

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3549

Appeal MA16-597

City of Vaughan

January 15, 2018

Summary: The appellant submitted a request to the city for a copy of a complaint sent to a specified Councillor and the building standards supervisor from a named individual. The city located responsive records but denied access to them citing the discretionary exemption at section 38(b) (personal privacy). 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), 14(1), 38(b).

Orders and Investigation Reports Considered: R980015, MO-3060.

BACKGROUND:

[1] A request was made to the City of Vaughan (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of a complaint sent to a specified Councillor and the Building Standards Supervisor from a named individual dated approximately July or August 2016.

[2] The city issued a decision denying access to the requested record pursuant to sections 14(1) and 38(b) of the *Act*.

[3] The requester, now the appellant, appealed that decision.

[4] As mediation did not resolve the dispute, this appeal was transferred to the

adjudication stage, where an adjudicator conducts a written inquiry under the *Act*. As the adjudicator in this appeal, I invited the parties, including the affected party, to provide representations. Representations were received and shared in accordance with section 7 of the IPC's *Code of Procedure* and Practice Direction 7.

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

RECORDS:

[6] A seven-page record comprised of emails and correspondence.

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?

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 record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1), which states, in part, 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,

(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[.]

[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.¹

[9] 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.² However, 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.³

Representations:

[10] In its representations, the city points to paragraphs (e), (f), (g) and (h) of the definition of "personal information" in section 2(1) and states that it is reasonable to expect that if the information in the record is disclosed, it would constitute an unjustified invasion of the affected party's privacy in that disclosure would identify the content of the email. The city notes that the email was submitted in confidence and refers to paragraph (f) of the definition of "personal information".

[11] The city notes the appellant's assertion that because the record originated from the affected party's professional email, it does not fall under the definition of personal information under the *Act*. It notes that past IPC orders have found that 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. The city submits that although the affected party sent the email correspondence from a professional email address, the contents of the email are personal in nature.

¹ Order 11.

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

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

[12] The appellant, in her representations, speaks of a dispute with a specified neighbour whom she notes works for the federal government. The appellant refers to specific by-law violations resulting in court appearances.

[13] The appellant claims that she is aware who sent the email (within the withheld records) as she was informed by the building inspector that they were unable to perform a scheduled inspection at a specified address because the owner had written a letter to a city Councillor stating that she did not want anyone on her property.

[14] The appellant refers to the email address that the affected party used when communicating with the city. She notes that the address is a federal government email address. She indicates that her dispute with the affected party is a private and personal one that is before the courts. The appellant submits that the affected party should not be writing on federal government letterhead and asserts that the affected party should be approaching persons in the city hall as a citizen, unless she is looking for some kind of favour.

[15] The affected party also provided representations in this appeal. She states that the information in the records is her personal information, and she does not consent to releasing that information to the appellant.

Finding:

[16] After reviewing the withheld record, I find that small portions contain the personal information of the appellant, and that all of the record contains the personal information of the affected party. The records include the affected party's name, home addresses and personal views and opinions that do not relate to another individual. The record also contains some of the personal information of the appellant, including her name and address.

[17] I do not agree with the appellant that the record contains the professional information of the affected party simply because the affected party utilized her professional email account to communicate with the city. In Reconsideration Order R-980015, Adjudicator Donald Hale commented on the difference between personal information compared to information provided in the course of employment that is not considered personal. In that case, it was found that the records did not contain the personal opinions of affected parties, "[r]ather, as evidenced by the contents of the records themselves, each of these individuals is giving voice to the views of the organization which he/she represents." Adjudicator Hale found that the affected parties could not be said to be communicating their personal opinions on the subjects in the records, and found that the information was not personal. Conversely, other orders have confirmed that complaints sent from professional email accounts may nevertheless

be made in a personal capacity.⁴

[18] After reviewing the records at issue, I do not find that the affected party was giving voice to the organization she worked for. Instead, she communicated to the city her own personal opinions and views regarding a specified incident. I do not agree that because the affected party utilized her work email, that the information cannot qualify as personal information. Despite the affected party's use of her work email, which was a federal government email address, the information still qualifies as personal information. Therefore, the fact that she sent her correspondence by utilizing a work email, even a federal government email, is not relevant to this appeal.

[19] I have reviewed the records and find that they contain the personal information of the affected party, as well as limited personal information of the appellant that fall under the definition of personal information in section 2(1) of the *Act*. In my review of the records, pages 1.1, 1.2, 1.3, 1.6 and 1.7 do not contain the personal information of the appellant, and only contain the personal information of the affected party. Pages 1.4 and 1.5 contain the personal information of both the appellant and the affected party. Since the section 38(b) analysis is on a record-by-record basis, the records, as a whole, relate to the appellant.

