



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-2264

Appeal MA06-385 and MA07-7

Otonabee Region Conservation Authority



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NATURE OF THE APPEAL:

The Otonabee Region Conservation Authority (the Authority) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for copies of all complaints that the Authority investigated with respect to the requester's property.

The Authority located 28 pages of records that were responsive to the request, including email messages, a letter, a map and photographs.

The responsive records contain information relating to individuals other than the requester, particularly the party who complained to the Authority about matters relating to the requester's property. Consequently, the Authority notified this affected party pursuant to section 21 of the *Act* that it intended to disclose the records to the requester but stated that all "personal and identifying information" would be severed from the records pursuant to the mandatory exemption in section 14(1) (personal privacy) of the *Act*.

In response, the affected party informed the Authority that they did not consent to the release of "any emails or communications" that they had sent to the Authority and submitted that disclosure would be a violation of their privacy.

After considering the affected party's views, the Authority issued a decision letter that informed the affected party that it had decided to disclose the records to the requester but reiterated that all "personal and identifying information" would be severed from the records pursuant to section 14(1) of the *Act*.

The affected party appealed the Authority's decision to this office and Appeal MA06-385 was opened. During the mediation stage of the appeal process, the mediator informed the Authority that because the records contain information relating to both the requester and other individuals, the discretionary exemption in section 38(b) (personal privacy) of the *Act* may be applicable.

As a result, the Authority issued a revised decision letter to both the requester and the affected party, informing them that it had decided to disclose the records to the requester but would be severing the personal information of the affected party pursuant to sections 14(1) and 38(b) of the *Act*.

The affected party confirmed to the mediator that they were appealing the Authority's revised decision. In addition, the requester filed an appeal of the Authority's decision to withhold portions of the records from him. Consequently, this office opened Appeal MA07-7, in which the requester is the appellant.

No further mediation was possible and both appeals were transferred to the adjudication stage of the appeal process. I decided to consider both appeals together. In the interests of clarity in this order, I will continue to refer to the appellant in Appeal MA06-385 as the "affected party" and the appellant in Appeal MA07-7 as the "requester."

I began my adjudication of these appeals by sending a Notice of Inquiry, setting out the facts and issues, to the Authority and the affected party. I invited both parties to submit representations on

all issues set out in the Notice of Inquiry. Both the Authority and the affected party submitted representations in response.

I then sent a Notice of Inquiry to the requester, along with the non-confidential portions of the Authority's representations and a summary of the affected party's representations. I invited him to submit representations on all issues set out in the Notice of Inquiry and to respond to the representations of the other parties. The requester did not submit any representations in response.

RECORDS:

There are 28 pages of records that are at issue in this appeal, including email messages, a letter, a map and photographs.

DISCUSSION:

PERSONAL INFORMATION

General principles

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 where 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;

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 [Order 11].

To qualify as personal information, the information must be about the individual in a personal 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 [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

Analysis and findings

The Authority submits that the records at issue contain the personal information of both the affected party and the requester. The requester did not submit any representations in these appeals. The affected party's representations do not directly address any of the specific legal issues in this appeal, but they imply that the records contain their personal information.

I have reviewed the records at issue and find that the email messages, the letter and the map contain the personal information of both the requester and the affected party. The personal information of the requester found in the records includes his name, address, phone number, and the views and opinions of another individual (the affected party) about him. The personal information of the affected party includes their name, address, phone number, email address and other identifiable information.

In addition, the affected party copied some of their complaint emails to other parties. Consequently, the "cc" field in these emails contain a mix of work and personal email addresses relating to various individuals. The work email addresses belong to individuals who are affiliated with the City of Peterborough (mainly elected officials), Parks Canada or the Authority. I find that these email addresses are professional, not personal information.

However, I find that the personal email addresses relating to various individuals is their personal information.

The records also include photographs of the requester's property, including his house and accompanying land. There are no individuals in these photographs. In my view, a photograph of a property alone that does not include the image of an identifiable individual is not "personal information," as that term is defined in section 2(1) of the *Act*. I find, therefore, that these photographs do not contain personal information.

The personal privacy exemptions in the *Act* only apply to personal information. Consequently, the discretionary exemption in section 38(b) cannot apply to the work email addresses of various individuals or the photographs of the requester's property. Neither the Authority nor the affected party have claimed that this information is exempt from disclosure under any other section of the *Act*. As a result, I find that this information must be disclosed to the requester.

