

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3448

Appeal MA16-245

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 records related to a particular sewer inspection report. The city denied access to the records in part under the discretionary personal privacy exemption in section 38(b) and the mandatory personal privacy exemption in section 14(1). This order upholds the city's decision and finds the information at issue exempt under section 38(b) or 14(1).

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(1), 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 access to a particular sewer inspection report and records in relation to actions taken by Toronto Water against a certain individual for "dumping hazardous material into the sewer".

[2] The city issued a decision granting partial access to the records. The city denied access to portions of the records pursuant to the discretionary personal privacy exemption in section 38(b) and the mandatory personal privacy exemption in section 14(1) of the *Act*.

[3] The requesters, now appellants, appealed the city's decision.

[4] 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 appellants and the individual whose personal information may be in the record (the affected person) in accordance with section 7 of the IPC's¹ *Code of Procedure and Practice Direction 7*.

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

RECORDS:

[6] The information at issue is the severances from a computer printout dated February 5, 2016 (identified as page 2) and the severances from a computer printout dated May 2, 2016 (identified as page 6).

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the mandatory personal privacy exemption at section 14(1) apply to page 2 and does the discretionary personal privacy exemption at section 38(b) apply to page 6 of the records?
- C. Did the institution exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Do the records 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 record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1). The city relies on paragraphs (b), (e) and (h), as follows:

"personal information" means recorded information about an identifiable individual, including,

¹ The Information and Privacy Commissioner, Ontario, Canada.

(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,

(e) the personal opinions or views of the individual except if they relate to another 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.²

[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.³

[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.⁴

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

[12] The city submits that this information meets the requirement of paragraphs (b), (e) and (h) of the definition of "personal information" in section 2(1). It states that the information at issue includes the affected person's name, sex, employment history, and views or opinions.

[13] 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.

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

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.

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

[15] I find that page 2 of the records contains the personal information of the affected person only, whereas page 6 of the records contains the personal information of both the affected person and the appellants. The personal information in the records of the appellants and the affected persons comes within paragraphs (b), (e) and (h) of the definition of "personal information" in section 2(1).

[16] I will consider whether the mandatory personal privacy exemption in section 14(1) applies to page 2 and whether the discretionary personal privacy exemption in section 38(b) applies to page 6 of the records.

B. Does the mandatory personal privacy exemption at section 14(1) apply to page 2 and does the discretionary personal privacy exemption at section 38(b) apply to page 6 of the records

[17] 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.

[18] 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.⁶

[19] In contrast, under section 14(1), where a record contains personal information of another individual but *not* the requester, the institution is prohibited from disclosing that information unless one of the exceptions in sections 14(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy [section 14(1)(f)].

[20] 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 sections 14(1) or 38(b). In this appeal, these paragraphs do not apply.

[21] In applying either of the section 38(b) or 14(1) exemptions, sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy.

[22] 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.

⁶ See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).

[23] 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;

[24] 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 Code and the city's zoning by-law.

[25] The city submits that in the current appeal, the personal information at issue, i.e., the name, employment history, views or opinions of an individual, and other personal information of an individual who is the subject of a complaint regarding illegal dumping, was compiled by the city as part of its investigation into a violation of by-laws (Municipal Code Chapter 548). The presumption in section 14(3)(b) applies to exempt the personal information at issue from disclosure.

[26] 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. Therefore, the presumption in section 14(3)(b) applies to the information at issue in this appeal.

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

[28] The presumption in section 14(3)(b) can apply to a variety of investigations, including those relating to by-law enforcement,⁹ as is the case here, and violations of environmental laws or occupational health and safety laws.¹⁰

[29] Concerning page 2 of the records, which is claimed to be exempt under section

⁷ Orders P-242 and MO-2235.

⁸ Orders MO-2213, PO-1849 and PO-2608.

⁹ Order MO-2147.

¹⁰ Orders PO-1706 and PO-2716.

14(1) (i.e., records that do not contain the requester's personal information), a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if a section 14(4) exception or the "public interest override" at section 16 applies.¹¹ In this appeal, neither sections 14(4) or 16 apply. Accordingly, the information at issue on page 2 is exempt under the mandatory personal privacy exemption in section 14(1) by reason of section 14(3)(b).

[30] Concerning page 6 of the records, which is 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.¹²

[31] 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).¹³

[32] 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;

[33] 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 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.¹⁴

[34] Based on my review of the parties' representations, I find that the personal information in page 6 of the records (as well as in page 2 of the records) was supplied by the affected person in confidence and that the factor in section 14(2)(h) applies. I further find that the appellants' representations do not establish any factors that favour disclosure of the information at issue.

¹¹ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

¹² Order MO-2954.

¹³ Order P-99.

¹⁴ Order PO-1670.

[35] 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.¹⁵

[36] 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 page 6 of the records would be an unjustified invasion of personal privacy. Therefore, the information at issue in page 6 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?

[37] 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.

[38] 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.

[39] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁶ This office may not, however, substitute its own discretion for that of the institution.¹⁷

[40] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁸

- the purposes of the *Act*, including the principles that
 - information should be available to the public

¹⁵ Order MO-2954.

¹⁶ Order MO-1573.

¹⁷ Section 43(2).

¹⁸ Orders P-344 and MO-1573.

- 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.

[41] 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;
- 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] not indicated any compelling reason for access to the personal information.

[42] The city states that it has historically maintained the confidentiality of the identities of subjects of investigation of alleged by-law infractions as this information is

highly sensitive. It states that 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 who have complained about them or may otherwise have an interest in the outcome of an investigation. The city notes further that, in this case, the individual did not consent to the disclosure of their personal information.

Analysis/Findings

[43] I find that in denying access to the information at issue in page 6 of the records, 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.

[44] Concerning the information that I have found subject to this exemption, which includes the affected person's name, sex, employment history, and views or opinions that do not relate to another individual, I find that the city has taken into account the considerations listed above, including the purpose of the personal privacy exemption in section 38(b).

[45] Accordingly, I am upholding the city's decision that the information at issue in page 6 of the records 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