

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3303

Appeal MA14-361

City of Mississauga

March 15, 2016

Summary: The appellants submitted a request for records relating to complaints received about their property. The city located responsive records and granted the appellants partial access. The city claims that the withheld portions would constitute an unjustified invasion of personal privacy under section 38(b). The adjudicator finds that the personal information at issue qualifies for exemption under section 38(b) and dismisses the appeal.

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(2)(d), 14(3)(b), and 38(b).

OVERVIEW:

[1] The appellants filed a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Mississauga (the city) for records relating to complaints received about their property.

[2] The city conducted a search for responsive records and granted the appellants with access to most of the records. However, the city withheld access to portions of some records and withheld access to one record entirely. The city takes the position that disclosure of the withheld portions would constitute an unjustified invasion of personal privacy under section 38(b). The city also takes the position that the withheld information qualifies for exemption under the law enforcement provisions under section 8(1)(d)(Confidential source of information) in conjunction with section 38(a).

[3] The appellants appealed the city's decision to this office and the appeal was assigned to a mediator who explored settlement with the parties. Mediation did not resolve the appeal and the file was transferred to adjudication, where an adjudicator conducts an inquiry under the *Act*. During the inquiry stage, the parties provided written representations to this office, which were shared in accordance with this office's confidentiality criteria.

[4] In their representations, the appellants advise that they are not seeking access to the address and telephone numbers of any complainants contained in the records. Accordingly, this information has been removed from the scope of this appeal. I have also removed the name and address information of an individual unrelated to the property-related complaints in question. This information is included on page 36 which contains photocopies of registered mail receipts. It appears that this information was photocopied in batches and as a result registered mail receipts relating to other matters were included in the records responsive to this request.

[5] Finally, I removed pages 50-52 from the scope of the appeal. This record was identified as correspondence in the Index of Records provided by the city. In my view, the information in this record does not respond to the appellants' request as it relates primarily to a complaint about a different property.

[6] In this order, I find that disclosure of information relating to any complainants, including their names, would constitute an unjustified invasion of personal privacy under section 38(b). As a result, it was not necessary that I also determine whether this information qualified for exemption under section 38(a) in conjunction with section 8(1)(d).

RECORDS:

[7] The records at issue in this appeal consist of complaint reports, a site report, emails and a draft letter relating to a stagnant water complaint (pages 1-9 and 12-13) and fence hedge encroachment complaint (pages 7-9 and 18).

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Would disclosure of the records constitute an unjustified invasion of personal privacy under section 38(b)?
- C. Did the city properly exercise its discretion under section 38(b)?

DISCUSSION:

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

[8] 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.

[9] 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.¹

[10] 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.²

[11] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.³

[12] The city submits that the records contain the personal information of the appellants along with the individuals who filed a complaint with the city.

[13] The appellants advise that they are not interested in pursuing access to the address and telephone number of the complainants. However, the appellants continue to seek access to the names of the complainants along with any withheld information regarding the nature of the complaints the city received about their property. The appellants argue that this information constitutes their own personal information as it contains the complainants’ views and opinions about their property.

[14] Having regard to the representations of the parties and the records, I find that the names of the complainants falls within the ambit of the definition of “personal information” in paragraph (h) as their names appear with other personal information relating to them, namely their complaints to the city about a specified property [paragraph (f)].

[15] Though information relating primarily to a property would ordinarily not constitute “personal information”, I am satisfied that the withheld portions of pages 1-9 and 12-13 relating to the stagnant water complaint and pages 7-9 and 18 of the fence hedge complaint also contain the personal information of the appellants. In reviewing the records, I note that one of the reports disclosed to the appellants includes information the by-law officer obtained from one of the appellants along with the

¹Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

² Orders P-1409, R-980015, PO-2225 and MO-2344.

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

officer's assessment about that information. Though this information does not appear along with this individual's name, I find that this information could potentially reveal the appellants' involvement in a by-law infraction investigation. Accordingly, I find that the information at issue constitutes the "personal information" of appellants as defined in paragraph (g) of section 2(1). As a result of this finding, the city's decision regarding access will be determined under Part II of the *Act* which recognizes the special nature of requests for one's own personal information.⁴

[16] As I have found that some of the records contain the "personal information" of both the appellants and complainants, I will determine whether disclosure of this information would constitute an unjustified invasion of personal privacy of the complainants under section 38(b).

B. Would disclosure of the records constitute an unjustified invasion of personal privacy under section 38(b)?

[17] Section 38(b) states:

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.

