

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-4453

Appeal MA22-00463

City of Mississauga

October 20, 2023

**Summary:** The appellant submitted a request to the city under the *Act* for records relating to specified complaints to the city's animal services department. The city located responsive records and disclosed a number to her, but an audio/video recording was withheld under the discretionary exemption in section 38(b) (personal privacy).

In this order, the adjudicator finds that portions of the recording are exempt from disclosure, but portions of the recording should be disclosed to the appellant.

**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(2)(h), 14(3)(b) and 38(b).

### OVERVIEW:

[1] The City of Mississauga (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records related to two specified complaints to the city's animal services department.

[2] The city identified responsive records and granted information, in part. The city withheld access to certain records and an audio/video recording under section 38(b). The requester, now the appellant, appealed the city's decision to the Information and Privacy Commissioner of Ontario (IPC). During mediation, the appellant advised the mediator that she is only pursuing access to the audio/video recording submitted to the

city as part of the specified complaints.

[3] No further mediation was possible and the appeal was transferred to the adjudication stage. The adjudicator previously assigned to the appeal decided to conduct an inquiry. She sought and received representations from the city. I was then assigned to the appeal, and I sought and received representations from the appellant. I sought reply representations from the city, and it continued to rely on its original representations. While representations were sought from the affected party, no representations were received. Representations were shared in accordance with the *IPC's Code of Procedure*.

[4] For the reasons that follow, I find that portions of the recording are not exempt from disclosure and order those specific portions disclosed.

## **RECORDS:**

[5] The sole record at issue is a one minute and five second long audio/video recording (the recording).

## **ISSUES:**

- A. Does the recording contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?
- B. Does the discretionary personal privacy exemption at section 38(b) apply to the personal information at issue?
- C. Did the institution exercise its discretion under section 38(b)?

## **DISCUSSION:**

### **Issue A: Does the recording contain personal information?**

[6] Before I consider the exemption claimed by the city, I must first determine whether the recording contains "personal information." If it does, I must determine whether the personal information belongs to the appellant, other identifiable individuals, or both. "Personal information" is defined in section 2(1) of the *Act* as "recorded information about an identifiable individual."

[7] 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 the individual. 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.<sup>1</sup> Section 2(1) of the *Act* gives a list of examples of personal information.

[8] The city submits that the recording contains footage of the appellant's property, but also contains information related to individuals other than the appellant, including the individuals' private residence and space. The appellant did not provide specific representations on whether the record constituted personal information, and did not dispute the city's submissions.

[9] Based on my review of the recording, I find that it contains video of the appellant's private yard and other individuals' private yards, as well as video and audio of individuals on both properties. The yards in question are fenced in and not otherwise visible from the street and individuals in both yards can be heard speaking in the recording. In my view, the information at issue is recorded information about these identifiable individuals, including their images, statements and actions. I find that the record at issue contains both the appellant's personal information and the personal information of other individuals.

[10] I will now consider the application of the section 38(b) exemption to withhold the recording.

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

[11] Having found that the recording contains the personal information of the appellant and other individuals, I will consider the application of the personal privacy exemption at section 38(b). 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 right.

[12] 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 appellant. This involves a weighing of the appellant's right of access to their own personal information against the other individual's right to protection of their privacy.

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

[14] 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).

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<sup>1</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

Additionally, the requester's own personal information, standing alone, cannot be exempt under section 38(b) as its disclosure could not, by definition, be an unjustified invasion of another individual's personal privacy.<sup>2</sup>

[15] Sections 14(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy under section 38(b). Section 14(2) provides a list of factors for the city to consider in making this determination, while section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

[16] Section 14(4) sets out certain types of information whose disclosure is not an unjustified invasion of personal privacy. The city submits that none of the paragraphs in section 14(4) apply to the information at issue. I agree and find that none of the situations described in section 14(4) are applicable in this appeal.

[17] In determining whether the disclosure of the recording would be an unjustified invasion of personal privacy under section 38(b), therefore, I will consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.<sup>3</sup>

### ***Representations***

[18] The city submits that none of the exceptions outlined in sections 14(1)(a) to (e) apply to the information at issue. They state that the recording was submitted as part of a by-law investigation into a possible violation of law, engaging the presumption in 14(3)(b).

