

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4172-F

Appeal MA19-00388

Municipality of Leamington

February 25, 2022

Summary: This final order follows Interim Order MO-4058-I, and determines the remaining issues in an appeal of the Municipality of Leamington's decision to deny access to portions of an email about the appellant. In Interim Order MO-4058-I, the adjudicator found that the information at issue was not exempt under section 38(a) (discretion to refuse requester's own information), in conjunction with section 6(1)(b) (closed meeting), because it would not reveal the substance of deliberations of a closed meeting of council. She ordered the municipality to disclose the information at issue except for the names of third parties. In this final order, the adjudicator finds that the names are not exempt under section 38(b), and she orders them disclosed.

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") and 38(b).

Order Considered: Interim Order MO-4058-I.

OVERVIEW:

[1] This final order determines the issue of access to four names that were withheld from portions of an email that the Municipality of Leamington (the municipality) was otherwise ordered to disclose in Interim Order MO-4058-I.¹

[2] By way of background, the appellant made a request under the *Municipal*

¹ Issued May 28, 2021.

Freedom of Information and Protection of Privacy Act (the *Act*) for access to all communications about him exchanged between municipal council members and staff between April 1, 2018 to February 20, 2019.²

[3] The municipality located responsive records and issued a decision granting partial access to the records, which it itemized and numbered in an accompanying index. The appellant appealed the municipality's decision to grant partial access to the Office of the Information and Privacy Commissioner of Ontario (the IPC).

[4] By the time the appeal moved from mediation to adjudication, only one record remained at issue: an email authored by the then-deputy mayor (former deputy mayor) and identified in the municipality's index of records as Record 23-A (the record).

[5] The municipality denied access to portions of the record that were non-responsive to the appellant's request because they were not about him. Those non-responsive portions are not at issue in this appeal.

[6] However, eight sentences in the record contain the former deputy mayor's comments about the appellant. They relate to a complaint the appellant made to the mayor and council criticizing an annual charity event hosted by the municipality. There is no dispute that the municipality shared the appellant's complaint with the event's organizers, or that it was later posted on social media and reported in a local news story. The record at issue contains a discussion about who might have disclosed the appellant's complaint, and to whom.

[7] The municipality denied access to the record on the basis that it was exempt under section 6(1)(b) (closed meeting), section 8(1)(b) (law enforcement investigation), and section 12 (solicitor-client privilege).

[8] By the end of mediation, the municipality had disclosed additional records to the appellant. Based on this further disclosure, the section 8(1)(b) and section 12 exemptions, as well as the reasonableness of the municipality's search (and access to records withheld as non-responsive), were removed as issues in the appeal. Included in the further disclosure were portions of the record at issue, which the municipality maintained were exempt under section 6(1)(b) because they would reveal deliberations of a closed meeting of council. I decided to conduct an inquiry. However, because the record withheld under section 6(1)(b) appeared to contain the appellant's personal information, I included section 38(a) (discretion to refuse a requester's own information) as an issue in the Notice of Inquiry that I sent to the parties.³

[9] After reviewing the record and the parties' representations submitted in response

² The entire request is reproduced in Interim Order MO-4058-I.

³ Section 38(a) provides that an institution may refuse to disclose to the individual to whom the information relates personal information if section 6 would apply to the disclosure of that personal information.

to the Notice of Inquiry, I issued a Supplementary Notice of Inquiry asking the parties to also submit representations on the possible application of the discretionary personal privacy exemption in section 38(b), because the record also contains references to individuals other than the appellant.

[10] The municipality declined to submit representations on section 38(b), and maintained its position that the record was exempt under section 6(1)(b).

[11] In Interim Order MO-4058-I, I found that the record contains the appellant's personal information. I also found that the information at issue is not exempt under section 38(a), in conjunction with section 6(1)(b), because disclosure would not reveal the substance of deliberations of a closed meeting of council. I ordered the municipality to disclose portions of the email at issue, severing the names of third parties. The appellant was to advise me upon receipt of the information whether he seeks access to the withheld names.

[12] After he received disclosure pursuant to Interim Order MO-4058-I, the appellant notified me that he continues to seek access to the withheld names. As noted above, because the record contains the appellant's personal information and possibly that of other identifiable individuals (affected parties), I asked the municipality to submit representations on whether the names of these individuals were their personal information, and whether they were exempt under section 38(b). The municipality again declined to submit representations on the section 38(b) exemption. I also notified affected parties and sent a Notice of Inquiry inviting them to submit representations on these issues. Finally, I sought the appellant's representations.

[13] In this order, I find that the mayor's and councillor's names in the record are not their personal information. I find that the names of two other affected parties are their personal information, but that disclosure of the names would not constitute an unjustified invasion of those individuals' personal privacy under section 38(b). I order the municipality to disclose the remaining information at issue, that is, the names of the individuals referred to in the record.

RECORD:

[14] The record is an email from the former deputy mayor to a municipal councillor, identified as Record 23-A in the municipality's index of records. The information remaining at issue in this appeal consists of a first and last name, a nickname, and two given names. The names are contained in the eight sentences that make up the first four lines and fifth partial line of the email.