I will now consider whether the personal information in the remaining records (the email messages, the letter and the map) qualify for exemption under section 38(b) of the *Act*.

PERSONAL PRIVACY

General principles

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 a number of exemptions from this right.

Under section 38(b), where a record contains the personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 38(b) is met.

If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt from disclosure under section 38(b).

Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. If paragraph (a), (b) or (c) of section 14(4) applies, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. 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 under section 38(b).

The Divisional Court has stated that once a presumed unjustified invasion of personal privacy is established under section 14(3), it can only be overcome if section 14(4) or the “public interest override” at section 16 applies. It cannot be rebutted by one or more factors or circumstances under section 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

If no section 14(3) presumption applies, 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 under section 38(b) [Order P-239]. 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) [Order P-99].

Section 38(b) is a discretionary, not a mandatory exemption. If the personal information at issue falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester’s right of access to his or her own personal information against the other individual’s right to protection of their privacy.

Analysis and findings

The records at issue contain the personal information of both the requester and the affected party. In addition, they contain the personal information (personal email addresses) of several other individuals. The Authority takes the position that some of this personal information qualifies for exemption under section 38(b) of the *Act*.

The requester did not submit representations on any of the issues in these appeals, including section 38(b). The affected party submitted representations but they do not specifically address the application of section 38(b). Consequently, there is no evidence before me from either the requester or the affected party as to whether the discretionary exemption in section 38(b) applies to the personal information in the records at issue.

Some portions of the records only contain the personal information of the requester. The Authority’s decision is to disclose this information to him. In these portions of the records, the requester’s personal information is not intertwined with the personal information of the affected party. In such circumstances, disclosure of the requester’s own personal information to him cannot constitute an unjustified invasion of the affected party’s personal privacy. Accordingly, I find that this information is not exempt from disclosure under section 38(b) of the *Act*, and I uphold the Authority’s decision to disclose those portions of the records to the requester.

In other portions of the records, the personal information of both the requester and the affected party is intertwined (e.g., comments made by the affected party about the requester that indicate

their relationship to him). In addition, some portions of the records contain only the affected party's personal information. Finally, other portions contain the personal email addresses of several individuals. It must be determined, therefore, whether disclosure of this personal information to the requester would constitute an unjustified invasion of the personal privacy of the affected party and the other individuals, pursuant to section 38(b) of the *Act*.

The Authority submits that the presumption in section 14(3)(b) applies to this personal information. This provision states:

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;

The Authority states that the personal information in the records at issue was compiled as part of an investigation into a possible violation of the law. In particular, it cites section 28 of the *Conservation Authorities Act* and Ontario Regulation 282/97, which it identifies as "the [Authority's] Fill, Construction and Alteration to Waterways Regulation."

I have reviewed the *Conservation Authorities Act*, including the provision cited by the Authority. It appears that conservation authorities are responsible for managing certain natural resources, particularly watersheds. Section 28, which gives conservation authorities the power to make regulations, states:

Subject to the approval of the Minister, an authority may make regulations applicable in the area under its jurisdiction,

- (a) restricting and regulating the use of water in or from rivers, streams, inland lakes, ponds, wetlands and natural or artificially constructed depressions in rivers or streams;
- (b) prohibiting, regulating or requiring the permission of the authority for straightening, changing, diverting or interfering in any way with the existing channel of a river, creek, stream or watercourse, or for changing or interfering in any way with a wetland;
- (c) prohibiting, regulating or requiring the permission of the authority for development if, in the opinion of the authority, the control of flooding, erosion, dynamic beaches or

pollution or the conservation of land may be affected by the development;

- (d) providing for the appointment of officers to enforce any regulation made under this section or section 29;
- (e) providing for the appointment of persons to act as officers with all of the powers and duties of officers to enforce any regulation made under this section.

Although the Authority cites Ontario Regulation 282/97, it appears that this regulation has been repealed and replaced by Ontario Regulation 167/06. Section 13 of the latter regulation specifically states that Ontario Regulation 282/97 is revoked.

Regulation 167/06 deals with the Authority's powers to regulate "development, interference with wetlands and alterations to shorelines and watercourses." Section 10 of this regulation empowers the Authority to appoint officers to enforce the regulation.

