

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3135

Appeal MA13-551

City Housing Hamilton Corporation

December 8, 2014

Summary: The appellant seeks access to the security camera footage from his apartment building. In its decision, City Housing denied the appellant access to three DVDs, in their entirety, under section 38(b) (personal privacy). During mediation, City Housing advised the appellant that it was willing to grant him access to his own personal information where he appears in the records. In this order, the adjudicator finds that the DVDs contain the personal information of the appellant and other individuals. The adjudicator upholds City Housing's decision and orders it to disclose as much of the appellant's personal information on the DVDs as can be reasonably severed without disclosing the personal information of other individuals.

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

Orders and Investigation Reports Considered: MO-1570

OVERVIEW:

[1] The City House Hamilton Corporation (City Housing) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to copies of the security camera footage of the floor hallway leading to the requester's unit in an apartment and the security camera footage for the front and rear doors of the apartment building recorded over a nine hour period on a specified date.

[2] City Housing created three DVDs in response to the request and issued a decision to the requester, denying him access to them. City Housing advised the requester that the records were exempt from disclosure under section 14(1) (personal privacy) of the *Act* because they identify other tenants in the building and their guests.

[3] The appellant appealed City Housing's decision.

[4] During mediation, City Housing clarified its decision and advised the mediator that it relied on section 38(b) (personal privacy) to withhold the DVDs as they also include the appellant's personal information. City Housing also advised the mediator that the factor weighing against disclosure in section 14(2)(f) (highly sensitive) applied to the DVDs. City Housing also indicated that it is prepared to disclose the portions of the DVDs on which the appellant's image appears.

[5] The appellant advised the mediator that he seeks access to the entire videos, not only the portions of the videos on which his image appears. He also claimed that the factor weighing in favour of disclosure in section 14(2)(b) (public health and safety) applied to the DVDs. The appellant also indicated that he believes that "identifying other tenants who live in the building is a moot issue", because he knows the other tenants and the individuals that visit.

[6] Mediation could not resolve the appeal and it was transferred to the adjudication stage of the appeals process. I began my inquiry by inviting City Housing to make representations in response to the issues raised in a Notice of Inquiry. City Housing submitted representations. I then invited the appellant to make representations in response to the Notice of Inquiry and City Housing's arguments, which were shared in accordance with section 7 of this office's *Code of Procedure* and *Practice Direction 7*. The appellant also submitted representations.

[7] In this decision, I uphold the decision of City Housing. I order it to disclose the portions of the records that contain only the appellant's personal information to him.

RECORDS:

[8] The records at issue consist of three DVDs.

ISSUES:

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

- C. Did City Housing exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[9] Under the *Act*, different exemptions may apply depending on whether a record at issue does or does not contain the personal information of the requester.¹ Where a record contains the requester’s own information, access is addressed under Part II of the *Act* and the exemptions at section 38 may apply. Where a record contains the personal information of individuals other than the appellant, access is addressed under Part I of the *Act* and the exemptions found at sections 6 to 15 may apply.

[10] In order to determine which sections of the *Act* may apply, it is necessary to first determine whether the records contain “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,

¹ Order M-352.

- (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.²

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

(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) For greater certainty, subsection (2.1) 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.

[13] 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.³

[14] 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.⁴

[15] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁵

² Order 11.

³ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

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

[16] City Housing submits that the records contain “personal information” as that term is defined in section 2(1), arguing that this “personal information” relates to the tenants in the apartment building and their guests who can be identified on the video.

[17] The appellant appears to agree that the DVDs contain the “personal information” of identifiable individuals and that anyone viewing the DVDs would be able to “associate the likeness of a person caught on the recording with the physical appearance of a person residing in the building.”

[18] Based on my review of the records, I find that the DVDs contain the “personal information” of identifiable individuals, including the appellant, as defined in section 2(1) of the *Act*. The DVDs consist of surveillance tapes from the appellant’s apartment building and contain images of identifiable individuals. Consistent with past orders of this office⁶, I find that the images contained in the DVDs fall within the ambit of paragraph (h) of the definition of personal information in section 2(1) of the *Act*. Accordingly, the DVDs contain the personal information of the individuals depicted, including the appellant.

