

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3891

Appeals MA18-00768 and MA18-00858

The Corporation of the Town of Kingsville

January 24, 2020

Summary: The Corporation of the Town of Kingsville (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records of all communications to the town regarding the development and operations at a specified address, as well as communications relating to a specified numbered company. The town issued a decision granting the requester partial access to the responsive records. The town withheld some information in the responsive records under the discretionary exemption at section 8(1)(b) (law enforcement investigation) and the mandatory exemption at section 14(1) (personal privacy) of the *Act*. Both the requester and a third party whose interests would be affected by disclosure appealed the town's decision to this office. The third party relied on the frivolous and vexatious provision at section 4(1)(b) of the *Act*, the discretionary exemptions at sections 8(1)(a) (law enforcement matter), 8(1)(b) (law enforcement investigation), and section 13 (danger to health and safety), and the mandatory personal privacy exemption at section 14(1) of the *Act*. The town later amended its position, and relied only on section 14(1) of the *Act*.

In this order, the adjudicator finds that the third party is not entitled to rely on section 4(1)(b). She finds that the records are exempt under section 14(1) of the *Act* and does not uphold the town's decision to disclose any of the information in the records to the requester.

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"), 2(2.1), 4(1)(b), 14(1), 14(2), and 14(3); and sections 5.1(a) and (b) of Regulation 823.

Orders Considered: Orders P-257, PO-2490, and PO-3738-I.

OVERVIEW:

[1] The Corporation of the Town of Kingsville (the town) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to records of all communications to the town regarding the development and operations at a specified address, as well as communications relating to a specified numbered company.

[2] Following third party notification, the town issued a decision granting the requester partial access to the responsive records. The town decided to withhold some information in the responsive records under the discretionary exemption at section 8(1)(b) (law enforcement investigation) and the mandatory exemption at section 14(1) (personal privacy), taking into consideration the presumption at section 14(3)(b) (possible violation of law) of the Act. The town produced an index of records containing a list of the responsive records along with exemptions relied upon to withhold information. The town held back all the records from disclosure in case of a third party appeal.

[3] Both the requester and the third party appealed the town's access decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office). The requester's appeal of the town's decision to withhold information is Appeal MA18- 00858, and the third party's appeal to partially disclose information is Appeal MA18- 00768. This order will dispose of the issues in both appeals. For ease of reference, I will refer to the requester appellant as "the requester" and the third party appellant as "the third party" in this order.

[4] The parties attempted mediation of both appeals. During mediation, the requester consented to his identity being disclosed to the third party by the mediator. The requester confirmed his continued interest in access to the records, the town issued a revised decision with respect to three of the records, and the third party took the position that the records should be withheld in full, based on:

- the frivolous and vexatious provision at section 4(1)(b) of the *Act*;
- the discretionary exemptions at sections 8(1)(a) (law enforcement matter) and (b) (law enforcement investigation), and section 13 (danger to health and safety); and
- the mandatory personal privacy exemption at section 14(1), taking into consideration the presumption at section 14(3)(b) of the *Act*.

[5] Since mediation could not resolve the appeals, the appeals moved to the adjudication stage, where an adjudicator may conduct a written inquiry. Since the appeals involve the same parties and records, the appeals moved jointly to adjudication.

[6] As the adjudicator of these appeals, I began a joint inquiry under the Act by sending a Joint Notice of Inquiry, setting out the facts and issues in both appeals, to the town and the third party. The town and third party provided representations in response to the Notice of Inquiry. As the town was no longer claiming section 8(1)(b), I amended the Notice of Inquiry sent to the requester accordingly. The non-confidential portions of the town's representations were shared with the requester, in accordance with Practice Direction 7 of the IPC's Code of Procedure. The representations of the third party were withheld from the requester due to confidentiality concerns, but I shared the third party's general position that the records should be withheld in their entirety based on the provisions of the Act that the third party had previously relied on. The requester provided written representations in response, which were summarized and shared with the other parties for comment.

[7] For the reasons that follow, I find the records, in their entirety, exempt under section 14(1) of the Act and do not uphold the town's decision to disclose any of the information in the records. I dismiss the requester's appeal.

RECORDS:

[8] The records at issue in this appeal consist of email correspondence grouped into 16 records, as outlined in the town's index.

ISSUES:

- A. Is the third party entitled to claim the frivolous or vexatious provisions in the *Act* when the town has not?
- B. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- C. Does the mandatory exemption at section 14(1) apply to the information at issue?

DISCUSSION:

Issue A: Is the third party entitled to invoke the frivolous or vexatious provisions in the *Act* when the town has not?

