

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4161

Appeal MA20-00280

City of Mississauga

February 11, 2022

Summary: The appellant submitted a request to the city for records relating to a complaint about a specified property. The city denied access to the record in part, relying on the discretionary exemptions in sections 38(b) (personal privacy) and 8(1)(d) (confidential source) of the *Municipal Freedom of Information and Protection of Privacy Act*. In this order, the adjudicator upholds the city's decision under section 38(a) in conjunction with section 8(1)(d), and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O 1990, c. M.56 , as amended, section 17.

Orders Considered: Order PO-3656.

OVERVIEW:

[1] The appellant made a request to the City of Mississauga (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to a specified complaint about a property.

[2] The city subsequently clarified the request with the appellant. The clarified request was for the following:

records pertaining to complaint number [specified number] against the second unit at the property located at [specified address]

[3] The city located a Service Request Report and issued a decision granting partial access to the report and denying access to the remainder relying on the law enforcement exemption in section 8(1)(d) (confidential source) and the discretionary personal privacy exemption in section 38(b).

[4] Following discussions with the appellant, the city notified an individual whose interests may be affected by disclosure of the record (the affected party) under section 21 of the *Act*. Following notification, the city issued a second decision confirming that it was denying access in full to the personal information in the record.

[5] The appellant filed an appeal with the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was appointed to explore settlement with the parties.

[6] During mediation, the appellant confirmed that he was not pursuing access to the following information:

- any information in the record relating to city employees redacted based on section 14(1) appearing next to "Taken by" on page 1 of the record; and
- any duplicate information appearing on pages 2 and 3 of the record.

[7] Also, during mediation, the mediator attempted to get the consent of the affected party for the disclosure of their personal information. The affected party did not consent.

[8] As mediation did not resolve the appeal, the file was moved to the adjudication stage of the appeals process where an inquiry was conducted.

[9] I began by inviting and receiving representations from the city and the affected party. As it appeared that the records may contain the appellant's personal information, I added section 38(a) (discretion to refuse a requester's own information), read with section 8(1)(d) to the scope of the inquiry.

[10] I then invited the appellant to submit representations in response. The city's representations were shared with the appellant in accordance with the IPC's *Code of Procedure*. The affected party's representations were not shared however, due to confidentiality concerns as set out in *Practice Direction 7*. The appellant did not submit representations.

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

RECORDS:

[12] The information at issue appears on page 1 of a 3-page Service Request report, under the headings "Contact" and "Customer Comments."

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(a), allowing an institution to refuse access to the appellant's own personal information, read with the section 8(1)(d) exemption apply to the information at issue?
- C. Was the city's exercise of discretion under section 38(a) proper in the circumstances?

DISCUSSION

Issue A: Does the record contain personal information as defined in section 2(1) and, if so, to whom does it relate?

[13] As the city has claimed the application of the discretionary personal privacy exemption, I must first determine whether the records contain "personal information" and, if so, to whom it relates.

[14] The term "personal information" is defined in section 2(1) of the *Act* as "recorded information about an identifiable individual." Information is "about" an individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about them.

[15] Generally, information about an individual in their professional, official or business capacity is not considered to be "about" the individual.¹ In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be "personal information" if it reveals something of a personal nature about them.²

[16] Information is about an "identifiable individual" if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.³

[17] Section 2(1) of the *Act* lists examples of personal information, including: an individual's address or telephone number (paragraph (d)), the views or opinions of another individual about the individual (paragraph (g)), and an individual's name appearing with other personal information relating to the individual (paragraph (h)).

¹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

² Orders P-1409, R-980015, PO-2225 and MO-2344.

³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[18] The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be "personal information."⁴

Representations

[19] In its representations, the city submits that the affected party's personal information appears in the record. It notes that their name, address and telephone number appear in the "Contact" section of the report, as described under paragraph (d) of the definition of personal information in section 2(1) of the *Act*. In addition, it notes that disclosure of the details of the complaint in the "Customer Comments" section could identify the affected party, citing paragraphs (g) and (h) of Section 2(1).

[20] The city does not address whether the record contains the appellant's own personal information.

[21] I have also considered the affected party's representations, which were kept confidential for the reasons set out above. As also noted above, the appellant did not submit representations.