[19] They also submit that section 14(2)(h) (information supplied in confidence) applies to the recording, as it was provided to the city in confidence as part of the by-law investigation. They state that disclosure of the footage would reasonably identify a confidential source of information, which would interfere with the city's by-law enforcement process, and that its disclosure would provide information about a private residence.

[20] The appellant submits that she was the complainant that led to the city's by-law investigation. She states that the city advised her that they received the recording and decided not to proceed with the complaint. She states that the affected party's lack of representations indicate that they have no specific reason to refuse access to the recording.

[21] She submits that the city's arguments related to the privacy of the properties and individuals in the video are not relevant to this appeal, stating that she has met and spoken to the other individuals in the video, and has been inside of the other property.

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<sup>2</sup> Order PO-2560.

<sup>3</sup> Order MO-2954.

She also submits that she is able to see the private yard in question from her own property. In reply, the city was asked to respond to the appellant's submission regarding her familiarity with the property and the video. The city reiterated that regardless of what information the appellant may have regarding the properties and individuals in the video, it was supplied in confidence as part of an investigation into a possible violation of law, and the affected party did not consent to its release.

### ***Analysis and finding***

[22] As stated above, the issue in this appeal is whether disclosure of the recording would be an unjustified invasion of their personal privacy under section 38(b).

#### *Presumptions and factors*

[23] If any of the five exceptions in sections 14(1)(a) to (e) apply, the section 38(b) exemption does not apply to the recording. Based on the representations of the parties and my review of the recording, I find that none of the exceptions apply.

[24] Under section 14(3)(b), the disclosure of an individual's personal information to another individual is presumed to be 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 of law or to continue the investigation.

[25] Even if no criminal proceedings were commenced against any individual, as is the case in this appeal, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.<sup>4</sup>

[26] I have reviewed the recording and the context surrounding it, and it is clear that the recording was submitted by the affected party to the city as part of an investigation into a possible violation of law. As the appellant submitted, the city obtained the recording as part of their investigation into the appellant's complaint against the affected party.

[27] Even though the complaint was dismissed by the city, the presumption in section 14(3)(b) only requires that there be an investigation into a possible violation of law. Additionally, previous IPC orders have found that this presumption also applies to by-law investigations.<sup>5</sup> I therefore find that the presumption against disclosure in section 14(3)(b) applies to the recording and that its disclosure to the appellant would be presumed to be an unjustified invasion of their privacy, subject to the factors discussed below.

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<sup>4</sup> Orders P-242 and MO-2235.

<sup>5</sup> See, for example, Order MO-2147.

[28] The city points to section 14(2)(h) as a factor weighing against disclosure. This factor applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.<sup>6</sup>

[29] Previous IPC orders have found that information provided as part of a by-law investigation was done so in confidence.<sup>7</sup> Based on the recording, its surrounding context related to the complaints to the city, and the representations of the parties, I make the same finding here. As such, I find that section 14(2)(h) is a relevant factor weighing against disclosure.

[30] I have considered whether any other factors favouring disclosure of the recording, either listed or unlisted, may apply. The appellant did not directly raise the issue, but throughout her representations she states that the city declined to proceed with her specified complaints after they received the video from the affected party. Accordingly, I find that through her access request she is raising an inherent fairness issue related to the city's disposition of her complaints, and this favours disclosure.

[31] Furthermore, the context surrounding situations where a requester is seeking information provided to a government body that concerns the requester has been found to be a relevant consideration favouring disclosure.<sup>8</sup> Here, the appellant seeks access to a video submitted by another party that contains information about herself and her yard. Considering the context of the appeal, I find that this gives rise to an inherent fairness issue and is a relevant factor weighing in favour of disclosure of the information.

*Balancing the factors, severances and absurd result*

[32] Balancing the section 14(3)(b) presumption against disclosure with the section 14(2)(h) factor and the inherent fairness issues discussed above, I find that the balance weights in favour of protecting the affected party's personal privacy, rather than the appellant's access rights. I have reached this conclusion in consideration of the nature of the information at issue, the confidentiality expectations of the affected party, and in consideration of the amount of information that has already been disclosed to the appellant about the by-law complaint.

