

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3893

Appeal MA19-00190

The Corporation of the Municipality of Clarington

January 27, 2020

Summary: The municipality received an access request for records relating to an incident at an ice rink. In its decision, the municipality granted partial access to the record and withheld the remaining information on the basis that disclosure would constitute an unjustified invasion of personal privacy. In this order, the adjudicator finds that the withheld information is personal information of an individual other than the requester, but orders the municipality to disclose some of the withheld information as it is not exempt under section 38(b) of the *Act*.

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) and 38(b).

Orders Considered: Orders MO-2954, MO-2980, PO-3939, and MO-3875.

OVERVIEW:

[1] The Municipality of Clarington (the municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to an incident at an ice rink during which the requester states she suffered injuries.

[2] In its decision, the municipality granted partial access to the record and relied on the mandatory personal privacy exemption at section 14(1) of the *Act* to withhold the remaining portions.

[3] The requester, now the appellant, appealed the decision to this office.

[4] During mediation, the appellant indicated that she was not seeking the personal cell phone number of a municipality employee. As such, the withheld portion on page 2 of the record is no longer at issue in this appeal.

[5] She confirmed she is seeking the name and address of an affected party.

[6] The mediator contacted the affected party, seeking consent for the disclosure of his personal information. He did not provide consent.

[7] The mediator advised the municipality that, as the record contains the personal information of the appellant and an affected party, the discretionary personal privacy exemption at section 38(b) rather than the mandatory exemption at section 14(1) is the appropriate personal privacy exemption to consider. The municipality did not agree to add section 38(b) to the scope of the appeal.

[8] As further mediation was not possible, the appeal moved to the next stage, where an adjudicator conducts a written inquiry under the *Act*.

[9] During the inquiry, I sought and received representations from the municipality, the appellant and the affected party.¹ Pursuant to section 7 of this office's *Code of Procedure and Practice Direction Number 7*, a copy of the municipality's representations (in its entirety) was shared. Non-confidential copies of the appellant's and the affected party's representations were also shared.²

[10] I added the possible application of section 38(b) to the scope of the appeal as the record contains the personal information of the appellant and other individuals, including the affected party. My reasons for doing so are explained later in this order.

[11] In this order, I find that the withheld information is personal information, but order the municipality to disclose the affected party's name and address after finding that section 38(b) does not apply to it.

RECORDS:

[12] The record is an accident/incident report. The information at issue consists of the name, address and phone number of an affected party contained on page 1 of the record.

¹ The affected party provided representations through a family member.

² Some portions of the appellant's and the affected party's representations were withheld as they met the criteria for withholding representations found in this office's *Practice Direction Number 7: Sharing of representations*.

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 exemption at section 38(b) apply to the information at issue?
- C. Did the municipality 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?

[13] The municipality relied on the mandatory personal privacy exemption at section 14(1) to withhold information that it found was the affected party's personal information.

[14] In order to determine whether the appropriate personal privacy exemption to consider is the one at section 14(1) or the one at section 38(b), and in order to determine whether the withheld information is exempt under the appropriate exemption, it is first necessary to decide whether the record contains "personal information" and, if so, to whom it relates.

[15] In order to determine whether section 38(b) of the *Act* applies, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates.

[16] "Personal information" is defined in section 2(1). Relevant paragraphs of that section are as follows:

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

(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;

[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.³

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

[19] The municipality submits that the record contains the information of the appellant and an affected party, which falls within the definition of "personal information" as defined in section 2(1) of the *Act*.

[20] The appellant and the affected party provided representations but their representations did not address this issue.

[21] Based on my review of the record, I find that it contains the personal information of the appellant and an affected party. Specifically, it contains information of the appellant and another individual, which would fall within paragraphs (d) and (h) of the definition of "personal information" in section 2(1) of the *Act*. As this record contains the personal information of both the appellant and another individual, Part II of the *Act* applies.

