

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3040

Appeal MA12-593

The Corporation of the Township of Adjala-Tosorontio

April 22, 2014

Summary: The appellant sought access to letters of complaint received by the township about a specified property owned by the requester. The township denied access in full to the letters of complaint. In this order, the decision of the township to deny access to some information on the basis of the exemption in section 38(a) (discretion to refuse requester's own information), in conjunction with section 8(1)(d) (confidential source), is upheld. This order also finds that some withheld information does not qualify for exemption, and ought to be disclosed.

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"), 4(2), 8(1)(d), 38(a) and 38(b).

Orders and Investigation Reports Considered: Order MO-2238.

BACKGROUND:

[1] The Corporation of the Township of Adjala-Tosorontio (the township) received the following request for access to information under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*):

Please provide a copy of all information regarding a complaint about my property [specified property]. Please provide me an actual copy of the complaint.

[2] The township interpreted the request as being for access to any complaint received about the property and identified a number of complaint letters as responsive to the request. Relying on sections 8(1)(d) (confidential source) and 14(1) (invasion of privacy) of the *Act*, the township denied access to them, in full.

[3] The requester (now the appellant) appealed the decision.

[4] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*.

[5] I commenced the inquiry by seeking representations from the township and a number of individuals whose interests may be affected by the disclosure of the requested information (the affected parties) on the facts and issues set out in a Notice of Inquiry. As the records appeared to contain the personal information of the appellant, I decided to add the potential application of sections 38(a) (discretion to refuse requester's own information) and 38(b) (personal privacy) as issues in the appeal.

[6] The township and a number of notified affected parties (the responding affected parties) provided representations in response to the Notice of Inquiry. None of the responding affected parties consented to the disclosure of any of their personal information contained in the records at issue. A number of responding affected parties advised that their information was provided in confidence. A number of affected parties also explicitly expressed concern about the information at issue being disclosed to the appellant. One of the affected parties specifically referred to the factors at sections 14(2)(e) (unfair exposure to pecuniary harm) and 14(2)(f) (highly sensitive) of the *Act* as being applicable in the circumstances of this appeal.

[7] I then sought representations from the appellant on the facts and issues set out in a Notice of Inquiry, the summarized representations of some of the responding affected parties set out above and the township's non-confidential representations.¹ The appellant provided responding representations.²

RECORDS:

[8] The records at issue in the appeal are complaint letters. The letters were described in a confidential index of records prepared by the township for this office.

¹ In making my findings in this appeal, I have considered the confidential and non-confidential representations of the parties.

² In his representations the appellant makes a request for access to the entire investigation file. The request, the mediation and this appeal proceeded on the basis that the complaint letters were the only records at issue in the appeal. The appellant had not previously taken issue with the scope of the appeal. In my view, the scope of this appeal is limited to addressing the complaint letters only.

DISCUSSION:

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

[9] In order to determine which sections of the *Act* may apply, it is necessary to decide whether a 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 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;

[10] 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.³

[11] Sections 2(2.1) and 2(2.2) also relate to the definition of personal information. These sections state:

2(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

2(2.2) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[12] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.⁴

[13] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.⁵

[14] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁶

[15] The township submits that the letters at issue contain names of complainants as well as addresses and telephone numbers. The township submits that all the letters of complaint were written in a personal capacity. The township further submits that the complaints were prepared and submitted to the town on a confidential basis and that the entirety of the letters fall within paragraph 2(1)(f) of the definition of personal information.

[16] The appellant submits that the records contain his personal information relating to his privacy interests regarding himself and the use of his property.

³ Order 11.

⁴ Orders P-257, P-427, P-1412, P-1621, R-980015 and PO-2225.

⁵ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁶ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[17] Having reviewed the records at issue, I find that they all contain the affected parties' personal information, including their name, along with addresses and, in two instances, an affected party's telephone number. The records also contain the affected parties' complaints about the appellant's property and his actions, which, in the circumstances, qualifies as the appellant's personal information. Accordingly, I find that the record contains both the personal information of the appellant and the affected parties under section 2(1) of the *Act*.

B: Does the discretionary exemption at section 38(a) in conjunction with section 8(1)(d) apply to the information at issue?

[18] Section 36(1) 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.

[19] Section 38(a) reads:

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

if section 6, 7, **8**, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[20] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.⁷

[21] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[22] In this case, although the township did not claim the application of section 38(a) in its decision, it has acknowledged that section 38(a) should be considered in conjunction with section 8(1)(d).