Analysis and finding

[22] I find that the record contains both the affected party and the appellant's personal information under section 2(1) of the *Act*.

[23] As the city points out, the affected party's name, address and telephone number, appearing in the "Contact" section of the report, constitute their personal information pursuant to paragraph (d).

[24] The partially severed "Customer Comments" section includes information the affected party relayed to the city, which, if disclosed, could be reasonably expected to identify the affected party, either on its own, or in combination with the other personal information contained in the record.

[25] Based on the evidence before me, the record at issue was created further to a complaint made about a specified address which the city refers to as the "appellant's property." It contains the address of the appellant's property and the "Customer Comments" section contains the substance of the affected party's complaint. Although the appellant is not referred to by name, it is clear that the record is about his property.

[26] Given that the record is a complaint filed against the appellant's property, I have also considered whether it contains information about a property or information about an identifiable individual. Previous orders of this office have found that, generally speaking, information about a property is not "personal information" unless it reveals

⁴ Order 11.

something of a personal nature about an individual.⁵

[27] In Order PO-3656, Senior Adjudicator Gillian Shaw canvassed relevant orders and jurisprudence in addressing the distinction between information that qualifies as “personal information” and information about residential properties. The following excerpt is instructive:

[21] In Order MO-2053, Adjudicator John Higgins reviewed the jurisprudence following Order 23 addressing this distinction between information about a residential property and “personal information”:

Subsequent orders have further examined the distinction between information about residential properties and “personal information”. Several orders have found that the name and address of an individual property owner together with either the appraised value or the purchase price paid for the property are personal information (Orders MO-1392 and PO-1786-I). Similarly, the names and addresses of individuals whose property taxes are in arrears were found to be personal information in Order M-800. The names and home addresses of individual property owners applying for building permits were also found to be personal information in Order M-138. In addition, Order M-176 and Investigation Report I94-079-M found that information about individuals alleged to have committed infractions against property standards by-laws was personal information. In my view, the common thread in all these orders is that the information reveals something of a personal nature about an individual or individuals.

...

[23] In *Edmonton (City) v Alberta (Information and Privacy Commissioner)*,⁶ the Alberta Court of Appeal upheld the adjudicator’s finding that information connected to a property might be “about an individual” if it had a personal dimension to it. In that case, the adjudicator contrasted complaints made about the removal of snow from the requester’s sidewalks (which would be about the requester’s conduct), with complaints made about lot grading (which would be about the requester’s property).

...

[25] I agree with the above decisions that the guiding principle in distinguishing personal information from information about a property is

⁵ See, for example, Orders MO-2081, MO-3415, PO-3616 and PO-3656.

⁶ 2016 ABCA 110 (CanLII) (*Edmonton v. Alberta (IPC)*).

whether the information in the record reveals something of a personal nature about an individual, or, put another way, whether the information has a personal dimension to it.

[28] I adopt Senior Adjudicator Shaw's approach in determining that the record at issue contains the appellant's personal information as it reveals something of a personal nature about him. The distinction highlighted by the Alberta Court of Appeal is helpful in the circumstances. Having reviewed the report at issue in this appeal, I find that it contains information regarding the appellant's conduct in relation to his property. I conclude, therefore, that the records contain his personal information.

[29] As the record at issue contains both the appellant and affected party's personal information, I will consider the appellant's right to access this information under Part II of the *Act*, under which the right of access is found in section 36(1).

Issue B: Does the discretionary exemption at section 38(a), allowing an institution to refuse access to the appellant's own personal information, read with the section 8(1)(d) exemption apply to the information at issue?

[30] 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 some exemptions from this general right of access to one's own personal information.

[31] Section 38(a) of the *Act* reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of the personal information.

[32] The discretionary nature of section 38(a) ("may" refuse to disclose) recognizes the special nature of requests for one's own personal information and the desire of the Legislature to give institutions the power to grant requesters access to their own personal information.⁷

[33] In this case, the city relies on section 38(a) in conjunction with section 8(1)(d) of the *Act* to deny the appellant access to the information at issue.

[34] Section 8(1)(d) states:

8(1) A head may refuse to disclose a record if the disclosure could reasonably be expected to

⁷ Order M-352.

