

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2760

Appeal MA11-440

Toronto Public Library Board

July 5, 2012

Summary: The appellant submitted a request to the Toronto Public Library Board for records pertaining to his exclusion from the Toronto Public Library. The board located one responsive record, provided access to the body of the record and withheld the name of the affected party pursuant to section 14(1) (personal privacy) of the *Act*. During mediation, the possible application of section 38(b) (personal privacy exemption where the record contains the appellant's personal information) was raised as an issue. The record contains the personal information of the appellant and the affected party. The name of the affected party is 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(2)(f), 14(2)(h), 38(b).

OVERVIEW:

[1] The appellant submitted a request to the Toronto Public Library Board (the board) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to the results of an investigation regarding the appellant's exclusion from the Toronto Public Library.

[2] The board located one responsive record; a two-page report titled the "Investigation of Reinstatement Request Report", and issued a decision granting partial access to it. In particular, the board severed out the name of the other individual identified in the report (the affected party) and provided the appellant with the balance of the report.

[3] The appellant appealed the board's decision, indicating that he wished to pursue access to the name of the other individual contained in the report.

[4] During mediation, the board confirmed that it was relying on the mandatory exemption at section 14 (personal privacy) of the *Act* with respect to its severing of the other individual's name. Because the record appears to contain the appellant's personal information, the mediator raised the application of the discretionary exemption at section 38(b) (personal privacy where the record also contains the appellant's personal information). The mediator attempted to contact the affected party to determine if he was willing to consent to disclosure of his name; however, the mediator was unable to reach this other individual, either by phone or by mail.

[5] The appeal was not resolved during mediation, and was, accordingly, forwarded to the adjudication stage of the appeal process.

[6] During the inquiry into the appeal, I sought and received representations from the board, which were shared with the appellant in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*. The appellant did not submit representations.

[7] In this order, I find that the record contains the personal information of both the appellant and the affected party. I find further that disclosure of the affected party's personal information (his name) would constitute an unjustified invasion of his personal privacy, and the information is, therefore, exempt under section 38(b) of the *Act*.

RECORD:

[8] The sole record at issue is the name of the affected party contained in a two-page "Investigation of Reinstatement Request Report."

ISSUES:

- A. Does the record contain "personal information" as defined in section 2(1)?
- B. Does the discretionary exemption at section 38(b) apply to the information at issue?

DISCUSSION:

A. Does the record contain "personal information" as defined in section 2(1)?

[9] 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 if 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.

[10] 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.¹

[11] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.²

[12] The board takes the position that the record, in its entirety, contains the personal information of both the appellant and the affected party. It points out, however, that the information at issue in the record pertains only to the affected party.

[13] As I indicated above, the record is a two-page "Investigation of Reinstatement Request Report." The report describes an incident that occurred on library property between the appellant and the affected party. Both parties are identified by name in the record. The appellant has been provided with a copy of the vast majority of the record with only the name of the affected party removed. Although the information at issue is the name of the affected party, this information must be viewed in the context of the whole record.³ I find that the record contains the personal information of both the appellant and the affected party. The information at issue pertaining to the affected party is easily removed from the remaining portions of the record, which, as I noted above, have been provided to the appellant.

[14] Because of this finding, my analysis of the personal privacy provisions of the *Act* will be conducted pursuant to the discretionary exemption at section 38(b).

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

[15] 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.

[16] Under section 38(b), where a record contains 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.

[17] Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met.

¹ Order 11.

² Order PO-1880, upheld on judicial review in Ontario (Attorney General) v. Pascoe, [2002] O.J. No. 4300 (C.A.).

³ Order M-352.

[18] If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the board 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.

[19] An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[20] 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.

[21] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁴ This office may not, however, substitute its own discretion for that of the institution.⁵

[22] The board indicates that the record documents its investigation into the appellant's reinstatement request. It notes that the record contains the names of the appellant and the affected party as well as the appellant's views regarding the affected party's sexuality and behaviour at a library branch. The board indicates that the information contained in the record was obtained from the appellant, library staff and sources other than the appellant.

[23] The board takes the position that the record does not contain exclusively the appellant's own personal information as it describes a situation involving both individuals, and reiterates that the information at issue contains only the affected party's name.

[24] In the context of the incident that led to the removal of the appellant from library premises and the subsequent investigation into his request for reinstatement, the board submits that the name of the affected party is highly sensitive (section 14(2)(f)). In addition, the board notes that the information was obtained from both the appellant and the affected party in confidence (section 14(2)(h)). The board states further:

⁴ Order MO-1573.

⁵ Section 43(2).

When documenting incidents that violate the library's Rules of Conduct, the [board] believes that all patrons maintain the same expectation of confidentiality; this includes documenting names, witness statements, or other information pertinent to the documentation and investigation into such incidents...

When collecting personal information, there is, at the very least, an implicit expectation of confidentiality between the customer and the library. Further, the [board's] Access to Information and Protection of Privacy Policy explicitly states the [board's] commitment to the protection of customer privacy. The [board] believes that [the affected party] has a reasonable expectation of confidentiality regarding whether the [board] would publicly circulate information identifying him as the individual that is the subject of the appellant's opinions and views concerning his sexual orientation and sexual behaviour.

[25] In exercising its discretion to withhold the affected party's name in the circumstances of this appeal, the board considered its commitment to protecting the privacy of all of its customers, including those involved in incidents that violate its Rules of Conduct. The board also considered the relationship between the appellant and the affected party, the nature of the information contained in the record and the extent to which it is significant and sensitive to the board, the affected party and the appellant. The board states further that in recognizing its commitment to openness and transparency, it decided to disclose the entire record to the appellant, with the exception of the affected party's name. In doing so, the board submits that it has met its obligations under the *Act*.

[26] Having reviewed the record and the submissions made by the board, I find that the name of the affected party is highly sensitive in the context of the nature of the incident that occurred at the library. In my view, disclosure of the affected party's name in association with the allegations made by the appellant, as outlined in the portions of the record that were disclosed to him, could reasonably be expected to cause the affected party significant personal distress.⁶

[27] In addition, based on the board's submissions regarding library policy and the nature of the allegations made by the appellant against him, I find that the affected party had a reasonable expectation that his name would be held in confidence at the time of the incident and afterwards.

[28] I find that the factors favouring non-disclosure in sections 14(2)(f) and (h) are significant in weighing the appellant's right to disclosure of the entire record and the affected party's right to privacy.

⁶ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

[29] The appellant did not make submissions, and I have no evidence before me that any of the factors favouring disclosure of the personal information at issue are relevant in the circumstances of this appeal, particularly since he has received the entire report except for the affected party's name.

[30] Accordingly, I find that disclosure of the affected party's name would constitute an unjustified invasion of his privacy.

[31] I have considered the board's exercise of discretion in withholding this information and find that its decision was made in good faith and that it took into account only relevant factors. The board clearly demonstrated its commitment to openness by providing the appellant with the body of its report regarding his request for reinstatement. The board's concern about protecting the privacy of the affected party in the context of the incident that occurred between the parties was made in full recognition of its obligations under the *Act* and the rights of both parties. On this basis, I uphold the board's exercise of discretion and find that the record at issue is exempt under section 38(b) of the *Act*.

ORDER:

I uphold the board's decision.

Original Signed by: _____
Laurel Cropley
Adjudicator

July 5, 2012 _____