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 in section 38(b) apply to the information at issue?

DISCUSSION:

Issue A: Does the record contain "personal information" as defined in section 2(1) and if so, whose personal information is it?

[15] Before considering whether the personal privacy exemption in section 38(b) applies to the information at issue, I must first determine whether the record contains "personal information" and to whom it relates. Section 2(1) of the *Act* defines "personal information" as recorded information about an identifiable individual," and contains a non-exhaustive list of examples of personal information. This list includes:

(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 disclosure of the name would reveal other personal information about the individual.

[16] Information that does not fall under paragraphs (a) to (h) of the definition of personal information in section 2(1) may still qualify as personal information.⁴ To qualify as personal information, the information must be about the individual in a personal capacity, and it must be reasonable to expect that an individual may be identified if the information is disclosed.⁵

[17] Information is "about" the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about them. Generally, information about an individual in their professional, official or business capacity is not considered to be "about" the individual.⁶

[18] 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.⁷

⁴ Order M-11.

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

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

⁷ Orders P-1409, R-98-0015

[19] 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.⁸

Representations

[20] As noted above, because the record contains names of individuals other than the appellant, I invited the municipality, the appellant, and affected parties to submit representations on whether the names are the personal information of identifiable individuals.

[21] The municipality declined to submit further representations, instead relying on its earlier representations. In those earlier representations, the municipality submitted only that the record contains the appellant’s personal information as described in paragraph (g) of section 2(1), because it contains the views or opinions of another individual about him.

[22] The appellant maintains that the record contains his personal information because it contains the then-deputy mayor’s views or opinions of him.

[23] Of the affected parties notified, only one submitted representations, stating that he did not consent to disclosure of his personal information.

Analysis and findings

[24] I have already found in Interim Order MO-4058-I that the record contains the appellant’s personal information because it contains the former deputy mayor’s views and opinions about him. I found that this qualifies as the appellant’s personal information pursuant to paragraph (g) of section 2(1) of the *Act*.

[25] The information at issue consists of a former councillor’s surname, the former mayor’s nickname, a third individual’s first and last name, and a fourth individual’s first name.

[26] The record also contains the former deputy mayor’s speculation about who she may or may not have told about the appellant’s complaint. To the extent that her email reveals that she may have discussed the complaint with a former councillor and the former mayor, I am satisfied that this discussion among councillors took place in their capacity as elected officials. The municipality has provided me with no basis on which I could conclude that a discussion between the former deputy mayor, a former councillor or the former mayor about a constituent’s complaint to the municipality occurred in their personal capacity. In coming to this conclusion, I have also considered that the information at issue is part of an email that discusses other municipal matters,

⁸ Order P-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

unrelated to the appellant. Based on the record itself, I am also not persuaded that disclosure of the former mayor's and councillor's names would reveal something of a personal nature about them or that they were acting outside an official capacity when they discussed or shared the appellant's complaint.

[27] On the other hand, the remaining two affected parties are not elected officials. Their names appear in the former deputy mayor's email where she speculates about who might have shared the appellant's complaint about the charity event with its organizers. Even though they are only identified as possible recipients of information, I find that disclosure of their names would reveal that they are involved with the charitable event that was the subject of the appellant's complaint, and that the former deputy mayor considered that she or another councillor might have shared the appellant's complaint with them. I find that this qualifies as their personal information under paragraph (h) of section 2(1).

[28] In the circumstances, I find that the record contains the personal information of the appellant and two affected parties, but not the personal information of the former mayor or former councillor.

[29] Because I have found that the record contains both the appellant's personal information and the personal information of two affected parties, I must consider the application of the discretionary personal privacy exemption in section 38(b) to their names.

Issue B: Would disclosure of the information at issue constitute an unjustified invasion of personal privacy under section 38(b)?

[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 exceptions from this right.

[31] Under the section 38(b) exemption, if a record contains the personal information of both the requester and another individual, the institution may refuse to disclose the other individual's personal information to the requester if disclosing that information would be an "unjustified invasion" of the other individual's privacy.

[32] The section 38(b) exemption is discretionary. This means that the institution can decide to disclose another individual's personal information to the requester even if this would result in an unjustified invasion of the other individual's personal privacy.

[33] If disclosing another individual's personal information would not be an unjustified invasion of personal privacy, then the information is not exempt under section 38(b).

[34] Sections 14(1) to (4) provide guidance in deciding whether disclosure would be an unjustified invasion of the other individual's personal privacy. If any of the section 14(1)(a) to (e) exceptions apply, disclosure would not be an unjustified invasion of

personal privacy and the information is not exempt from disclosure under section 38(b).

[35] Sections 14(2), (3) and (4) also help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b). Section 14(4) lists situations where disclosure would not be an unjustified invasion of personal privacy, in which case it is not necessary to decide if any of the factors or presumptions in sections 14(2) or (3) apply.

[36] The parties do not rely on section 14(4), and I find that it does not apply in this appeal.