[9] In the reasons that follow, I will explain why the third party is not entitled to claim section 4(1)(b) (frivolous or vexatious request) of the Act when the town has not done so.

[10] The frivolous or vexatious provisions at section 4(1)(b) of the Act give an institution the power not to process a request if the head of the institution finds the

request to be frivolous or vexatious. Since this is a summary mechanism to deal with requests, the use of this discretionary power can have serious implications on the ability of a requester to obtain information under the Act, and therefore it should not be exercised lightly.¹

[11] Section 4(1)(b) says:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious. [Emphasis added.]

[12] Section 5.1 of Regulation 823 under the Act elaborates on the meaning of the terms "frivolous" and "vexatious," as follows:

A head of an institution that receives a request for access to a record or personal information **shall conclude** that the request is frivolous or vexatious if,

(a) **the head is of the opinion** on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or

(b) **the head is of the opinion** on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access. [Emphasis added.]

[13] The IPC has held that a third party is not entitled to resist disclosure on the basis of section 4(1)(b), as the frivolous or vexatious provisions were included in the Act by the Legislature to protect the interests of an institution in administering the Act, not the interests of other parties outside government.² This office has noted that if the Legislature had intended for the frivolous or vexatious provisions to be available for non- government parties to invoke, it would have done so through express language like that used in the third party information and personal privacy exemptions in sections 14(1) and 38(1) of the Act. Therefore, the lack of express statutory language affording outside parties the right to rely on section 4(1)(b) and the other provisions is an "insurmountable hurdle" to such a claim.³ Accordingly, the discretionary power to invoke section 4(1)(b) belongs to an institution.

¹ Order M-850.

² Order PO-3738-I.

³ Order PO-2490.

[14] Following this approach, I find that the third party is not entitled to invoke the frivolous or vexatious provisions of the Act.

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

[15] On the basis of the following, I find that the records contain “personal information” as defined in section 2(1) of the Act, and that this information belongs to the third party and other identifiable individuals.

[16] 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;

[17] 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.⁴ To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁵

Personal information of the third party

[18] As argued by the town, I find that the records contain the third party's name [paragraph (h) of section 2(1), above], address and e-mail address [paragraph (d) of section 2(1)], and other information that may identify the third party.

[19] In addition, I find that the views or opinions expressed in the e-mails are also the personal information of the third party, under paragraphs (e) and (h) of section 2(1) of the Act.

[20] Furthermore, I find that the e-mails themselves, in their entirety, are the third party's "personal information" under the introductory wording of the definition of personal information at section 2(1). Each e-mail, as a whole, is recorded information about the third party that would reveal the fact that the third party made such statements to the town.

Personal information of other identifiable individuals

[21] The town submits, and I find, the records also contain personal information, as defined under section 2(1) of the Act, belonging to other identifiable individuals. Having reviewed the records, I find that this includes such personal information as the address or name of an individual, where release of the name would reveal other personal information about the individual.

No personal information of the requester

[22] The town submits that the records do not contain the personal information of the requester. I agree with this assessment, given the business context of the content of the complaints and my review of each of the records. The requester's self-identification in his representations as a co-developer of the business also weighs towards finding that the context of the information at issue is a business context.

[23] For a personal privacy exemption to apply, the information must be "personal information" and to qualify as such, the information must be about the individual in a personal capacity. Under section 2(2.1) of the Act, "personal information" does not

⁴ Order 11.

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

include the name, title, or contact information of an individual that identifies the individual in a business, professional or official 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.⁶

[24] Having reviewed the records, I find that the requester is referenced as a co-owner of the business in question, and that this does not qualify as his "personal information" under the Act. The fact that the records contain complaints about the requester's business (as acknowledged by all parties) does not bring this information into the realm of the personal.

[25] For these reasons, the records contain the "personal information" of the third party and other identifiable individuals, but not the requester. This means that the request for access to the records must be considered under the mandatory personal privacy exemption at section 14(1) of the Act.

Issue C: Does the mandatory exemption at section 14(1) apply to the information at issue?

[26] As I will explain below, none of the exceptions to section 14(1) apply, so the town is prohibited from disclosing any portion of the records to the requester.

[27] 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 paragraphs (a) to (e) applies, or unless the section 14(1)(f) exception applies. Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy, but I find that none of those situations are relevant in these circumstances.

Sections 14(1)(a) to (e)

[28] If any of paragraphs (a) to (e) of section 14(1) apply, the section 14(1) exemption does not apply.

[29] Based on my review of the records and the parties' submissions, I find that, as the town submits, none of these exceptions apply in the circumstances of these appeals.

