

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2977

Appeal MA12-306

City of Ottawa

November 14, 2013

Summary: The appellant sought access to records held by the city about an incident which resulted in the appellant sustaining a dog bite. The city granted access to certain records, and denied access to portions of three records (including the names, dates of birth, addresses, gender, telephone numbers and/or statements of two affected parties) on the basis of the exemptions in sections 14(1) and 38(b) (personal privacy) of the *Act*. This order finds that the withheld portions of the records contain the personal information of identifiable individuals other than the appellant, and upholds the application of sections 14(1) and 38(b) to the withheld portions of the records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2(1) (definition of "personal information"), 14(3)(b), 38(b).

Orders and Investigation Reports Considered: Order MO-2147.

OVERVIEW:

[1] The City of Ottawa (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all records regarding a particular dog attack on a specified date.

[2] The city identified the responsive records and granted partial access to them. Access was denied to some information in the records on the basis of the exemption in

section 14(1) (personal privacy) of the *Act*. The city also advised that some information in the records was being denied as it was not responsive to the request.

[3] The appellant, through a representative (hereafter "the appellant"), appealed the city's decision. In his letter of appeal, the appellant also took the position that additional records responsive to the request should exist.

[4] During mediation an additional responsive record was identified. The city provided partial access to this record, and denied access to some information on the basis of the exemptions in sections 8(1)(d) (law enforcement) and 14(1) of the *Act*. The city also advised that some information in the record was denied as it is not responsive to the request.

[5] Also during mediation, certain affected parties consented to the disclosure of information in the records relating to them, and the city disclosed that information to the appellant. Two other affected parties were identified. One of these parties did not consent to the disclosure of their personal information, and the other could not be located or contacted.

[6] The appellant confirmed that he was not pursuing access to certain records, thereby removing section 8(1)(d) from the exemptions at issue in this appeal. The appellant also confirmed that he was no longer appealing the issue of whether additional records exist.

[7] The city maintained that the exemption in section 14(1) applied to the remaining withheld portions of the records. It also advised that, as one record may contain the personal information of the appellant, section 38(b) (personal privacy) would apply to this record.

[8] Mediation did not resolve this file, and it was transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry to the city and one affected party, initially, and received representations from the city. I then sent the Notice of Inquiry, along with a complete copy of the representations of the city, to the appellant, who declined to provide representations.

RECORDS:

[9] The records remaining at issue are portions of an Animal Bite Report and two Occurrence Reports. The withheld portions include the names, dates of birth, addresses, gender, telephone numbers and/or statements of two affected parties.

ISSUES:

- A: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B: Does the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply to the information at issue?

DISCUSSION:

A: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[10] 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,

- (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 if 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;

[11] 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

[12] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.²

[13] The city takes the position that the exempted information found in the Animal Bite Report and the two Occurrence Reports constitutes personal information as defined under section 2(1) of the *Act*. It states:

The types of information that are exempted are name, telephone number, municipal address, and information including descriptions of relationships that would reveal these types of information. The Affected Parties whose personal information is at issue in this appeal are individuals who were in contact with the City and/or were involved in respect of occurrences involving dog(s) that were the subject of potential/actual infractions of the City Animal Care and Control By-law These individuals included person(s) who provided information to the City in furtherance of the City investigation and who were responsible for the dog(s). The information therefore constitutes personal information under section 2(1)(h) of the definition of personal information under the *Act*.

[14] The city also submits that the information was provided in a personal capacity, and not a professional, official, or business capacity.

[15] The appellant did not provide representations in this appeal.

[16] As noted above, the portions of the records remaining at issue consist of the names, dates of birth, addresses, gender, telephone numbers and/or statements of two

¹ Order 11.

² Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

affected parties, contained in an Animal Bite Report and two Occurrence Reports. The dates of birth, addresses, gender and telephone numbers of the affected parties are clearly their personal information under paragraphs (a) and (d) of the definition of personal information in section 2(1) of the *Act*.

[17] With respect to the names and statements of these individuals, I am satisfied that they constitute personal information under paragraph (h) of the definition, because their names appear with other personal information relating to them.

[18] I also note that the portion of the Animal Bite Report that was disclosed to the appellant contains the name and address of the appellant, as well as other information relating to the appellant. Applying a record-by-record³ approach to the records at issue, I find that the Animal Bite Report also contains the personal information of the appellant.

[19] Because the Animal Bite Report contains the personal information of the appellant and other individuals, I will consider whether the discretionary exemption in section 38(b) applies to the withheld information in this record.

[20] The other records remaining at issue contain only the personal information of identifiable individuals other than the appellant, and I will review the application of the mandatory exemption in section 14(1) to these records.

B: Does the mandatory exemption in section 14(1) or the discretionary exemption in section 38(b) apply to the records?

[21] 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 exemptions from this right.

[22] Under section 38(b), where a record contains personal information of both the requester 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 requester. Section 38(b) reads:

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

³ See Order M-352.

[23] If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

[24] Under section 14, where a record contains personal information only of an individual other than the requester, the institution must refuse to disclose that information unless disclosure would not constitute an "unjustified invasion of personal privacy". Section 14(1)(f) reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

[25] In both section 38(b) and 14 situations, sections 14(1), (2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the individual's personal privacy. Section 14(2) provides some criteria 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. In addition, if the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy.