[18] 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 records which also contain the requester's personal information.⁵

[19] 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.

[20] In the circumstances of this appeal, I must determine whether disclosing the personal information of other individuals to the appellants would constitute an unjustified invasion of their personal privacy under section 38(b).

[21] Sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of 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. The parties have not claimed that any of the exclusions in section 14(4) apply and I am satisfied that none apply.

⁴ Order M-352.

⁵ Order M-352.

[22] 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). Given that the affected individuals have not consented to the release of their information, I am satisfied that none of these paragraphs apply.

[23] 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 their 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.

14(3)(b): investigation into a violation of law

[24] The city submits that the record was compiled and is identifiable as part of an investigation into a possible violation of law and takes the position that disclosure would constitute an unjustified invasion of personal privacy taking into consideration the presumption under section 14(3)(b). This section states:

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.

[25] In its reply representations, the city submits that the records were created as a result of complaints it received. The city advises that its staff "responded and investigated the complaints and, as a result of their findings, issued property standard orders".

[26] The appellants' representations did not specifically address the issue of whether the presumption at section 14(3)(b) applies.

[27] Having regard to the submissions of the parties and the records, I am satisfied that the personal information at issue was collected as part of the city's investigation into a possible violation of law, namely its zoning by-laws. Previous decisions from this office have established that the presumption at section 14(3)(b) can apply to a variety of investigations, including those relating to by-law enforcement.⁶ In addition, the presumption only requires that there be an investigation into a possible violation of law. As a result, the presumption at section 14(3)(b) applies even if no proceedings were commenced against the appellants.⁷

[28] Accordingly, I find that the presumption at section 14(3)(b) applies in the circumstances of this appeal.

⁶Orders PO-2201, PO-2419, PO-2480, PO-2572 and PO-2638.

⁷Orders MO-2213, PO-1849 and PO-2608.

14(2)(d): fair determination of rights

[29] Section 14(2)(d) states:

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,

the personal information is relevant to a fair determination of rights affecting the person who made the request.

[30] For section 14(2)(d) 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
- (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.⁸

Representations of the parties

[31] The appellants advise that they require access to information confirming the identity of the complainants and the nature of the complaints made against them.⁹ The appellants explain that in the past the city investigated a similar complaint relating to the fence hedge encroachment issue. The appellants advise that this complaint was eventually dismissed by the courts a few years ago. Given the courts finding, the appellants submit that any complaint relating to the same encroachment issue should not have been investigated by the city, particularly if it originated from the same complainant. The appellants take the position that the city failed to appropriately manage recent complaints made about their property and argue that the confidentiality the city's complaint process affords complainants encourages frivolous and vexatious complaints.

⁸ 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.).

⁹ The appellants also submit that disclosure of the withheld information would confirm how many individuals filed complainants about their property. For the purposes of this order, I have referred to the individual or individuals who filed complaints in the plural, without confirming whether the records disclose there was more than one complainant to avoid any inadvertent disclosures of personal information.

[32] The appellants also submit that the factor favouring disclosure at section 14(2)(d) applies to circumstances of this appeal for the following reasons:

- Their rights to freedom, liberty, security and reasonable expectation of privacy has been violated by the city and they are contemplating legal proceedings against the city;
- Information confirming the identity of the complainants and the nature of the complaints is required to establish that the complaints were “frivolous and vexatious”; and
- The withheld information is required to “develop and present the case in Ontario Court”.

[33] The city’s representations did not specifically address the merits of the appellants’ argument that the factor at section 14(2)(d) applies.

Decision and analysis

[34] The appellants advise that they are contemplating legal action against the city for the manner in which it handled recent complaints about their property. Without commenting on whether the appellants have a cause of action that could be resolved by the courts, I find that the legal right identified by the appellants is not solely based on moral or ethical grounds. I am also satisfied that the appellants’ legal rights relate to a contemplated proceeding. Accordingly, find that parts 1 and 2 of the section 14(2)(d) test has been met.

[35] However, in order for the factor at section 14(2)(d) to be given any consideration in this appeal, the appellants’ must establish that all four parts of the test have been met.

[36] The appellants submit that disclosure of the personal information at issue would establish that the complaints were frivolous and vexatious. The appellants explain that this determination is significant to the determination of their legal rights. However, having regard to the submissions of the parties and the records themselves, I find that the personal information at issue has no bearing or significance to the legal rights identified by the appellants. I also find that disclosure of the personal information is not required for the appellants to prepare for the contemplated proceeding or ensure a fair hearing.