Section 14(1)(a) – consent

[30] Despite the town's position that section 14(1)(a) (consent) does not apply, it appears to argue that it may have been relevant to Records 3 and 4, due to specified

⁶ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

comments in those records. I have reviewed those comments and I find that they relate to specific complaints or events, and not a request made under the Act.

[31] For section 14(1)(a) to apply, the consenting party must provide a written consent to the disclosure of his or her personal information in the context of an access request.⁷ Since the third party did not consent to the disclosure of their personal information in the context of an access request, I find that section 14(1)(a) does not apply.

Section 14(1)(f) - disclosure not an unjustified invasion of personal privacy

[32] In applying the section 14(1)(f) exception to the section 14(1) exemption, sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy.

Section 14(3)

[33] 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.

[34] The town initially relied on the presumption at section 14(3)(b) (possible violation of law) to withhold portions of the records, but has since withdrawn its reliance on this provision. In correspondence to this office pre-dating the inquiry, the third party also raised section 14(3)(b). However, for section 14(3)(b) to apply, the party asserting its application would have to show that the personal information at issue was compiled and is identifiable as part of an investigation into a possible violation of law. The third party did not do so, and in light of the town's current position, I have insufficient evidence to accept that section 14(3)(b) applies.

[35] I also find that no other section 14(3) presumption applies to the records at issue.

Section 14(2)

[36] Under section 14(1), if the records are not covered by a presumption in section 14(3), section 14(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy, and the information will be exempt unless the circumstances favour disclosure.⁸

[37] The list of factors under section 14(2) is not exhaustive. The institution must also

⁷ Order PO-1723.

⁸ Order P-239.

consider any circumstances that are relevant, even if they are not listed under section 14(2).⁹

[38] Here, none of the parties directly cited listed section 14(2) factors for or against disclosure of the records to support their respective positions.

[39] However, the requester argued that the records should be disclosed in the interests of transparency and the ability to assess the complaints in the interests of protecting his livelihood. I have considered this as the requester raising an unlisted section 14(2) factor because this office has previously found that inherent fairness issues may be relevant in determining whether disclosure would be an unjustified invasion of personal privacy.¹⁰

[40] The requester states that he is aware that the town received comments or complaints about his business from the third party. He also states that he and his co-owner seek access to the records to assess the content of these comments or complaints "as to the viability and accuracy of such," and that since the business is their source of livelihood, it is fair that they the records be disclosed for "fair accountability and reasonable transparency."

[41] While I accept that the requester has raised an unlisted section 14(2) factor, I find that he did not establish that it applies in this case. The undisputed evidence before me is that the requester has already had an opportunity to understand the nature of the complaints against his business (whether or not they came from the third party). The town's representations (under Issue B, which were shared with the requester) indicate that the requester's business has been a public issue and the subject matter of town council meetings. In addition, there is no evidence before me that the requester has been prevented from carrying on his business by the town, despite the complaints. This, too, dissuades me from accepting that the unlisted factor raised by the requester applies in the circumstances.

[42] Having reviewed the records, I find that no listed or unlisted section 14(2) factors favouring disclosure apply in the circumstances of these appeals. Since there are no factors favouring disclosure in these appeals, the exception in section 14(1)(f) has not been made out, and I find that the responsive records are exempt from disclosure under the mandatory personal privacy exemption at section 14(1) of the Act. Accordingly, I will order the town to withhold the records in their entirety.

[43] I have also reviewed the records to determine whether portions of them can be disclosed without revealing any exempt information, given the town's initial decision to

⁹ Order P-99.

¹⁰ Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014.

disclose portions of the records. However, I am satisfied that it is not reasonably possible to sever and disclose any information in the records without revealing information that is exempt. The records, on their own and in their entirety, consist of the personal information of the third party, because they reveal the fact of the third party's contact with the town to complain about the business in question.

[44] Given my findings, I do not need to address the third party's arguments on the application of the discretionary exemptions found at sections 8(1)(a), 8(1)(b), and 13 in the Act.¹¹

ORDER:

The third party's appeal is allowed and the requester's appeal is dismissed. I do not uphold the town's decision, and the responsive records should be withheld in full.

Original signed by _____
Marian Sami
Adjudicator

January 24, 2019 _____

¹¹ This office has considered the raising of discretionary exemptions by parties that are not institutions under the *Act* in previous orders and determined that only in rare circumstances should a third party be entitled to claim a discretionary exemption [Orders P-257 and PO-3512, for example]. If the claim is not made in such a "rare circumstance," the affected person has no right to rely on the exemption, and the Commissioner has no obligation to consider it [Order P-257].