[22] Part II (where section 38(b) is found) applies to records which contain the requester's own personal information, while Part I (where section 14(1) is found) applies to records which do not contain the requester's own personal information. In determining whether a requester's personal information is contained in the record, this office takes a record by record approach which means that the unit of analysis is the record, rather than individual paragraphs, sentences or words contained in a record.⁵ Since the record contains the appellant's personal information, Part II applies and the correct personal privacy exemption to consider is section 38(b).

[23] Accordingly, as Part II applies to the record, I must consider whether the information at issue is exempt pursuant to the discretionary exemption at section 38(b) of the *Act*.

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

[24] Since I found that the record contains the personal information of the appellant and another individual, section 36(1) of the *Act* applies to the appellant's access

³ Order 11.

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

⁵ See Order M-352.

request. 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.

[25] Under section 38(b), where a record contains personal information of both the appellant 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 appellant.⁶

[26] 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).

[27] 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.⁷ However, if the information fits within any of paragraphs (a) to (e) of section 14(1) or within 14(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[28] 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. Also, 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.⁸ 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).⁹

Representations

[29] The municipality submits that it would constitute an unjustified invasion of the affected party’s privacy to disclose the information at issue. The municipality relies on prior orders¹⁰ of the IPC in which the IPC found that the existence of disclosure processes available to parties under the *Rules of Civil Procedure* reduces the weight that should be given to the section 14(2)(d) factor, which requires the municipality to consider whether the information at issue is relevant to a fair determination of rights. It

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

⁷ Order MO-2954.

⁸ Order P-239.

⁹ Order P-99.

¹⁰ See Orders M-1146, MO-1436, PO-1728, MO-2442 and MO-3631.

submits that the appellant would be able to commence a civil action against the affected party as an unnamed defendant, by use of a pseudonym, and then use the civil court process to obtain the affected party's name and address from it. Thus, it submits the IPC should find in favour of not disclosing the information at issue given that there is an alternate and more appropriate method of obtaining the information at issue.

[30] The appellant submits that the disclosure of the affected party's name and address does not constitute an unjustified invasion of personal privacy as he is a party to her underlying action. She submits that she requires his name and address to commence a civil claim against him. The appellant also submits that she would be severely prejudiced if she is not provided with the affected party's name and address as she would be barred from exercising her civil right to pursue her claim for damages.

[31] In response to the municipality's suggestion that she bring a law suit against John Doe, the appellant submits that she should not have to waste time and resources along with court time and resources to bring forth an application or motion (and subsequent motion to amend pleadings) to obtain the identity and address for service of the alleged tortfeasor (wrongdoer). She submits that it is not in the public's interest for litigants to use court time and resources to obtain the identity of a tortfeasor.

[32] Although the affected party provided representations, his representations did not address this issue. He confirms that he does not consent to the disclosure of his personal information in the record.

Analysis and findings

[33] The withheld information at issue does not fit within the exceptions set out in section 14(1)(a) to (e) nor section 14(4) of the *Act*. As such, I will consider whether any of the factors or presumptions under sections 14(2) and (3) apply.

[34] The municipality submits that the presumption at section 14(3)(b) applies to the information at issue, which reads as follows:

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;

[35] For section 14(3)(b) to apply, there must be an investigation into a possible

violation of law.¹¹

[36] The municipality submits that it created the record at issue so that there would be a contemporaneous account of the event to inform any future investigation.

[37] However, the municipality did not indicate which violation of law was being investigated; in fact, it appears to acknowledge that it is not conducting an investigation at present. As such, I do not give the presumption any weight.

[38] As noted above, the appellant submits that the factor in section 14(2)(d) applies while the municipality submits that the factors in sections 14(2)(e), 14(2)(f), 14(2)(h), and 14(2)(i), weigh in favour of non-disclosure. Those sections read as follows:

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,

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(f) the personal information is highly sensitive;

(h) the personal information has been supplied by the individual to whom the information relates in confidence; and

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

Section 14(2)(d): fair determination of rights

[39] The appellant submits that the affected party's name and address are relevant to a fair determination of her rights. She submits that the information at issue would allow her to access civil remedies to seek damages for the injuries she sustained from the skating incident. Without this information, the appellant submits she cannot serve the affected party or obtain damages against him.