[20] The bulk of the records contains the personal information of the affected party, including statements concerning an incident which she was involved in. I find that this statement contains the views and opinions about the incident and is personal information, rather than professional. I rely on the abovementioned orders to make this finding.

[21] Further, I find that the record contains correspondence sent to the city by the affected party that is implicitly or explicitly of a private or confidential nature, since it is referencing particular orders to comply and speaks to the behaviour of a specified city employee.

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

[22] Since I found that the records contains the personal information of both the appellant and the affected party, section 36(1) applies to this appeal. 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.

[23] 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

⁴ See Order MO-3215.

is discretionary, the institution may also decide to disclose the information to the requester.⁵

[24] 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).

[25] In making this determination, this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.⁶ If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). 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.

[26] 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.⁷ Some of the factors listed in section 14(2), if present, weigh in favour of disclosure, while others weigh in favour of non-disclosure. 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).⁸

Representations:

[27] The city submits that none of the exceptions in section 14(1)(a) to (e) applies to the release of the personal information and that none of the presumptions in section 14(3) applies.

[28] In referencing the section 14(2) factors, the city submits that 14(2)(f) (highly sensitive) is relevant. It refers to Order MO-3060 where it was held that to be classified as highly sensitive, the IPC must be satisfied that the release of the withheld information would cause significant distress to the affected party. The city submits that the situation in this appeal is similar to that in MO-3060 in that it involves a complaint made to the city's by-law department. In MO-3060, the adjudicator found that the appellant's personal information could be released but the remainder of the record should remain severed. However, in this appeal, the city submits that the same result is not possible because releasing any part of the record would be an unjustified invasion of the affected party's privacy.

[29] The city also submits that section 14(2)(h) (supplied in confidence) is another

⁵ See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).

⁶ Order MO-2954.

⁷ Order P-239.

⁸ Order P-99.

relevant factor in this appeal. It refers again to MO-3060 where the adjudicator held that under section 14(2)(h) it is reasonable to conclude from the circumstances that the affected party “expected some level of confidentiality or discretion regarding at least, the use of his own personal information.” The city states that, in this instance, the affected party articulated her complaint to their ward Councillor and select city staff in confidence, and did not expect that it would be shared with the appellant.

[30] The city submits that the appellant is not aware of the specific content of the email and is only aware that the record exists. It is the city’s position that much of the record does not contain the appellant’s personal information, however, it is of the view that the entire record contains the personal information of the affected party.

[31] Finally, the city submits that it could not effectively release the document with only minor severances because the personal information of the appellant is minor and the remaining severances would remove substantial informational value and context from the remainder of the record.

[32] The appellant does not believe that the information in the record is highly sensitive and would cause significant distress. She takes the position that the dispute involves a fence issue and backyard structures.

[33] The appellant took issue with the city’s statement in its representations, that the affected party had an expectation of confidence when she articulated her complaint to select city staff.

[34] The appellant agrees with the city that she is unaware of the specific content of the record.

Analysis and finding:

[35] The city points to the factors at section 14(2)(f) (highly sensitive) and (h) (supplied in confidence) as relevant in this appeal.

[36] The appellant did not specifically identify any of the provisions favouring disclosure at section 14(2)(a) to (d) as relevant. However, the appellant’s representations suggest that section 14(2)(a) (public scrutiny) may be relevant to my consideration.

14(2)(a): public scrutiny

[37] Although the appellant did not specifically raise this factor as weighing in favour of disclosure, I am including it in my analysis as a result of my review of the appellant’s representations

[38] This section contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public

scrutiny.⁹ The information at issue, comprises information the city has in its possession as a result of receiving an email from an affected party. There is no evidence that the information has been altered. In addition, after a review of the records, I am satisfied that the dispute between the affected party and the appellant is a private matter and disclosure would not assist in subjecting the activities of the government to scrutiny.

14(2)(f): highly sensitive

[39] In order for personal information to be considered highly sensitive in the manner contemplated by section 14(2)(f), I must be satisfied that disclosure of the information could reasonably be expected to cause significant personal distress to the affected party.¹⁰ Based on the circumstances set out in the representations, I accept that the relationship between the appellant and the affected party is a difficult one and that disclosing the information in the records could reasonably be expected to cause significant personal distress to the affected party. Therefore, the factor at section 14(2)(f) applies to the affected party's personal information.

14(2)(h): supplied in confidence

[40] The relevance of the factor in section 14(2)(h) is determined by an evaluation of whether the personal information was supplied by the affected party in confidence. The city argued that although the record did not contain a notation asking that it be kept confidential, the affected party had not consented and had asserted an expectation of confidentiality over it.

