

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3443

Appeal MA16-57

City of Toronto

May 19, 2017

**Summary:** The appellant made a request to the city for records relating to particular noise complaints. The city identified responsive records and granted partial access, but denied access to some portions of the record citing the discretionary exemption at 38(b) (personal privacy) read in conjunction with section 14(3)(b) (investigation into a possible violation of law). On appeal, the adjudicator upholds the city's decision.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of personal information), 14(3)(b), 16, 38(b).

### OVERVIEW:

[1] A request was made to the City of Toronto (the city) pursuant to the *Municipal Freedom of Information and Privacy Act* (the *Act*) for access to records relating to particular noise complaints. Specifically, the requester asked for,

...any and all records of and between the complainant(s) and the city (eg letters, emails, notes, copies of notes on city computer) including the identity & address of the complainant(s), all details of the noise complaints on file relating in any way to the dog at [a specific address] including but not limited to [three specific complaint numbers].

[2] The city identified a number of records responsive to the request and granted

partial access to them. The city denied access to portions of the records citing section 14(1) of the *Act* and subsequently advised it is also relying on section 38(b) in conjunction with section 14(1).

[3] The requester, now the appellant, appealed the city's decision.

[4] As mediation did not resolve this appeal, the file was transferred to adjudication where an adjudicator conducts a written inquiry under the *Act*. As the adjudicator in this appeal, I invited the parties to make representations setting out their position on the issues. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and Practice Note 7. The appellant raised the possible application of the public interest override in section 16 of the *Act*.

[5] In this order, I uphold the decision of the city.

## **RECORDS:**

[6] Computer generated records and one letter. The information at issue consists of an affected party's name, address and telephone number.

## **ISSUES:**

- A. Does the record 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?
- C. Did the institution exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?
- D. Does the public interest override at section 16 apply to the information at issue?

## **DISCUSSION:**

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

[7] In order to determine which sections of the *Act* may apply, it is necessary to decide 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,

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

(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;

[8] 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.<sup>1</sup>

[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.<sup>2</sup>

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

### ***Parties' Representations***

[11] In the city's representations, it is pointed out that the information at issue includes the name, address and telephone number of an affected party. The city states that this is the personal information of an individual other than the appellant. If this information is disclosed, the affected party would be identified. The city submits that this information meets the requirements of paragraphs (d) and (h) of the definition of "personal information" in section 2(1) of the *Act*.

[12] The appellant states in her representations that she agrees that the identity of the complainant appears to fit within the definition of personal information in section 2(1). However, the appellant submits that the address may not be personal information if the affected party lives or rents in a building or rental. The appellant states that she has not been provided with even the street or address of the affected party's building. The appellant submits that providing the building address would not identify the affected party without a unit number. The appellant notes that the city severed the entire address including the street and City.

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<sup>1</sup> Order 11.

<sup>2</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

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

## ***Analysis and finding***

[13] From my review of the records, I find that they contain the personal information of the appellant and the withheld information also contains information that qualifies as the personal information of an affected party under the *Act*. This includes the name, address, telephone number and marital status of an individual that falls within the ambit of paragraphs (a), (d) and (h) of the definition of personal information in section 2(1) of the *Act*.

[14] In her representations, the appellant suggests that the affected party's address may not be considered personal information of the affected party if they live in a building or rental property. Although she did not refer to Order PO-2347, in that order, former Assistant Commissioner Mitchinson held that although an individual's address qualifies as "personal information" under paragraph (d) of section 2(1), an address that is not referable to an identifiable individual does not constitute personal information for the purposes of the *Act*. However, in this instance I am not satisfied that by disclosing the address without the unit number of the affected party is sufficient to render the affected party unidentifiable from the remaining information. Paragraph (d) of section 2(1), set out above, mentions "address" and makes no other distinction, therefore I find that in this instance the entire address is personal information under the *Act*.

### **B: Does the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply to the information at issue?**

[15] Since I found that the records contain the personal information of both the appellant and an affected party, section 36(1) of the *Act* applies to this appeal. 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.

[16] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.<sup>4</sup>

[17] 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 appellant. This involves a weighing of the appellant's right of access to their own personal information against the other individual's right to protection of their privacy.

[18] Sections 14(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy under section 38(b).

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<sup>4</sup> See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).

[19] If the information fits within any of paragraphs (a) to (h) of section 14(3), disclosure of the information is presumed to be an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[20] Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.<sup>5</sup>

[21] The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).<sup>6</sup>

[22] The city submits that the presumption at section 14(3)(b) of the *Act* applies to the personal information at issue.

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

[23] Section 14(3)(b) 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;

[24] The presumption can apply to a variety of investigations, including those relating to by-law enforcement<sup>7</sup> and violations of environmental laws or occupational health and safety laws.<sup>8</sup>

[25] Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.<sup>9</sup>

***Parties' representations:***

[26] The city, in its representations, states that access to records containing both the appellant's personal information as well as another individual's personal information has been denied in part under section 38(b) in conjunction with 14(1) as the disclosure

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<sup>5</sup> Order P-239.