[19] I note that portions of the DVDs contain the personal information of the appellant exclusively. During mediation, City Housing advised that it is prepared to disclose any of the appellant’s personal information that is contained in the DVDs. As City Housing is prepared to disclose this information to the appellant, I will not consider it further in this order. I will, however, order City Housing to disclose it to the appellant.

[20] As I have found that the DVDs contain the personal information of both the appellant and other identifiable individuals, I will consider whether they qualify for the personal privacy exemption at section 38(b) in Part II of the *Act*.

B. Does the discretionary exemption at section 38(b) apply to the DVDs?

[21] Section 38(b) of the *Act* is the discretionary personal privacy exemption under Part II of the *Act*. Section 38(b) provides:

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

if the disclosure would constitute an unjustified invasion of another individual’s personal privacy.

⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

⁶ Orders HO-005 and PO-2477.

[22] Because of the wording of section 38(b), the correct interpretation of "personal information" in the preamble is that it includes the personal information of other individuals found in the records, which also contains the requester's personal information.⁷

[23] In other words, where a record contains personal information of both the requester and another individual, and the 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.

[24] In the circumstances of this appeal, it must be determined whether disclosing the personal information of the appellant and the other individuals identified in the records would constitute an unjustified invasion of these other individuals' personal privacy under section 38(b).

[25] If the information at issue 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 personal information against the other individual's right to protection of their privacy.

[26] In determining whether the exemption in section 38(b) applies, sections 14(1), (2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of the personal information in the records would result in an unjustified invasion of another individual's personal privacy. Section 14(2) provides some criteria for the institution 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 under section 38(b).

[27] Both parties submit that the exceptions in section 14(4) of the *Act* do not apply to the DVDs. Based on my review of them, I agree and find that none of the exceptions in section 14(4) apply to the personal information in the DVDs.

Section 14(1)

[28] In its representations, City Housing submits that section 14(1) applies to the DVDs "as the requested information has images of the requester and other tenants of the building". City Housing then states that sections 14(1)(a) and (b) apply to the records, which read as follows:

⁷ Order M-352.

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

- (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
- (b) in compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates.

[29] City Housing does not make any submissions explaining why these exceptions apply to the DVDs. Based on my review of them, I find that section 14(1)(a) and (b) of the *Act* do not apply to the records. None of the other tenants in the apartment building were contacted for their consent and, therefore, none of these individuals that are identifiable in the DVDs consented to their disclosure to the appellant. Accordingly, section 14(1)(a) does not apply to the records at issue.

[30] With regard to section 14(1)(b), City Housing did not provide me with any evidence to demonstrate that there are compelling circumstances affecting the health or safety of an individual or a number of individuals. Based on my review of the DVDs, I find that section 14(1)(b) does not apply to them.

[31] In his representations, the appellant submits that section 14(1)(f) (reproduced above) applies. The appellant submits that "every person who lives in the building is aware that he/she is being recorded on security video. There is a notification of this fact in the front door lobby of the building. They should expect that in the event of a security incident that video will be viewed". It appears that the appellant believes that, as the building has notifications in place regarding the surveillance recording, the disclosure of the footage would not constitute an unjustified invasion of personal privacy.

Section 14(3)

[32] In his representations, the appellant submits that none of the presumptions in section 14(3) of the *Act* apply to the records at issue.

[33] In its representations, City Housing submits that the presumption in section 14(3)(h) of the *Act* applies. Section 14(3)(h) states:

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

indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

[34] City Housing submits that the footage "identifies the individuals' racial or ethnic origins or religious associations".