Section 8(1)(d)

[23] Section 8(1)(d) states:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

⁷ Order M-352.

disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source.

[24] The term “law enforcement” is used in several parts of section 8, and is defined in section 2(1) as follows:

“law enforcement” means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
- (c) the conduct of proceedings referred to in clause (b)

[25] The term “law enforcement” has been found to apply to a municipality’s investigation into a possible violation of a municipal by-law.⁸

[26] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.⁹

[27] Except in the case of section 8(1)(e), where section 8 uses the words “could reasonably be expected to”, the institution must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient.¹⁰

[28] It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption.¹¹

Section 8(1)(d): confidential source

[29] The institution must establish a reasonable expectation that the identity of the source or the information given by the source would remain confidential in the circumstances.¹²

⁸ Orders M-16, MO-1245.

⁹ *Ontario (Attorney General) v. Fineberg (1994)*, 19 O.R. (3d) 197 (Div. Ct.).

¹⁰ Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

¹¹ Order PO-2040; *Ontario (Attorney General) v. Fineberg*, cited above.

[30] The township submits:

... Upon receipt of the complaints, the township's building inspector and by-law officer conducted an investigation to determine if the buildings located on the property complied with the *Building Code Act*¹³, the township's Zoning By-law and Clean and Clear By-law¹⁴. The investigation could have led to court proceedings if it were determined that there was a violation of the *Building Code Act*, the Township's Zoning By-law and Clean and Clear By-law.

... In this appeal, the records contain identifiable information about the complaints and were given for the purpose of starting an investigation into possible violations of the *Building Code Act*, the Township's Zoning By-law and Clean and Clear By-law.

The complainants agreed to provide written complaints concerning [the appellant's] property on the condition that their identities would be kept confidential and would not be released to [the appellant]. Upon receipt of the complaints, the township commenced an investigation into the condition and uses of the property and buildings on the property. The disclosure of the records would disclose information furnished only by a confidential source. The records are what triggered the investigation. Without the records, the township would have been unaware of possible violations of its by-laws.

Further, it is important in municipalities for residents to bring forth complaints about possible violations of by-laws. By-law Enforcement officers are unable to inspect all properties in a municipality and rely on the residents to bring possible by-law violations to their attention. Many residents will refuse to make complaints if their identity and the written complaint had to be disclosed to the property owner. Often the complainants are neighbours and the release of the complaint as well as their names and addresses can result in very difficult neighbour relations.

[31] The township further submits that the records cannot be disclosed in a severed form and that the entirety of the letters should be withheld.

[32] Two of the affected parties stated that they were told that their complaints would remain confidential. One stated that the information was provided with an expectation that it would remain confidential. Another of the affected parties asserted

¹² Order MO-1416.

¹³ 1992, S.O. 1992, c. 23.

¹⁴ Township by-law 04-52.

that they were the source of confidential information pursuant to section 8(1)(d) of the *Act*.

[33] The appellant submits that the complaints have nothing to do with any by-law or law enforcement matter, and that the first time that the appellant learned about any relation to by-law matters or by-law enforcement was when this was raised in the township's submissions. The appellant asserts that a concern over by-laws or by-law enforcement is only a pretext raised by the township's lawyer to avoid disclosure.

[34] The appellant further states that "a township's by-laws are not law and are not law enforcement" and that section 8(1)(d) does not apply because this is not a matter of "law enforcement". The appellant asserts that no charges for breach of a township by-law were laid. Instead, he submits, this is simply an issue between neighbours. The appellant submits that there is "no evidence that the complaint[s] [were made] for a proper purpose" and they ought to be released to him.

[35] With respect to confidentiality, the appellant submits that "there is no information provided that the complaints were confidential, nor does the township have the right to guarantee confidentiality [or] have the right to solicit complaints on the basis or assumption that the information will never be released".

[36] Finally, the appellant asserts that, based on a number of grounds, it would be absurd to withhold the information from him. I will address this submission in the discussion on the exercise of discretion below.

Analysis and finding

[37] As noted above, previous orders of this office have determined that a municipality's by-law enforcement process qualifies as a "law enforcement" matter for the purposes of section 2(1) of the *Act*.¹⁵ I agree with those orders and adopt their finding for the purposes of this appeal.

