

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-3447

Appeal MA16-241

City of Toronto

May 25, 2017

**Summary:** The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* for certain 311 calls made by a named individual relating to complaints about the requesters' property from 1997 to 2016. The city denied access to the information that identified the complainant(s) under the discretionary personal privacy exemption in section 38(b). This order upholds the city's decision and finds the information at issue exempt under section 38(b).

**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), 38(b), 14(3)(b), 14(2)(h).

### OVERVIEW:

[1] The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA or the Act)* for certain 311 calls made by a named individual relating to complaints about the requesters' property from 1997 to 2016.

[2] The same correspondence also included a second request for 311 calls made by one of the requesters. This request was treated separately by the city and is not the subject of this appeal.

[3] The city issued a decision advising that "the disclosure of the details of 311 calls

and either confirming or denying the identity of any caller would constitute an unjustified invasion of personal privacy.” The city granted partial access to a summary of 311 calls against the appellant’s property from September 2009 to the date of the request. Access to the remainder of the information was denied pursuant to the mandatory personal privacy exemption in section 14(1) of the *Act*. In addition, the city confirmed that 311 calls can only be traced back to 2009.

[4] The requesters, now appellants, appealed the city’s decision.

[5] During the mediation, the appellants confirmed that they are not taking issue with the city’s decision that 311 calls can only be traced back to 2009.

[6] The city advised that it was also relying on the discretionary personal privacy exemption in section 38(b) of the *Act* to deny access to the withheld information.

[7] As mediation did not resolve the issues in this appeal, this matter proceeded to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. Representations were sought and exchanged between the city, the appellant and the individuals whose personal information may be in the records [the affected person(s)] in accordance with section 7 of the IPC’s<sup>1</sup> *Code of Procedure and Practice Direction 7*. In its representations, the city relied only on the discretionary section 38(b) exemption.

[8] In this order, I uphold the city’s decision that the information at issue is exempt under section 38(b).

## **RECORDS:**

[9] The record remaining at issue is titled “Contact History – [appellants’ address]”. The city has severed the information about the identity of the complainant(s) from this record.

## **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 discretionary personal privacy 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?

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<sup>1</sup> The Information and Privacy Commissioner, Ontario, Canada.

## **DISCUSSION:**

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

[10] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

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

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual’s name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[11] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as

personal information.<sup>2</sup>

[12] The city states that the information at issue includes the identity of individuals that have made complaints against the property in question and that this is the personal information of individuals other than the appellant.

[13] The city submits that this information meets the requirement of paragraph (h) of the definition of "personal information" in section 2(1) of *MFIPPA*. It states that the records contain some personal information relating to the appellant, therefore, section 38(b) is being relied upon.

[14] The appellants did not respond to the questions in the Notice of Inquiry directly on any of the issues in this appeal, instead they set out their reasons for wanting the information at issue in the records.

[15] The affected person(s) representations are confidential on all of the issues and they did object to disclosure of their information.

### ***Analysis/Findings***

[16] 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>3</sup>

[17] 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.<sup>4</sup>

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

[19] The record includes the personal information of both the appellants and the affected person(s) in their personal capacity including their names which appears with other personal information relating to them in accordance with paragraph (h) of the definition of personal information in section 2(1).

[20] As the record contains the personal information of both the appellants and the affected person(s), I will now consider whether the discretionary personal privacy exemption in section 38(b) applies to exempt this information.

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<sup>2</sup> Order 11.

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

<sup>4</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

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

**B. Does the discretionary personal privacy exemption at section 38(b) apply to the information at issue?**

[21] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

[22] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.<sup>6</sup>

[23] If any of paragraphs (a) to (e) of section 14(1) apply or if any of the paragraphs in section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). In this appeal, these paragraphs do not apply.

[24] In applying the section 38(b) exemption, sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy.

[25] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy.

[26] The city submits that the presumption in section 14(3)(b) of *MFIPPA* applies to the information that has been severed. 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;

[27] The city refers to Order M-382 where it was determined 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). It also refers to Order MO-1496, where it was found that section 14(3)(b) applied to information compiled by the city as part of its investigation into a possible violation of the Building

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<sup>6</sup> See below in the “Exercise of Discretion” section for a more detailed discussion of the institution’s discretion under section 38(b).