[40] This office has found that for section 14(2)(d) to apply, the appellant must establish that:

¹¹ Orders P-242 and MO-2235.

(1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and

(2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and

(3) the personal information to which the appellant seeks access has some bearing on is significant to the determination of the right in question; and

(4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.¹²

[41] There is no dispute that the appellant seeks the affected party's name and address to sue for damages in court. I am satisfied that she has met the four-part test in section 14(2)(d) because:

1. her right to sue is drawn from common law;
2. the right is related to a contemplated civil claim for damages;
3. the personal information to which she seeks access (i.e. the appellant's name and address for service) has a direct bearing on a determination of her right to receive damages because she needs to identify the appellant in order to bring a successful claim; and
4. she needs the affected party's name to prepare for the proceeding by serving him with her claim.

[42] Therefore, I find that disclosing the affected party's name and address in the circumstances of this particular case is relevant to a fair determination of the appellant's rights under section 14(2)(d) and that this factor weighs in favour of disclosing this information to her.

[43] The municipality submits that, although section 14(2)(d) applies, less weight should be given to it because of the existence of disclosure processes available to parties under the *Rules of Civil Procedure*.

[44] In Order MO-2980, Adjudicator Colin Bhattacharjee dealt with a similar issue. In

¹² Order PO-1764; see also Order P-312, upheld on judicial record in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

that case, the appellant sought access to the name of the owner of a dog that bit her so that she could bring a civil claim for damages. With respect to discovery mechanisms available within the litigation process, Adjudicator Bhattacharjee wrote:

In my view, the existence of other possible methods of access does not preclude the appellant from exercising her access rights under the *Act* to seek the dog owner's name before she files a civil claim. As the victim of a dog attack, she has a right to seek the information in the most efficient, cost-effective manner that she sees fit and should not have to jump through numerous hoops in different forums to seek basic information that would enable her to exercise her legal right to seek redress.

[45] I agree and adopt this reasoning. The mere existence of a discovery mechanism within litigation may reduce the weight given to the factor in section 14(2)(d), but I find that it should still be given considerable weight in the circumstances of this appeal.

Section 14(2) factors that weigh against disclosure

[46] With respect to the factors in sections 14(2)(e) and (i), the municipality submits that there is considerable risk that disclosure of the information at issue would expose the affected party unfairly to pecuniary or other harm, or would unfairly damage his reputation. I disagree.

[47] I note that the court will determine whether the affected party would face any damages, after a hearing of the case before it. In this context, I do not view any potential pecuniary or other harm to be unfair to the affected party for the purpose of section 14(2)(e).¹³

[48] With respect to section 14(2)(i), I find that this factor does not apply in the circumstances. Previous orders of this office have found that section 14(2)(i) is not established simply on the basis that the damage or harm envisioned by this section is present or foreseeable: it must also be demonstrated that this damage or harm would be unfair to the individual involved.¹⁴ I am not persuaded that, where allegations are to be tested in court, any damage to the affected party's reputation would be unfair.

[49] The municipality also raises the factor in section 14(2)(f). It submits that the personal information is highly sensitive.

[50] To be considered highly sensitive, however, there must be a reasonable

¹³ See Order PO-1912.

¹⁴ Orders M-347 and P-256.

expectation of significant personal distress if the information is disclosed.¹⁵

[51] I again adopt the reasoning of Adjudicator Bhattacharjee in Order MO-2980, where he found that whether an individual's name and address is highly sensitive depends on the context, and should be assessed on a case-by-case basis. Specifically, Adjudicator Bhattacharjee wrote:

An individual's name and address is not always sensitive information. For example, the names and addresses of most individuals appear in publically accessible telephone or online 411 directories and are clearly not highly sensitive in that context.

However, the names and addresses of individuals have greater sensitivity when this information is collected by the state or agencies of the state such as the police ...

[52] In this case, the affected party's name and address is contained in the municipality's accident/incident report. It is not contained in a police record, and, therefore, I do not find that the context is highly sensitive. I acknowledge that the disclosure of his name and address may cause the affected party some personal distress, at least in the form of an unwelcome law suit, but I have insufficient basis on which to find that doing so in this case would cause him significant personal distress as the factor in section 14(2)(f) requires. As a result, I give it little weight.