[38] I have reviewed the records and considered the representations of the parties to the appeal. The records relate to complaints made about infractions of the *Building Code Act*, the township's Zoning By-law and its Clean and Clear By-law. On the evidence provided, I accept that, at the time the affected parties submitted their complaints, they had a reasonable expectation that their identities would remain confidential.¹⁶ Finally, I find that disclosure of the names, signatures, addresses, handwritten date and in two cases, the telephone numbers of the complainants, would disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source.

¹⁵ See footnote 8, above.

¹⁶ See, for example Order MO-2238.

Accordingly, I find that this information qualifies for exemption under section 38(a) of the *Act*, in conjunction with section 8(1)(d).

[39] With one exception, I do not make the same finding with respect to the information in the body of the complaint letters. In my view, because of the number of letters at issue and the manner in which all except the last letter in the township's confidential index were written, after severing the personal identifiers described above, revealing the body of the letters would not disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source. Accordingly, that information does not qualify for exemption under section 38(a) of the *Act*, in conjunction with section 8(1)(d).

[40] In my view, however, because of the nature and content of body of the last letter in the township's confidential index, I find that disclosing it would disclose information furnished only by the confidential source. In that regard, I find that the last letter cannot reasonably be severed under section 4(2) of the *Act*¹⁷, as any potential severance would either reveal exempt information or result in disconnected snippets of information being revealed. Accordingly, I find that all of the information in the body of the last letter also qualifies for exemption under section 38(a) of the *Act*, in conjunction with section 8(1)(d). As I have found that the entirety of the last letter in the township's index of records qualifies for exemption under section 8(1)(d) of the *Act*, it is not necessary that I also consider whether it is exempt under section 38(b).

[41] I will now consider whether the balance of the information in all but the last letter qualifies for exemption under section 38(b) of the *Act*.

C: Does the discretionary exemption at section 38(b) apply to the information at issue?

[42] In the section 38(b) analysis that follows, I will only be considering the body of the letters remaining at issue, and not the last letter in the township's index of records.

[43] As I indicated above, section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. 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"

¹⁷ Section 4(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. The key question raised by section 4(2) is reasonableness and a head will not be required to sever the record and disclose portions where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, severance will not be considered where an individual could ascertain the content of the withheld information from the information disclosed. See in this regard, Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

[44] 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 approach 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.

[45] It has previously been held by this office that sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met. In particular, these orders have held that if the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). Similarly, if any paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[46] The above analysis applies only if the personal information of another identifiable individual remains at issue to be disclosed. I have carefully reviewed the complaint letters remaining at issue and the representations and in my view, once the personal identifiers set out above are removed from the letters, no information that qualifies as personal information of another identifiable individual, except the appellant, remains. Therefore, disclosing the remaining information in those letters would not result in an unjustified invasion of another individual's personal privacy. Accordingly, I will order that once the information that qualifies for exemption under section 8(1)(d) is severed from the letters, the remaining information be disclosed to the appellant.

D. Did the township properly exercise its discretion?

[47] I have also reviewed the circumstances surrounding the appeal and the townships representations on the manner in which it exercised its discretion to withhold the information under section 8(1)(d). Based on the evidence before me, I am satisfied that the township properly exercised its discretion not to disclose to the appellant the information that I have found to qualify for exemption under section 38(a).

[48] Finally, I find that the absurd result principle is not applicable to the information that I have found to qualify for exemption under section 38(a). The absurd result principle applies where, for example, the requester originally supplied the information or is otherwise aware of it. In those circumstances, the information may not be exempt, if withholding the information would be absurd and inconsistent with the purpose of the exemption.¹⁸ The very reason for this appeal is for the appellant to obtain the complaints and/or ascertain the identities of the complainants, which indicates that he

¹⁸ Orders M-444, M-451, M-613, MO-1323, PO-2498 and PO-2622.

does not believe that complaints were actually made or is unsure of the identities of the complainants. In the circumstances of this appeal, I find that the absurd result principle does not apply.

ORDER:

1. I uphold the township's decision to withhold the last letter in the townships confidential index of records as well as the names, signatures, addresses, handwritten date and telephone number of the complainants in the other letters at issue in the appeal.
2. I do not uphold the township's decision to withhold the balance of the information in the letters.
3. I order the township to disclose the balance of the information in all but the last letter in the township's confidential index of records by sending it to the appellant by **May 29, 2014** but not before **May 26, 2014**.
4. In order to ensure compliance with this order, I reserve the right to require the township to provide me with a copy of the material sent to the appellant.

Original Signed By:
Steven Faughnan
Adjudicator

April 22, 2014