[35] Adjudicator Donald Hale considered the application of the presumption in section 14(3)(h) to a videotape depicting the events of a specified date as viewed by a camera located in a common area of a secondary school in Order MO-1570. In that decision, Adjudicator Hale found as follows:

I do not accept the position taken by the Board with respect to the application of section 14(3)(h) to the personal information contained in the videotape. While some of the physical characteristics of some of the affected persons are evident, I find that the presumption in section 14(3)(h) requires something more. In order to satisfy the requirements of the presumption, the record must "indicate the individual's racial or ethnic origin". In the present situation, the videotape does not convey this type of specific information. Rather, it simply displays a photographic image of the individual without any accompanying indication as to the racial or ethnic origin of the person. While it may be possible to draw certain assumptions about the racial or ethnic origin of the people who appear on the videotape, I find that the tape itself does not "indicate" such information with the requisite degree of specificity.

[36] I agree with Adjudicator Hale's findings and adopt them for the purposes of this analysis. Upon review of the DVDs, I find that they do not indicate the racial or ethnic origins or religious associations of identifiable individuals with the "requisite degree of specificity". The DVDs provide only video footage of the individuals captured by the surveillance cameras; there is no accompanying indication as to the racial or ethnic origin or religious associations of those individuals. Accordingly, I find that the presumption in section 14(3)(h) does not apply to the records.

[37] I have reviewed the remaining presumptions listed in section 14(3) and find that none apply to the DVDs.

Section 14(2)

[38] In situations where the records are claimed to be exempt under section 38(b), section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of privacy under section 38(b).⁸

⁸ Order P-239.

[39] In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring *disclosure* in section 14(2) must be present. In the absence of such a finding, the exception in section 14(1)(f) is not established and the mandatory section 14(1) exemption applies.⁹

[40] The list of factors under section 14(2) is not exhaustive. The institution must consider any circumstances that are relevant, even if they are not listed under section 14(2).¹⁰

[41] In its representations, City Housing submits that the factors in section 14(2)(a), (b), (e), (f) and (i) apply to the personal information in the DVDs. The appellant submits that the factor favouring disclosure in section 14(2)(b) applies. Additionally, the appellant submits that the individuals captured in the footage should not have an expectation of privacy as the surveillance cameras were located in public areas and there is a notification regarding video surveillance in the front door lobby of the building. The relevant sections of section 14(2) state as follows:

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,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
- (b) access to the personal information may promote public health and safety;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[42] With regard to section 14(2)(a), City Housing states that, as a social housing provider, approximately 50% of the tenants in the building have been housed from the Access to Housing wait list, including victims of abuse. City Housing submits that disclosing the identities of the tenants would violate its mandate of providing safe and affordable housing. In addition, City Housing submits that disclosing the personal information of identifiable individuals could put them at a "potential safety risk".

⁹ Orders PO-2267 and PO-2733.

¹⁰ Order P-99.

[43] Section 14(2)(a) is generally viewed as a factor *favouring* disclosure of the personal information at issue. However, it appears that City Housing submits that the DVDs should not be subjected to public scrutiny. Based on my review of the records and City Housing's representations, I find that section 14(2)(a) does not apply. The DVDs consist of surveillance footage taken from a residential building. There is no evidence before me that would suggest that the disclosure of this footage would subject City Housing's activities to public scrutiny. Therefore, I find that section 14(2)(a) does not apply.

[44] With regard to section 14(2)(b), City Housing submits that "when tenants are identified, there is a risk to the tenant and their family. Some of our tenants are vulnerable and as such, identifying these tenants makes them vulnerable to predators". While it appears that City Housing submits that there exists a health and safety risk to disclosure, section 14(2)(b) is a factor favouring disclosure where access to the personal information may promote public health and safety.

[45] In his representations, the appellants submits that section 14(2)(b) applies to the records. The appellant states as follows:

This issue is at its core an issue of public health and safety.... [The] request for security video was prompted by the illegal entry and vandalization [*sic*] of my apartment. The person(s) who did this could it do again to someone else. Until this matter is resolved all the tenants at the building at risk. The whole purpose of the security video is to make a safe environment where people know their persons and property are protected. If the residents are to be denied access to security video when they are threatened, it defeats the purpose of having these cameras in the first place.