[37] In deciding whether the disclosure of personal information in the records would be an unjustified invasion of personal privacy under section 38(b), the IPC will consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.⁹

Representations

[38] As noted above, the municipality declined to submit representations on the application of section 38(b), either in response to a Supplementary Notice of Inquiry before Interim Order MO-4058-I was issued, or after, in response to a Notice of Inquiry seeking representations on the application of section 38(b) to the withheld names.

[39] When I notified the affected parties, I stated that, if they did not submit representations, I would assume their position to be that they do not consent to disclosure of information about them, but that the inquiry would continue and that an order would be issued without further notice to them. The affected party who submitted representations submits that he did not initiate any communications with the mayor and that disclosure of information about him would be "a violation of [his] personal rights."

[40] The appellant submits that the record contains his personal information because it contains a discussion about him by elected officials. He says that he is entitled to all information about him, and that he will get full disclosure when he sues the municipality, so they "might as well cough it up now."

Analysis and findings

[41] Under section 42 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* rests with the institution.

[42] On its face, the record at issue was authored by the former deputy mayor and contains her speculation about individuals with whom she or another councillor might have shared the appellant's complaint. The record identifies the other individuals as

⁹ Order MO-2954.

persons the mayor or councillor might have told about the appellant's complaint; it does not identify them as participants in, or initiators of, any communication with the former deputy mayor or councillor, only as possible recipients of communication from municipal councillors.

[43] Neither the municipality nor the affected parties have provided me with any basis on which I can find that disclosure of their names in the circumstances would constitute an unjustified invasion of their personal privacy. None relied on any listed or unlisted factors in section 14(2) that might apply to weigh against disclosure.

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

[44] The appellant's representations make repeated reference to future legal action against the municipality, and he therefore appears to be arguing that the factor at section 14(2)(d) (fair determinations of rights) applies to favour disclosure.

[45] Section 14(2)(d) states that:

(2) 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.

[46] In order to establish that the factor in section 14(2)(d) applies, the appellant must show that:

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;
2. The right is related to a proceeding, which is either existing or contemplated, not one that has already been completed;
3. The personal information to which the appellant seeks access has some bearing on or is significant to the determination of the right in question;
4. The personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.¹⁰

[47] All four parts must be established for section 14(2)(d) to apply. While the

¹⁰ Order PO-1764, in which the relevant considerations for the application of section 14(2)(d) were adopted from the test set out in Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

appellant submits that he will bring a claim against the municipality, he has not provided any information to support an assertion that access to an email from 2018 is required for a contemplated proceeding or to prepare for it, or even information about the nature of such a proceeding. The appellant says only that access should be granted because the entire email will in any event eventually be disclosed as part of examinations for discovery in a legal proceeding.

[48] I find that this does not meet the four-part test of section 14(2)(d), and that section 14(2)(d) does not apply to weigh in favour of disclosure.

Unlisted factor

[49] The parties did not submit that any unlisted factors favouring disclosure or non-disclosure apply. I find that no listed factors apply. However, I have considered a factor raised in the appellant's initial representations as an unlisted factor that I find applies and weighs in favour of disclosure in the circumstances.

[50] With his initial representations, the appellant included what he described as "email excerpts taken from [his] recent Freedom of Information request" from which he says it is "abundantly clear the Councillors bantered back and forth" about releasing his complaint. Although these emails were provided to the municipality with the appellant's representations, the municipality did not submit representations in response.

[51] These excerpts contain a chain of discussions between councillors, including those named in the record at issue, about, among other things, sharing the appellant's complaint with the charity event's organizers. It includes messages exchanged between the same individuals discussing the same matter as in the record at issue. The messages contain the names at issue in this appeal, which have not been severed from those messages. I find that prior disclosure of similar information in response to the appellant's access request, and from which the names at issue in this appeal have not been severed, is an unlisted factor that applies in the circumstances to weigh in favour of disclosure.

[52] The parties do not submit that any other unlisted factors apply to favour or weigh against disclosure, and I find that none do.

Conclusion

[53] The record at issue contains commentary by an elected official about the appellant and his complaint about a charity event hosted by the municipality. It contains the former deputy mayor's musings about who might have shared the appellant's complaint with the event's organizers, but does not conclude which individuals received that information or from whom. The parties opposing disclosure have not identified any listed or unlisted factors that would apply in favour of privacy protection. I have reviewed the record and assessed the various enumerated considerations in section 14(2) and have also considered any unlisted factors. I have

concluded that, without specific representations, there are no factors that favour non-disclosure.

[54] I find that disclosure of the withheld names would not be an unjustified invasion of personal privacy in the circumstances and that the names are therefore not exempt under section 38(b). I order the municipality to disclose the remaining names at issue in record 23-A to the appellant.

ORDER:

1. I order the municipality to disclose to the appellant the names severed from the record. The names to be disclosed are highlighted in the copy of the record being provided to the municipality with this order. The municipality is to make this disclosure by April 1, 2022 but not before March 28, 2022.
2. In order to verify compliance with order provision 1, I reserve the right to require the municipality to provide me with a copy of the disclosed record.

Original Signed by: _____
Jessica Kowalski
Adjudicator

February 25, 2022 _____