[53] Finally, the municipality raises the factor in section 14(2)(h). It submits that it would be unfair to disclose the affected party's personal information since he provided it voluntarily. The municipality submits that disclosure of this information could seriously erode the public confidence in the municipality, and would tend to discourage members of the public from volunteering relevant information.

[54] In order for section 14(2)(h) to apply, both the individual supplying the information and the recipient must have an expectation that the information will be treated confidentially, and that expectation must be reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.¹⁶

[55] I find that in the circumstances the personal information in the record has been supplied by the affected party in confidence and that the factor in section 14(2)(h), which weighs against disclosure, applies.

[56] With respect to unlisted factors, none of the parties raised any unlisted factors. I

¹⁵ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

¹⁶ Order PO-1670.

note that in Order MO-2954, Adjudicator Laurel Cropley noted that the *Act* should not be used in a way that prevents individuals from exercising their legal rights. She found that this is an unlisted factor favouring disclosure.

[57] Although the facts in this appeal are different from those before Adjudicator Cropley in Order MO-2954, I find that the same general principle nevertheless applies. I agree that the *Act* should not be used in a way that prevents individuals from exercising their legal rights, and find in this appeal that the non-disclosure of the affected party's name and address unduly impairs the appellant's ability to pursue her right to seek damages. Therefore, I find that this unlisted factor, together with the factor at section 14(2)(d), weighs in favour of disclosure.

[58] Although I have given the factor in section 14(2)(h) some weight, I find that it is outweighed in the circumstances of this particular appeal by the factor at section 14(2)(d) and the unlisted factor discussed above, both of which strongly weigh in favour of disclosure of the affected party's name and address.

[59] After considering and weighing the factors, and balancing the interests of the parties, I find that disclosing the affected party's name and address would not constitute an unjustified invasion of his personal privacy under section 38(b) in this particular case. I will order this information disclosed to the appellant.

[60] However, I do not find that the factors favouring disclosure apply to the affected party's phone number. The appellant does not require the affected party's phone number to be able to commence and serve her claim against him. After considering the factor in section 14(2)(h), and balancing the interests of the parties, I find that the disclosure of the affected party's phone number would constitute an unjustified invasion of his personal privacy under section 38(b), subject to my finding on the municipality's exercise of discretion below.

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

[61] As I found that the section 38(b) exemption applies to the affected party's telephone number, I will consider whether the police exercised their discretion under this section.

[62] 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.

[63] 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.

[64] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁷ This office may not, however, substitute its own discretion for that of the institution.¹⁸

[65] In its representations, the municipality submits that it properly exercised its discretion not to disclose the information. It submits that it considered that individuals should have a right of access to their own personal information; the privacy of individuals should be protected; the relationship between the requester and the affected party; and the fact that the affected party had not provided consent. The municipality submits that it took into account all relevant factors and did not take into account any irrelevant factors.

[66] Based on my review of the parties' representations and the exempt information, I find that the municipality properly exercised its discretion. I find that the municipality took into account that individuals should have a right of access to their own personal information; the privacy of individuals should be protected; the relationship between the requester and the affected party; and the fact that the affected party had not provided consent. I am satisfied that the municipality did not act in bad faith or for an improper purpose. I am also satisfied from my review of the municipality's representations that the municipality took into account the fact that the record contains the personal information of the appellant. Accordingly, I uphold the municipality's exercise of discretion in deciding to withhold the exempt information pursuant to the section 38(b).

ORDER:

1. I order the municipality to disclose the name and address of the affected party from page 1 of the record only.
2. I order the municipality to disclose a severed copy of the record to the appellant by **March 3, 2020** but not before **February 25, 2020**. I have enclosed a copy of the highlighted record with this order. To be clear, only the highlighted parts of the record must be disclosed to the appellant.
3. I reserve the right to require the municipality to provide me with a copy of the record disclosed to the appellant.

¹⁷ Order MO-1573.

¹⁸ Section 43(2).

Original Signed By: _____
Lan An
Adjudicator

January 27, 2020 _____