[46] As stated above, section 14(2)(b) is a factor favouring disclosure where access to the personal information may promote public health and safety. While I agree with the appellant that the surveillance cameras are installed for the purposes of safety and security, I do not agree that the disclosure of the footage that contains the personal information of a number of identifiable individuals to an individual requester would assist in promoting public health and safety. Therefore, I find that section 14(2)(b) does not apply to the DVDs.

[47] With regard to section 14(2)(f), City Housing submits that some of the personal information contained in the records can be considered to be highly sensitive. City Housing states that if a tenant's safety is compromised, the tenant and their family are usually relocated either via Access to Housing or an internal transfer to protect their identity and ensure their safety. City Housing submits that the disclosure of the personal information of tenants who are potentially at risk to another tenant, who may share the information with others, would compromise the safety of its tenants.

[48] Previous orders of this office have found that to be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.¹¹ Based on my review of City Housing's representations and the records, I find that section 14(2)(f) applies. Considering City Housing's submissions regarding its tenants and potential safety issues, I find that there is a reasonable expectation of significant personal distress if the DVDs are disclosed to a fellow tenant. City Housing submits that some of the tenants are vulnerable and/or victims of abuse and that the disclosure of their identities would violate its mandate of providing safe and affordable housing. Upon consideration of these submissions, I find that it is reasonable to expect that these tenants would be distressed if their personal information is disclosed to the appellant. Therefore, I find that the factor weighing against disclosure in section 14(2)(f) applies to the records.

[49] Even though City Housing submits that sections 14(2)(e) and (i) apply to the records, it did not make any submissions on their application. Based on my review of these factors and the remaining factors in section 14(2), I find that none apply.

[50] In his representations, the appellant submits that "every person who lives in the building is aware that he/she is being recorded on security video. There is a notification of this fact in the front door lobby of the building. They should expect that in the event of a security incident that video will be viewed". It appears that the appellant believes that the tenants and other identifiable individuals have a lesser expectation of privacy as the cameras are visible and there is a notification that surveillance cameras are recording.

[51] I do not agree with the appellant's submission. While I agree that it is reasonable to expect that tenants are aware that they are under surveillance, I do not agree that the disclosure of the footage at issue to an individual requester would not constitute an unjustified invasion of their personal privacy. The appellant is not a member of the security staff at the building; he seeks the footage at issue for his own purposes.

[52] In Order MO-1570, Adjudicator Hale considered a similar argument in relation to security cameras located in "quasi-public" areas of a school and where their existence was well-known to students and staff:

In my view, the affected persons have a reasonable expectation that the tape recordings in which they appear will not be used for any purpose beyond school safety and security. I accept that people may be aware of the existence of the cameras, and that they are located in areas people would consider "quasi-public". Despite this, in my view, people have a reasonable expectation that the tape recordings will only be used for the

¹¹ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

limited purpose for which they were installed. I do not accept that persons automatically waive or lose their privacy rights upon entering a public area, even if they are aware of the existence of surveillance cameras. As stated in this office's "*Guidelines for Using Video Surveillance Cameras in Public Places*" (October 2001), "Pervasive, routine and random surveillance of ordinary, lawful public activities interferes with an individual's privacy." I find that the privacy expectation of the affected persons is a significant factor weighing against disclosure.

[53] I agree and adopt this analysis for the purposes of this appeal. The surveillance cameras that are the subject of the appellant's request are located in "quasi-public" places in the building, i.e. the hallway and entries to the building. Further, the appellant has provided me evidence to demonstrate that his fellow tenants and other individuals are aware of the existence of these cameras. However, I find that the appellant's fellow tenants and other individuals whose images may be captured by the cameras have a reasonable expectation that the footage in which they appear will not be used for any purpose beyond the building's safety and security and will not be viewed by anyone other than building staff and security and law enforcement. I agree with Adjudicator Hale's finding that individuals do not waive or lose their privacy rights when they enter areas under video surveillance. Moreover, this office has found that this type of surveillance of ordinary and lawful public activities may interfere with an individual's privacy, I find that the privacy expectations of the tenants and other individuals captured in the footage is a significant factor weighing against disclosure.