<sup>6</sup> Order P-99.

<sup>7</sup> Order MO-2147.

<sup>8</sup> Orders PO-1706 and PO-2716.

<sup>9</sup> Orders P-242 and MO-2235.

could constitute an unjustified invasion of personal privacy of the other individual named in the records. This applied to pages 1, 3, 8 and 9. Furthermore, section 14(1) was used to deny access in part to page 5, which was a letter addressed to an affected party. The city states that releasing this information would also constitute an unjustified invasion of personal privacy.

[27] The city states that none of the exemptions in paragraphs 14(1)(a) to (e) apply and note that the affected party did not consent to the disclosure of the information. The city submits that the factors and presumptions in section 14(2), 14(3) and 14(4) assist in determining if disclosure would be an unjustified invasion of privacy under section 14(1)(f).

[28] The city submits that the presumption in section 14(3)(b) of the *Act* applies to the information that has been severed. The city states that it also considered the factors under section 14(2). It is the city's position that there would be no support for the application of any of the factors contained in 14(2) although it notes that section 14(2)(h) is relevant in that the personal information was supplied by the individual to whom the information relates in confidence.

[29] The city refers to Adjudicator Higgins' Order M-382 where it was confirmed "that personal information relating to investigations of alleged violations of municipal by-laws falls within the scope of the presumption provided by section 14(3)(b) of the *Act*." The city also refers to former Senior Adjudicator Goodis' Order MO-1496 where it was found that "section 14(3)(b) applied to information compiled by the city of Toronto as part of its investigation into a possible violation of the Building Code and the city's zoning by-law."

[30] The city submits that in the current appeal the personal information at issue (i.e., the name, address and telephone number of an individual who filed a complaint concerning a noisy animal) was compiled by the city as part of its investigation into a violation of a noise by-law (*Municipal Code Chapter 591*). Furthermore, the city advises complainants that their personal information will be kept confidential and therefore, they have an expectation of this confidentiality.

[31] In her representations, the appellant points to "compelling reasons" to release the information in the record. She states that the affected party has made three complaints, resulting in three notices being issued to the appellant by the city warning of potential fines and findings of guilt, and a possible unannounced site visit. The appellant states that without, at a minimum an address, the city may not even have a complainant within any appropriate radius of the appellant's address. The appellant states that the affected party is already aware of the appellant's address and it is only fair that similar information be reciprocated. The access to information would also be in line with the city's recommendation as set out in a letter from the city to the affected party recommending that the affected party and the appellant consider speaking with one another. The appellant states that the affected party is aware of the steps and

possible continued action requiring their testimony (as they received correspondence from the city) and as such cannot have any expectation of confidentiality. The appellant argues that the *Act* should not be used to allow an affected party to make numerous complaints which result in notices and inspections while remaining anonymous. The appellant submits that the release of the identity or address of the affected party would not in any way undermine the city's ability to effectively investigate a by-law infraction complaint.

[32] The affected party also made representations in this appeal. The affected party is of the view that the withheld portions of the record contain their personal information and they do not consent to having it released to the appellant.

[33] In its reply representations, the city states that its by-law complaint process is a confidential process where complainants are advised that their personal information will be kept confidential. It states that this applies whether there is one or several complaints about the same issue by the same individual. The confidentiality of the complainant is maintained.

[34] The city submits that the by-law related complaint and investigation process is a wholly separate and distinct process from that of the Ontario Court of Justice. The city's Municipal Licensing & Standards Division ("MLS") inspects and investigates private and public property to ensure compliance with Acts, by-laws and regulations. The city submits that during the entire MLS investigation process, names of complainants are kept confidential. Complainants are advised that if the issue is moved to the court system, the complainants would then be considered witnesses and may be required to give evidence. The city states that this in no way negates the confidentiality of the complainant's name(s) during the investigation process. The city states that even though it explained to the affected party that legal action against the dog owner can be initiated through the court system, this does not jeopardize the expected confidentiality of the affected party's personal information.

### ***Analysis and finding:***

[35] As stated above, the presumption in section 14(3)(b) can apply to a variety of investigations, including those relating to by-law enforcement.<sup>10</sup>

[36] I agree with the city that the personal information in the records was compiled during law enforcement investigations. This information was compiled by the by-law officers during their by-law enforcement investigations when they were investigating possible violations of law concerning the property. The letter in question (at page 5 of the records) was sent by the city to an affected party regarding the noise complaint at the appellant's address and I find it is part of the law enforcement investigation. Accordingly, the presumption in section 14(3)(b) applies to this personal information.

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<sup>10</sup> Order MO-2147.