[26] The city submits that the disclosure of the information remaining at issue would constitute an unjustified invasion of the personal privacy of the affected parties. It refers to the presumption in section 14(3)(b) which reads:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

[27] The city submits that this presumed invasion of privacy applies because "all the personal information [was] collected as part of an investigation into a possible violation of law." It states that the potential violations relate to "individual(s) responsible for dog(s) in the area who may may/were allowing activity that contravenes the City Animal Care and Control By-law...." The city also submits that this information is similar

to by-law complainant information, which previous orders have found falls within the presumption in section 14(3)(b).⁴

[28] The city also refers to the factors in sections 14(2) (f), (g) and (h) in support of its position. Although the appellant did not provide representations, in the earlier stages of this appeal he raised the possible application of the factor in section 14(2)(d). These sections 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,

- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (f) the personal information is highly sensitive;
- (g) the personal information is unlikely to be accurate or reliable;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence;

[29] Regarding the factor in section 14(2)(h), the city states:

... it is established practice at the City to keep confidential the names of individuals who provide information to aid an investigation/register a complaint. In addition, the identity of individuals charged or convicted under the Animal Care and Control By-law ... would be kept confidential, although this type of information may become available through the prosecution of the matter in open courts or before the Animal Control Tribunal.

[30] With respect to the factor in section 14(2)(f), the city states that identifying information is highly sensitive in a dog bite context, and that disclosure of personal information relating to the affected persons may result in unwanted contact from the appellant and/or antagonism resulting in personal distress.⁵ Regarding the factor in section 14(2)(g), the city submits that the information collected from the affected parties may be incomplete and/or inaccurate in some respects.

⁴ The city refers specifically to Orders MO-2814, MO-2860 and MO-2147.

⁵ The city refers to Order MO-2147 in support of its position on this point.

[31] The city also refers to the factor in section 14(2)(d), and acknowledges that this is a possible factor favouring disclosure. However, the city states that, with respect to this factor:

The City defers to [the appellant's] submissions on what legal right(s), if any, are at issue and how acquiring the personal information might assist in exercising any such right(s). The City submits that there is other information in the records including the Dog Bite Report that may assist the appellant in any legal proceeding in respect of this matter.

[32] As noted, the appellant did not provide representations in this appeal.

Findings

[33] With respect to the application of the presumption in section 14(3)(b), on my review of the records and the representations, I am satisfied that the personal information of the two affected parties, contained in the two Occurrence Reports, was compiled by the city in the course of its investigation of a possible violation of law (a possible by-law infraction). It therefore fits within the presumption in section 14(3)(b). Accordingly, I find that the disclosure of the personal information contained in the two Occurrence Reports is presumed to constitute an unjustified invasion of the personal privacy of identifiable individuals under section 14(3)(b) of the *Act*.

[34] With respect to the information in the Animal Bite Report, I have not been provided with sufficient evidence to satisfy me that this information was compiled and is identifiable as part of an investigation into a possible violation of law. It appears that this record was created following the completion of the investigation, and for the purpose of providing information to the local health unit. Accordingly, I find that the withheld information in this record does not fall within the presumption in section 14(3)(b) as it was not compiled for the purpose of the investigation itself.⁶

[35] With respect to the factor favouring disclosure in section 14(2)(d), previous orders have confirmed that, for this section to apply, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and

⁶ See Order MO-2147. See also Orders MO-1498 and MO-1824-I.

- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.⁷

[36] In the absence of representations from the appellant, I am not satisfied that the personal information at issue is relevant to the fair determination of the appellant's rights, and find that the factor in section 14(2)(d) does not apply. No other factors favouring disclosure were referred to by the parties, and I find that there are no other factors favouring disclosure of the information to the appellant.

[37] Because the presumption in section 14(3)(b) applies to the withheld information in the two Occurrence Reports, and because there are no factors favouring disclosure, I am satisfied that the disclosure of the information in those records would constitute an unjustified invasion of the personal privacy of the affected parties. As a result, I find that the withheld portions of the two Occurrence Reports, which contain only the personal information of identifiable individuals other than the appellant, qualify for exemption under section 14(1) of the *Act*.

[38] Regarding the withheld portions of the Animal Bite Report, in the absence of any factors favouring disclosure, I find that this information qualifies for exemption under section 38(b) of the *Act*, subject to my review of the city's exercise of discretion.

Exercise of discretion

[39] As noted above, section 38(b) is a discretionary exemption. When a discretionary exemption has been claimed, an institution must exercise its discretion in deciding whether or not to disclose the record at issue. On appeal, the Commissioner may determine whether the institution failed to do so.⁸

[40] 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 consideration,
- it fails to take into account relevant consideration.

⁷ Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

⁸ Orders PO-2129-F and MO-1629.

[41] In such circumstances, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁹ This office, may not, however, substitute its own discretion for that of the institution.¹⁰

[42] The city submits that it appropriately applied section 38(b) of the *Act* to exempt the personal information in the Animal Bite Report. It states that it properly exercised its discretion to apply section 38(b) in order to protect the confidentiality of the personal information of the affected parties. It also notes that it severed portions of the records consistent with section 4(2) of the *Act*, and "disclosed as much of the responsive record as possible without disclosing information which was exempt." It also notes that, by doing so, the appellant was provided with an account of the investigation including a description of the bite injury.

[43] On my review of the circumstances of this appeal, the information remaining at issue, and in the absence of representations from the appellant, I am satisfied that the city properly exercised its discretion to apply the exemption in section 38(b) to the information which I have found qualifies for exemption under that section. I note that the city has provided the appellant with significant parts of the records relating to the incident, and has denied access only to those portions which contain the personal information of identifiable individuals. Accordingly, I am satisfied that the city has not erred in exercising its discretion not to disclose to the appellant the remaining information contained in the records.

ORDER:

I uphold the decision of the city, and dismiss the appeal.

Original signed by: _____
Frank DeVries
Adjudicator

_____ November 14, 2013

⁹ Order MO-1573.

¹⁰ Section 43(2).