[41] In Order MO-3060, although Adjudicator Daphne Loukidelis found that there was an explicit assertion of confidentiality on a fax cover sheet, she nevertheless stated that it was "also reasonable to conclude from the circumstances that the affected party expected some level of confidentiality or discretion regarding, at least, the use of his own personal information." As noted, MO-3060 also dealt with a complaint made to the city's by-law department. In the circumstances of this appeal, I also find that it is reasonable to conclude from the circumstances that the affected party expected some level of confidentiality or discretion regarding, at least, the use of her own personal information when articulating her complaint, and I find that the section 14(2)(h) factor applies to the personal information of the affected party that appears in the record.

[42] After considering the competing interests of the appellant's right to disclosure of information against the privacy rights of the affected party, I conclude that there are no factors weighing in favour of the disclosure of the affected party's personal information contained in these records. However, in view of my finding that the factors at sections 14(2)(f) and (h) are relevant, I conclude that disclosure of the records to the appellant would constitute an unjustified invasion of the affected party's personal privacy.

⁹ Order P-1134.

¹⁰ Order PO-2518.

Therefore, this personal information qualifies for exemption under section 38(b).

[43] Under section 4 of the *Act*, if the city receives an access request that falls within one of the exceptions under sections 6 to 15, the city “shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.” The city submits that it could not effectively release the document with minor severances because the personal information of the appellant is minor. In my review of the record, I agree with the city that the personal information of the appellant is so limited that to sever out the personal information of the affected party and provide the appellant with her own personal information would only result in the disclosure of “disconnected snippets”, or “worthless”, “meaningless” or “misleading” information.¹¹

[44] I acknowledge that the appellant is aware of the identity of the affected party, as she has requested the complaint made by the named affected party, and the city has identified the record as responsive. However, as the appellant is clearly seeking the substance of the complaint, the disclosure of the name of the affected party without additional information would also only result in the disclosure of disconnected snippets in the context of this appeal.

Absurd Result

[45] I also considered whether the absurd result principle applies in the circumstances of this appeal. According to the principle, whether or not the factors or circumstances in section 14(2) or the presumptions in section 14(3) apply, where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 14(1), because to find otherwise would be absurd and inconsistent with the purpose of the exemption.¹² One of the grounds upon which the absurd result principle has been applied in previous orders is where the information is clearly within the requester’s knowledge.¹³

[46] In her representations, the appellant agreed with the city that she is unaware of the specific contents of the records. Therefore, under the circumstances, I find that refusing to disclose this specific information to the appellant would not lead to an absurd result.

[47] Subject to my review of the city’s exercise of discretion, I find that the discretionary exemption in section 38(b) applies to exempt the affected party’s personal information.

¹¹ See Order PO-1735, Order PO-1663 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

¹² Orders M-444 and MO-1323.

¹³ Orders MO-1196, PO-1679, MO-1755 and PO-2679.

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

[48] 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.

[49] 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.

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

[51] The city noted that while exercising its discretion, it took into account relevant factors which included:

- The purpose of the *Act*, including the principle that the privacy of individuals should be protected
- Whether the requester is seeking his or her own personal information
- Whether the requester has a sympathetic or compelling need to receive the information
- The relationship between the requester and any affected persons
- The nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected persons.

[52] The city stated that it is of the opinion, that for residents to be confident in their relationship with elected officials and city staff, they need to feel that there is a certain level of confidentiality with respect to the complaint process that is in effect.

[53] The city noted that it also considered the relationship between the appellant and the affected party and the nature of the information contained in the record, when it

¹⁴ Order MO-1573.

¹⁵ Section 43(2).

exercised its discretion under section 38(b) to deny the record in full.

[54] The appellant again refers to the fact that the affected party was utilizing a federal email address and therefore sending her communication from one government agent to a local government agent. She submits that as a federal government agent writing to another government agent, using company resources, there should be transparency. The appellant asserts that she has a right to know what the affected party is saying about her.

[55] I have considered the circumstances surrounding this appeal and the city's representations and I am satisfied that the city has properly exercised its discretion with respect to section 38(b) of the *Act*. I am satisfied that it did not exercise its discretion in bad faith or for an improper purpose. The city considered the purposes of the *Act* and has given due regard to the nature and sensitivity of the information in the specific circumstances of this appeal, and I have upheld its decision with respect to the information they have claimed is exempt. Accordingly, I find that the city took relevant factors into account and I uphold their exercise of discretion in this appeal.

ORDER:

The appeal is dismissed.

Original Signed by: _____
Alec Fadel
Adjudicator

January 15, 2018