[37] As the presumption in section 14(3)(b) applies, I will examine any factors favouring disclosure. The appellant did not specifically refer to section 14(2) but she did set out several factors she argues should be considered, including: that the city advised the affected party to speak with the dog owner about their concerns; that the city informed the affected party that she should be prepared to testify in court; and, that since the affected party made three separate complaints, as advised by the city, there can be no expectation of confidentiality. However, I do not find that the factors raised by the appellant favour disclosure. Advising an affected party to speak with the dog owner leaves that decision up to the affected party who can decide whether or not to approach the dog owner and therefore disclose their identity. The possibility that an affected party may testify in court concerning their complaint also is not a factor that favours disclosure as a by-law related complaint and investigation is a separate and distinct process from that of appearing before the Ontario Court of Justice as a witness. Finally, whether or not an affected party makes three noise complaints, the city is still bound by the *Act* which does not specify that an affected party's personal information can be released in that instance.

[38] Since I have found that there are no factors that favour disclosure, I find that the personal information at issue in the records is exempt by reason of the discretionary personal privacy exemption in section 38(b).

### **EXERCISE OF DISCRETION**

#### **C: Did the institution exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?**

[39] 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.

[40] 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.

[41] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>11</sup> This office may not, however,

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<sup>11</sup> Order MO-1573.



substitute its own discretion for that of the institution.<sup>12</sup>

### ***Relevant considerations***

[42] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>13</sup>

- 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
  - 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
- the historic practice of the institution with respect to similar information.

### ***Representations:***

[43] The city submits that, in refusing to disclose the information at issue, it considered all of the relevant factors, including the following:

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<sup>12</sup> Section 43(2).

<sup>13</sup> Orders P-344 and MO-1573.

- That individuals should have the right to access their own personal information. Access was provided to the requested records with the exception of the identifying information of the complainant, where if disclosed, would identify the complainant;
- There is a reasonable expectation of confidentiality within the city by-law enforcement process and individuals would be less likely to make complaints if they knew their identity would not be kept confidential;
- Release of confidential sources of information would undermine the city's ability to effectively investigate a by-law infraction complaint;
- The wording of the exemption in section 38(b) in conjunction with sections 14(1)(f) and 14(3)(b);
- Compelling or sympathetic reason; the appellant has not indicated any compelling reason for access to the personal information.

[44] It is the city's position that it has exercised its discretion under section 38(a) and (b) in good faith and for a proper purpose. The city has considered all relevant factors, therefore its exercise of discretion should be upheld.

[45] The appellant's representations did not specifically address the issue of whether the city properly exercised its discretion under section 38(b).

*Analysis and finding:*

[46] In reviewing the records, I find that the city took into account relevant factors in weighing the factors both for and against the disclosure of the information at issue and did not take into account irrelevant considerations. The city's representations reveal that they considered the appellant's position and circumstances, balanced against their mandate to gather information as part of an investigation into a by-law enforcement matter, in exercising their discretion not to disclose the information at issue.

[47] Also, I agree with the city that the severed information is the affected party's personal information. After reviewing the records, I accept that the city disclosed as much of the information to the appellant as possible without disclosing the personal information of the affected party.

[48] Under these circumstances, therefore, I am satisfied that the city has appropriately exercised its discretion under section 38(b).

**D: Does the public interest override at section 16 apply to the information at issue?**

[49] In her representations, the appellant raised the potential application of the public

interest override at section 16 which provides:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[50] For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[51] The *Act* is silent as to who bears the burden of proof in respect of section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.

[52] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

[53] A public interest does not exist where the interests being advanced are essentially private in nature. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.

[54] In her representations, the appellant argues that it is contrary to public policy and/or public interest to support a complainant making numerous anonymous complaints resulting in notices warning of fines up to \$5000 and notices that the dog owner could be found guilty, and further unannounced site inspections at the personal address of the appellant. The appellant states that privacy legislation should not be a tool to allow complainants to hide behind and allege baseless allegations.

[55] The appellant states that it is also in the public interest that should the affected party and the appellant be in the same area, that neighbours are able and encouraged to talk.

[56] In light of the above concerns, the appellant submits that disclosure is also desirable for the purpose of subjecting the activities of the city to public scrutiny.

[57] I find that the appellant has failed to show that there is a compelling public

interest in disclosure of the withheld portions of the records at issue. As already stated, the only information that was severed from the record was an affected party's name, address, telephone number and marital status. I am not convinced that there is a compelling public interest in disclosing this kind of information and I find that disclosure of the information would not serve the purpose of informing or enlightening the citizenry about the activities of government or its agencies.

**ORDER:**

I uphold the city's decision to withhold the personal information of the affected party under section 38(b).

Original Signed by: \_\_\_\_\_  
Alec Fadel  
Adjudicator

\_\_\_\_\_ May 19, 2017