section 38(b) exemption to this record.

## **INVASION OF PRIVACY**

### **Introduction**

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

Section 38(b) of the *Act* provides:

A head may refuse to disclose to the individual to whom the information relates personal information,

where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

In this case, I have determined that the record contains the personal information of both the appellant and other individuals. As a result, I will consider whether the disclosure of the personal information at issue would be an unjustified invasion of the personal privacy of other individuals, and is therefore exempt from disclosure under section 38(b).

Under section 38(b) of the *Act*, where a record contains the personal information of both the appellant and another individual, and disclosure of the information would constitute an “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the appellant. On appeal, I must be satisfied that disclosure *would* constitute an unjustified invasion of another individual’s personal privacy (see Order M-1146).

If the information falls within the scope of section 38(b), the institution may choose to exercise its discretion to disclose the information to the requester. I will review the Ministry’s exercise of discretion under section 38(b) later in this order, after I have decided whether the exemption applies.

In determining whether the exemption in section 38(b) applies, sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the head to consider in making a determination as to

whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(3) lists the types of information whose disclosure is *presumed* to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767], though it can be overcome if the personal information at issue falls under section 14(4) of the *Act* or, if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 14 exemption. (See Order PO-1764)

If none of the presumptions in section 14(3) apply, the institution must consider the application of the factors listed in section 14(2), as well as all other considerations that are relevant in the circumstances of the case.

In addition, if any of the exceptions to the section 14(1) exemption at paragraphs (a) through (e) apply, then disclosure would not be an unjustified invasion of privacy under section 38(b).

### **Unjustified invasion of another individual's personal privacy**

This office has addressed the treatment of personal information contained in a petition involving circumstances similar to those in this case.

In Order M-580, Adjudicator Holly Big Canoe considered the application of section 14 to the signatures contained in a petition. The petition in that case recorded a complaint about the condition of the appellant's property. Adjudicator Big Canoe found the signatures exempt by virtue of the presumption against disclosure in section 14(3)(b) (investigation into possible violation of law). In reaching this conclusion, Adjudicator Big Canoe concluded that the information at issue was compiled and was identifiable as part of an investigation into a possible violation of law under the institution's Property Standards By-law.

Senior Adjudicator David Goodis applied the reasoning in Order M-580 to the circumstances in Order MO-1209, where the record at issue was a petition containing the substance of a complaint and the signatures, addresses and telephone numbers of ten individuals. The institution disclosed the substance of the petition and the signatures, but not the addresses and telephone numbers. The appellant in that case indicated that he was no longer interested in the signatories' telephone numbers and so at inquiry the information at issue was only the addresses of the ten individuals. Senior Adjudicator Goodis found that the record at issue was compiled and is identifiable as part of an investigation into a possible violation of law under the institution's Property Standard By-law 45-90 and the *Building Code Act, 1992*. He concluded that section 14(3)(b) applied to the record at issue and he found that disclosure of the record would constitute an unjustified invasion of the individuals' personal information under section 38(b).

Turning to this appeal, I note that the Municipality has not made any representations regarding the application of section 14(3)(b) in the circumstances in this appeal. However, on my review of the record, section 14(3)(b) may be a relevant consideration. Page 1 of the record, which was disclosed to the appellant, states in part:

We ask that you take our concerns very seriously and hear our fear of violence brewing around this situation. [The appellant's] body language is intimidating and threatening and our children are increasingly anxious that she may physically attack them. We await your timely response...

In my view, the tone and substance of this passage imply a request for an immediate investigation into the allegations set out in the complaint submitted by the individuals who signed the petition. However, there is no evidence before me that the petitioners' request was addressed to a law enforcement body, or that it was compiled and is identifiable as part of an investigation into a possible violation of law. Therefore, in the circumstances of this case, while there are elements of a section 14(3)(b) argument, I find that the information before me does not substantiate the application of this section. Having found the section 14(3)(b) presumption not applicable I must now consider other factors weighing for or against disclosure.

The Municipality has raised in its representations the application of sections 14(2)(e) (unfair exposure to pecuniary or other harm) and 14(2)(h) (supplied in confidence) as factors it considered in deciding to withhold the information at issue. For reasons expressed below, section 14(2)(f) (highly sensitive) may be a relevant factor and so I will also consider its application in this appeal. Section 14(2)(e), (f) and (h) read:

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

- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence;

With respect to section 14(2)(e), the Municipality states that it felt this was a relevant factor since the "safety of individuals" is raised by the substance of the complaints set out on page 1 of the petition.

With respect to section 14(2)(h), the Municipality submits that while there is no explicit expectation that the identity of the petitioners would be kept confidential there is an implicit expectation based on the fact that the substance of the petition appears on a separate page from the names, addresses and telephone numbers of the petitioners.

In addition, while the Municipality does not expressly raise the application of section 14(2)(f), the substance of the petition and the Municipality's representations suggest that one of the factors it considered in deciding not to disclose was the highly sensitive nature of the information, evidenced by the strained relationship between the petitioners and the appellant.

I am satisfied that the Municipality's reliance on sections 14(2)(e) and (h) are relevant factors that it considered in reaching its decision to not disclose the information at issue to the appellant. I am also satisfied that section 14(2)(f) is a relevant consideration favouring non-disclosure. In addition, considering other unlisted factors that could mitigate against disclosure, I note that the information at issue does not contain the appellant's personal information and the appellant has not raised any factors weighing in favour of disclosure. The Municipality has provided the appellant with all of the information that contains her personal information and has denied access only to information that pertains to other individuals.

I find that none of the exceptions under section 14(4) apply. The application of the "public interest override" at section 16 of the Act was not raised, and I find that it has no application in the circumstances of this appeal.

Accordingly, taking into account all of the listed and unlisted factors, I find that disclosure of the information at issue would be an unjustified invasion of personal privacy, and it is exempt under section 38(b).

### **EXERCISE OF DISCRETION**

The section 38(b) exemption is discretionary, and permits the Municipality to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

The exercise of discretion under section 38(b) involves a balancing principle. The institution must weigh the appellant's right of access to his or her own personal information against the other individual's right to the protection of their privacy. If the institution determines that the release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives the institution the discretion to deny access to the personal information of the appellant.

The Commissioner may find that the institution erred in exercising its discretion where, for example,

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



In such a case this office may send the matter back to the institution for an exercise of discretion based on proper considerations (Order MO-1573). This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

The Municipality submits that it has exercised good faith regarding the processing of this file and has restricted the appellant's access based on relevant factors. The Municipality states that in reaching its decision to deny access to the information at issue it considered the following factors:

- the section 38(b) exemption seeks to protect the interests of those whose personal information could be disclosed from being exposed unfairly to personal harm
- the appellant is not seeking her own personal information, but rather the personal information of other individuals
- there is no apparent sympathetic or compelling need for the requester to receive the information
- the relationship between the appellant and any affected persons appears to be confrontational

In the circumstances of this case, I am satisfied that the Municipality has properly balanced the appellant's right of access against privacy considerations. Accordingly, I find that the Municipality has not erred in the exercise of its discretion to deny the appellant access to the withheld information.

**ORDER:**

1. I uphold the Municipality's decision that the withheld portions of the record qualify for exemption under the *Act*.

Original signed by: \_\_\_\_\_  
Bernard Morrow  
Adjudicator

December 23, 2004  
\_\_\_\_\_