[54] In conclusion, I find that the consideration listed in section 14(2)(f) and the privacy expectations of other individuals weigh against disclosure of the records to the appellant. As I have found that there are no factors weighing in favour of disclosure, I find that the DVDs are exempt from disclosure under the personal privacy exemption in section 38(b) as their disclosure would result in an unjustified invasion of identifiable individuals' personal privacy.

C. Did City Housing exercise its discretion under section 38(b)? If so, should I uphold the exercise of discretion?

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

[56] In addition, I 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.

[57] In either case, I may send the matter back to the institution for an exercise of discretion based on proper considerations.¹² However, I may not substitute my own discretion for that of the institution.¹³

[58] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:

- the purposes of the *Act*, including the principles that information should be available to the public, individuals should have a right of access to their own personal information, exemptions from the right of access should be limited and specific and the privacy of individuals should be protected;
- the wording of the exemption and the interests it seeks to protect;
- whether the requester is seeking his or her own personal information;
- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;
- the relationship between the requester and any affected persons;
- whether disclosure will increase public confidence in the operation of the institution;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;
- the age of the information; and
- the historic practice of the institution with respect to similar information.

¹² Order MO-1573.

¹³ Section 43(2) of the *Act*.

[59] City Housing submits that I should uphold its exercise of discretion because its decision was made to protect the privacy of the tenants in the building. City Housing states that it did not make its decision in bad faith and that it is willing to sever the appellant's personal information from the DVDs and disclose it to him.

[60] In his representations, the appellant submits that I should not uphold City Housing's exercise of discretion because he believes it has acted in bad faith. The appellant suggests that there may be a "rogue staff member" who may have entered his unit and vandalized it. However, the appellant states that City Housing is "either oblivious of this possibility or they just don't want to address it". The appellant states that he is willing to view the videos at its premises as opposed to obtaining copies of the records, which would thereby "eliminate any issue over images being viewed by inappropriate people". The appellant also submits that he already possesses the information City Housing claims to be protecting, as he knows the identities of his fellow tenants. Finally, the appellant states that he does not have access to information regarding which tenants are at risk or vulnerable.

[61] I have reviewed the circumstances surrounding this appeal and representations of both parties on the manner in which City Housing exercised its discretion. I note that City Housing is willing to disclose the appellant's personal information to him and that the information that remains at issue consists of the personal information of the tenants of the building and other identifiable individuals. While I acknowledge that the appellant may be aware of the identities of his fellow tenants, the records contain their personal information and I have found that its disclosure would result in an unjustified invasion of other individuals' personal privacy under section 38(b). Further, while it is clear that the appellant wishes to view the DVDs to ascertain who entered his apartment and vandalized it, I find that City house did not improperly exercise its discretion to withhold the personal information of other individuals from disclosure. Based on my review of City Housing's representations and the DVDs, I am satisfied that it weighed the appellant's interest in obtaining access to information against the protection of other individuals' personal privacy. Accordingly, I am satisfied that City Housing did not err in the exercise of its discretion to refuse to disclose the personal information contained in the DVDs that relates to other identifiable individuals.

[62] Therefore, I uphold City Housing's decision to withhold those portions of the records that qualify for exemption under section 38(b) of the *Act*.

ORDER:

1. I order City Housing to disclose, by **January 13, 2015** as much of the appellant's personal information depicted in the DVDs as can reasonably be severed without disclosing any other individuals' personal information.

2. I uphold City Housing's decision to deny access to the remaining personal information in the DVDs.
3. In order to verify compliance with order provision 1, I reserve the right to require City Housing provide me with a copy of the DVD sent to the appellant.

Original Signed by: _____
Justine Wai
Adjudicator

_____ December 8, 2014