One of the records at issue states that the requester's property "is within the floodplain of the Otonabee River and is subject to Ontario Regulation 167/06." After receiving complaints from the affected party, the Authority appointed a "regulations officer" to investigate whether the requester was in compliance with Regulation 167/06. Consequently, the Authority compiled the personal information of the requester, the affected party and other individuals as part of an investigation into a possible violation of the law (Regulation 167/06). I find, therefore, that disclosure of this information is presumed to constitute an unjustified invasion of personal privacy under section 14(3)(b) of the *Act*.

As noted above, the Divisional Court stated in *John Doe* that once a presumed unjustified invasion of personal privacy is established under section 14(3), it can only be overcome if section 14(4) or the "public interest override" at section 16 applies. It cannot be rebutted by one or more factors or circumstances under section 14(2). I have considered the exceptions in section 14(4) of the *Act* and find that the personal information remaining at issue does not fall within the ambit of this section. Moreover, the "public interest override" in section 16 does not apply, because the requester has a private, not a public interest, in seeking access to the records at issue, and he has not raised the application of this provision.

Accordingly, I find that those portions of the records containing the intertwined personal information of both the requester and the affected party qualify for exemption under section 38(b) of the *Act*. Similarly, those portions of the records containing only the affected party's personal information qualify for exemption under section 38(b). Finally, those portions of the records containing the personal email addresses of various individuals also qualify for exemption under this provision.

In short, disclosure of this personal information to the requester would constitute an unjustified invasion of the personal privacy of the affected party and other individuals. Subject to my discussion below on the issue of exercise of discretion, I uphold the Authority's decision to withhold these portions of the records from the requester.

I would note that in the copy of the records provided to me, the Authority did not sever the name of the affected party from the emails of August 19, 2006 and August 24, 2006. In addition, it did not sever the personal email addresses of several individuals from the email of August 24, 2006. Consequently, I will order the Authority to sever this information from the records before they are disclosed to the requester.

EXERCISE OF DISCRETION

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.

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

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that:
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected

- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

The thrust of the affected party's representations is that disclosure to the requester of any part of the "confidential correspondence" that they sent to the Authority would be an invasion of their privacy. They submit that disclosing this correspondence would set a "dangerous precedent" because many government departments, including the Authority, municipal bylaw departments and law enforcement agencies, depend on citizens to report alleged infractions or crimes. They assert that citizens will not assist these government departments if they know that any complaints they submit will be disclosed.

The Authority states that its head considered several factors before it decided to partially disclose the records at issue to the requester. For example, it submits that the requester has a right to access his own personal information, and the records contain several accusations against him that he is entitled to know. It also took into account the fact that the affected party copied some of their emails to other individuals. The Authority further submits that the exemptions to disclosure should be limited and specific. Accordingly, it asserts that it decided to only disclose information relating to the complaints against the requester and severed all information that would identify the affected party.

In the appeal letter that he submitted to this office, the requester states that he is appealing "any severances that may be requested by [the affected party] to the information ..." However, he did not submit representations on any of the issues in these appeals, including whether the Authority exercised its discretion properly in deciding to withhold portions of the records from him.

In my view, the Authority exercised its discretion based on proper considerations. In reaching its decision to disclose a severed version of the records, it weighed the requester's right of access to his own personal information against the privacy rights of the affected party. I am not persuaded that the Authority failed to take relevant factors into account or that it considered irrelevant factors in applying the section 38(b) exemption. I find, therefore, that its exercise of discretion was proper.

ORDER:

1. I uphold the Authority's decision to disclose a severed version of the records to the requester, subject to order provisions 2, 3 and 4 below.
2. I order the Authority to withhold the name of the affected party from the emails of August 19, 2006 and August 24, 2006.
3. I order the Authority to withhold those portions of the records containing the personal email addresses of any individuals.
4. I order the Authority to disclose those portions of the records containing the work email addresses of any individuals affiliated with the City of Peterborough, Parks Canada or the Authority.
5. I have provided the Authority with a copy of the records and highlighted in green those portions that must be withheld from the requester. To be clear, the green highlighted portions must **not** be disclosed to the requester.
6. I order the Authority to disclose the severed records to the requester by February 29, 2008 but not before February 25, 2008.
7. I reserve the right to require the Authority to provide me with a copy of the records that it discloses to the requester.

Original signed by: _____
Colin Bhattacharjee
Adjudicator

January 25, 2008 _____