Code and the city's zoning by-law.

[28] The city submits that in the current appeal, the personal information at issue, i.e., the names of individuals who filed complaints concerning various issues (illegal dumping, general pruning, fence and waste issues) was compiled by it as part of its investigation into a violation of by-laws (Municipal Code Chapters 447, 548, and 813).

[29] I agree with the city that the information at issue was compiled by it as part of an investigation into a violation of law, namely the zoning by-laws referred to above.

[30] 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>7</sup> The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.<sup>8</sup>

[31] The presumption in section 14(3)(b) can apply to a variety of investigations, including those relating to by-law enforcement,<sup>9</sup> as is the case here, and violations of environmental laws or occupational health and safety laws.<sup>10</sup> Therefore, the presumption in section 14(3)(b) applies to the information at issue in this appeal.

[32] 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>11</sup>

[33] The city relies on the factor that favours privacy protection in section 14(2)(h), which reads:

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 has been supplied by the individual to whom the information relates in confidence;

[34] The city states that it advises complainants that their personal information will be kept confidential and therefore, they have an expectation of this confidentiality. It states that the information at issue was provided to it in confidence.

[35] The factor in section 14(2)(h) applies if both the individual supplying the information and the recipient had an expectation that the information would be treated

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<sup>7</sup> Orders P-242 and MO-2235.

<sup>8</sup> Orders MO-2213, PO-1849 and PO-2608.

<sup>9</sup> Order MO-2147.

<sup>10</sup> Orders PO-1706 and PO-2716.

<sup>11</sup> Order P-99.

confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.<sup>12</sup>

[36] As stated above, the appellants' representations do not establish or address any of the factors disclosed in section 14(2).

[37] Based on my review of the city's and the affected person(s) representations, I find that the personal information was supplied by the affected person(s) in confidence and that the factor in section 14(2)(h) applies.

[38] For records claimed to be exempt under section 38(b) (i.e., records that contain the requester's personal information), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.<sup>13</sup>

[39] In balancing the applicable factor and presumption in this appeal in sections 14(2)(h) and 14(3)(b), both of which favour privacy protection, I find that disclosure of the personal information in the records would be an unjustified invasion of personal privacy. Therefore, the information at issue is exempt under section 38(b), subject to my review of the city's exercise of discretion.

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

[40] 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.

[41] 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.

[42] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>14</sup> This office may not, however,

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<sup>12</sup> Order PO-1670.

<sup>13</sup> Order MO-2954.

<sup>14</sup> Order MO-1573.

substitute its own discretion for that of the institution.<sup>15</sup>

[43] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>16</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.

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

- 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 complainants, [which] if disclosed, would identify the complainants;

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<sup>15</sup> Section 43(2).

<sup>16</sup> Orders P-344 and MO-1573.



- 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); and
- Compelling or sympathetic reason: the appellant[s] [have] has not indicated any compelling reason for access to the personal information.

[45] The city states that it has historically maintained the confidentiality of the identities of complainants to alleged by-law infractions as this information is highly sensitive. The rationale for doing so is to foster greater assistance to the city from its citizens, for the purposes of its investigations to ensure compliance with the city's various by-laws without fear of repercussions, including unwanted contact or harassment by those they have complained about. The city notes further that, in this case, the individuals did not consent to the disclosure of their personal information.

***Analysis/Findings***

[46] I find that in denying access to the information at issue in the record, the city exercised its discretion under section 38(b) in a proper manner taking into account relevant considerations and not taking into account irrelevant considerations.

[47] I agree with the city that concerning the information I have found subject to this exemption, the names of the complainant(s) who made by-law complaints in their personal capacity, it has taken into account the considerations listed above, including the purpose of the personal privacy exemption in section 38(b).

[48] Accordingly, I uphold the city's decision that the information at issue in the record is exempt under section 38(b).

**ORDER:**

I uphold the city's decision and dismiss the appeal.

Original Signed by: \_\_\_\_\_  
Diane Smith  
Adjudicator

\_\_\_\_\_ May 25, 2017