[37] Throughout their representations, the appellants advise that they know the identity of the individuals who filed complaints about their property. However, they argue that confirmation of this information would strengthen their case against the city. In my view, the names of the complainants have no bearing or significance to the question of whether the city mismanaged the property-related complaints against the appellants and in doing so violated their legal rights. In making my decision, I note that the questions the appellants raised about the city’s complaint process relate to systemic

issues about how complaints are initiated and the policies or processes that are in place at the city, which the appellants argue result in encouraging frivolous and vexatious complaints. Given the amount of information the appellants have been provided by the city about the nature of past and recent complaints, including the details of any property standard orders, I am satisfied that disclosure of the personal information at issue is not relevant to a fair determination of the legal rights identified by the appellants. Accordingly, I am not satisfied that parts 3 and 4 of the test in section 14(2)(d) has been met.

[38] As a result of my finding, I find that the factor at section 14(2)(d) does not apply in the circumstances of this appeal.

Summary

[39] I find that the presumption at section 14(3)(b) applies in the circumstances of this appeal. Given that the factor at section 14(2)(d) does not apply and no other factors favouring disclosure have been established, I find that disclosure of the personal information at issue would constitute an unjustified invasion of personal privacy under section 38(b).

[40] In making my decision I also considered whether the absurd result principle could apply in the circumstances of this appeal.

[41] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under section 38(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.¹⁰

[42] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement.¹¹
- the requester was present when the information was provided to the institution.¹²
- the information is clearly within the requester's knowledge.¹³

[43] In their representations, the appellants state that "we are aware of the identity of the complainants and their complaints". The appellants advise that they obtained this information from another city department.

[44] Having reviewed the records along with the appellants' submissions, I find that the absurd result principle has no application in this appeal. Given that the appellants

¹⁰ Orders M-444 and MO-1323.

¹¹ Orders M-444 and M-451.

¹² Orders M-444 and P-1414.

¹³ Orders MO-1196, PO-1679 and MO-1755.

did not provide the information at issue to the city nor were present when the information was provided, there is insufficient evidence to establish that the withheld information is clearly within their knowledge.

[45] Accordingly, I find that the personal information at issue contained in records is exempt from disclosure under section 38(b), subject my assessment of whether the city exercised its discretion properly.

C. Did the city properly exercise its discretion under section 38(b)?

[46] The section 38(b) exemption is discretionary, and permits an institution 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.

[47] In addition, 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

[48] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁴This office may not, however, substitute its own discretion for that of the institution.¹⁵

[49] The city submits that it properly exercised its discretion, considered the confidential nature of the records and the privacy concerns of the complainants along with the principle that requesters should have access to their own information. The city advised that it provided the appellants with "...all of the property standard records related to the concerned property" in addition to their personal information contained in the records.

[50] The appellants submit that the city failed to take into account all relevant considerations and took into account an irrelevant consideration. In support of this position, the appellants state:

... it seems completely contrary to the principles of [the *Act*] that the rights of the complainants be unjustly favoured over the rights of the individuals who are subject to the complaints. The city in managing the access request should have reviewed the history of the complaints against our property and establish the relevant factors in making the determination of granting or denying access to the requested information.

¹⁴ Order MO-1573.

¹⁵ Section 43(2).

In so far as examining all the relevant factors, we believe that the city has failed to consider all such factors and took the biased decision of protecting their by-law complaint process hence protecting the identity of the complainant and their complaint.

[51] I have carefully reviewed the submissions of the parties and am satisfied that the city properly exercised its discretion and in doing so took into account relevant considerations such as the sensitive nature of the personal information at issue. I am also satisfied that the city did not exercise its discretion in bad faith or for an improper purpose. I also find that there is no evidence that the city took into account irrelevant considerations, such as those alleged by the appellants.

[52] Though I note that one of the purposes of the *Act* includes the principle that requesters should have a right of access to their own information, I find that the nature of the personal information at issue, the manner of its collection, and the sensitivity of it outweighs this principle; particularly when I also consider the amount of information the city has already disclosed to the appellants.

[53] Having regard to the above, I find that the city properly exercised its discretion to withhold the personal information I found exempt under section 38(b).

ORDER:

I uphold the city's decision to deny the appellants access to the withheld portions of the records found responsive to the request.

Original Signed by: _____

Jennifer James
Adjudicator

March 15, 2016 _____