(d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source[.]

[35] The term “law enforcement,”⁸ is defined in section 2(1):

“law enforcement” means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or

(c) the conduct of proceedings referred to in clause (b)

[36] The IPC has found that “law enforcement” can include a municipality’s investigation into a possible violation of a municipal by-law.⁹

[37] The law enforcement exemption must be approached in a sensitive manner, because it is hard to predict future events in the law enforcement context, and so care must be taken not to harm ongoing law enforcement investigations.¹⁰

[38] However, the exemption does not apply just because a continuing law enforcement matter exists,¹¹ and parties resisting disclosure of a record cannot simply assert that the harms under section 8 are obvious based on the record. They must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 8 are self-evident and can be proven simply by repeating the description of harms in the *Act*.¹²

[39] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.¹³ However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.¹⁴

⁸ The term “law enforcement” appears in many, but not all, parts of section 8.

⁹ Orders M-16 and MO-1245.

¹⁰ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

¹¹ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

¹² Orders MO-2363 and PO-2435.

¹³ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

¹⁴ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

[40] Section 8(1)(d) is intended to protect the identity of people who provide information to an institution in the context of a law enforcement matter. In order for section 8(1)(d) to apply, the city must establish a reasonable expectation that the identity of the source or the information given by the source would remain confidential in the circumstances.

Representations

[41] The city submits that section 8(1)(d) applies in this case, as the affected party provided it information in confidence about a possible violation of a by-law, which led to an inspection of the appellant's property. The city provides a copy of the by-law in question, the *Second Units Registration By-law 0114-2016*, noting that violations may result in a fine or a charge.

Analysis and finding

[42] As noted above, previous orders have established that the term "law enforcement" under section 2(1) of the *Act* includes municipal by-law enforcement. In this case, the affected party provided the city information, which according to the city led to an investigation of a possible contravention of the *Second Units Registration By-law 0114-2016*.

[43] Having considered the city's representations, along with the affected party's confidential representations, I find that the affected party had a reasonable expectation that their identity and the information they provided in the context of this by-law matter would be kept confidential.

[44] Based on my review of the record and the evidence before me, I find that disclosure of the withheld information would identify the affected party and reveal confidential information they provided in the context of a municipal by-law complaint. I note that the appellant has already been provided with most of the information in the record. I find that all the remaining information would identify the affected party and it is not possible to sever the record further to provide additional access.

[45] For these reasons, I have determined that the information at issue is exempt under section 38(a) in conjunction with section 8(1)(d), subject to my finding on the city's exercise of discretion.

[46] As I have found section 38(a) read with section 8(1)(d) applies to the information at issue, it is not necessary for me to consider the possible application of the personal privacy exemption in section 38(b).

Issue C: Was the city's exercise of discretion under sections 38(a) proper in the circumstances?

[47] The exemption at section 38(a) is discretionary, meaning that the institution can

decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to do so.

[48] This office 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 considers irrelevant considerations, or it fails to take into account relevant considerations.

[49] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁵ It cannot, however, substitute its own discretion for that of the institution.¹⁶

Representations, analysis and finding

[50] In its representations, the city submits that it properly exercised its discretion. It notes that withholding the information at issue is consistent with the practice of maintaining the confidentiality of complainants under the by-law complaint process, and ensuring the public will not be deterred from identifying by-law infractions. The city further notes that the affected party has not consented to the disclosure of their information, which it submits would be an unjustified invasion of personal privacy.

[51] I find that in making its decision, the city exercised its discretion in good faith, considering relevant considerations. In granting partial access to the appellant, the city weighed his right to access his own personal information, alongside the affected party's right to privacy, the sensitivity of the information, and the preservation of public confidence in the by-law enforcement process. It also considered its historic practice of maintaining the confidentiality of complainants in by-law matters.

[52] There is no evidence before me to suggest that the city took into account any irrelevant considerations or that they exercised their discretion in bad faith. Accordingly, I uphold the city's exercise of discretion in the circumstances.

ORDER:

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

Original Signed by: _____
Stephanie Haly
Adjudicator

February 11, 2022 _____

¹⁵ Order MO-1573.

¹⁶ Section 43(2).