[33] However, based on my review of the recording, I also find that it can be reasonably severed in a manner that protects the privacy rights of the affected party, while also respecting the appellant's access rights. As described above, the recording contains footage of the appellant's yard, as well as other yards and other individuals. While the personal information of other individuals would be disclosed if the entire

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<sup>6</sup> Order PO-1670.

<sup>7</sup> See, for example, MO-3447.

<sup>8</sup> Orders PO-1750 and PO-1767.

recording were released, resulting in an unjustified invasion of privacy for the reasons discussed above, there are significant portions of the recording where the video can be severed so that only the appellant's property is visible.

[34] In particular, disclosing the portions of the recording where no other individuals are present, with everything except for the appellant's yard redacted, would provide the appellant with some access to the information she is seeking, while respecting the privacy rights of the affected party. With respect to the audio, based on my review of the recording, the identities of the individuals who are speaking are not clear, and in order to ensure that the personal information of the affected party is not disclosed, the audio should be removed from the recording prior to its disclosure. Accordingly, I will order portions of the video, redacted so that only the appellant's property is visible, to be disclosed. Although this portion of the recording would not reveal what occurred on the affected party's property or the city's reasoning for dismissing the appellant's complaints, it would provide the appellant with her personal information.

[35] In her representations, the appellant explained that she was already aware of the identities of the other individuals in the video and the affected party's property, raising that withholding the recording or portions of it would lead to an absurd result. I find that withholding the portions of the recording discussed above would not lead to an absurd result. Even if the appellant does know the identity of the affected party and is generally aware of what the property looks like, it does not follow that she is aware of the contents of the recording. Accordingly, I find that, with the exception of the portions of the recording discussed above, the recording is exempt from disclosure under section 38(b), subject to the city's exercise of discretion, discussed below.

### **Issue C: Did the city exercise its discretion under section 38(b)?**

[36] The section 38(b) exemption is discretionary and permits an institution to disclose information, despite the fact that it could withhold it. Having found that portions of the recording are exempt under section 38(b), I must next determine if the city properly exercised their discretion in withholding the information. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[37] The IPC may find that an 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; or
- it fails to take into account relevant considerations.

[38] In either case, the IPC may send the matter back to the institution for an

exercise of discretion based on proper considerations.<sup>9</sup> The IPC may not, however, substitute its own discretion for that of the institution.<sup>10</sup>

### ***Representations, analysis and finding***

[39] The city submits that the by-law complaint process has traditionally guaranteed the confidentiality of individuals who provide information for the purposes of investigating into possible violations of law. They state that this ensures that members of the public will not be deterred from identifying by-law infractions. They state that disclosure of the footage would identify a confidential source of information, interfering in the by-law enforcement process. They state that it would also reveal private residences, where there is a reasonable expectation of privacy.

[40] The appellant did not provide specific representations on the city's exercise of discretion under section 38(b).

[41] I have reviewed the considerations relied upon by the city and I find that they properly exercised their discretion in response to the access request. Based on their overall representations and the amount of records already disclosed to the appellant, it is clear that they considered the purposes of the *Act* and sought to balance the appellant's interest in accessing the full records with the protection of the affected party's privacy when making their access decision.

[42] I find that the city did not exercise their discretion to withhold the affected party's personal information for any improper purpose or in bad faith, and that there is no evidence that they failed to take relevant factors into account or that they considered irrelevant factors. Accordingly, I uphold the city's exercise of discretion in denying access to the portions of the recording that I have not ordered disclosed.

### **ORDER:**

1. I uphold the city's decision to withhold portions of the recording.
2. I order the city to disclose portions of the recording where no other individuals are present, severed so that only the appellant's property is visible, with the audio removed. To be clear, I order the city to disclose 00:00:00-00:00:20 and 00:00:46-00:01:05 of the video with the above severances. I order that this be done by **November 27, 2023**, but not before **November 20, 2023**.
3. In order to verify compliance with Order provision 2, I reserve the right to require the city to provide me with a copy of the recording disclosed to the appellant.

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<sup>9</sup> Order MO-1573.

<sup>10</sup> Section 43(2) of the *Act*.



Original signed by: \_\_\_\_\_  
Chris Anzenberger  
Adjudicator

October 20, 2023 \_\_\_\_\_