

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2814

Appeal MA12-245

Municipality of Middlesex Centre

November 29, 2012

Summary: The appellant sought access to information about a by-law complaint lodged against him. The municipality granted partial access to the responsive record and relied on sections 14(1) and 38(b) (personal privacy) to deny access to the complainant's name. The decision of the municipality is upheld.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1), 38(b), 14(3)(b).

OVERVIEW:

[1] The appellant made a request under the *Municipal Freedom of Information and Privacy Act* (the *Act*) to the Municipality of Middlesex Centre (the municipality) for access to information regarding a particular by-law complaint lodged against him.

[2] The municipality identified one responsive record, an email, and issued an access decision to the appellant granting partial access to it. The municipality relied on the mandatory personal privacy exemption in section 14(1) of the *Act* to deny access to a portion of the record, specifically, the complainant's name.

[3] The appellant appealed the municipality's decision.

[4] During mediation, the municipality advised that it was also relying on the discretionary exemption in section 38(b) (personal privacy), in conjunction with the presumption in section 14(3)(b) (investigation into possible violation of law) of the *Act*.

[5] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[6] I sought and received representations from the municipality and the appellant. I also sought representations from another individual whose rights may be affected by disclosure of the record (the affected party). The affected party advised that he did not consent to disclosure of his personal information or his representations. The appellant also requested that I not share his representations with the affected party.

[7] I decided that the criteria set out in *Practice Direction Number 7* for withholding representations were satisfied in the circumstances of this appeal, and accordingly, I did not share the affected party's representations with the appellant; nor did I share the appellant's representations with the affected party. I also withheld from the appellant, the portions of the municipality's representations that reveal the identity of the affected party.

RECORD:

[8] The sole record at issue in this appeal is a single email in which the name of the affected party has been withheld.

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(b) apply to the information at issue?
- C. Did the municipality exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[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) in part as follows:

“personal information” means recorded information about an identifiable individual, including,

...

(d) the address, telephone number, fingerprints or blood type of the individual,

...

(h) the individual’s name where 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] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.¹

[11] In its representations, the municipality states that the record contains the personal information of the appellant and the affected party. In his representations, the appellant acknowledges that the withheld information is the personal information of the affected party.

[12] Based on my review of the record, I find that it contains the personal information of both the appellant and the affected party. Specifically, the record contains the name of the affected party and identifies him as the individual who complained to the municipality; this qualifies as personal information under paragraph (h) of the definition of that term in section 2(1) of the *Act*.

[13] The record also contains the appellant’s personal information, including his address, engaging paragraph (d) of the definition in section 2(1). The record also includes information about an incident on the appellant’s property and the municipality’s planned actions as a result of the incident, which qualifies as his personal information

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

under paragraph (h) of section 2(1). While the appellant is not named in the record, he is identifiable by virtue of his address and the details of the incident concerning his property being included in the record.

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

General principles

[14] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution, while section 38 provides a number of exemptions from this right.

[15] 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.

[16] If the information 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 own personal information against the other individual’s privacy protection right.

[17] Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold 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 under sections 14 or 38(b).

[18] The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f). If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under sections 14 or 38(b).

[19] 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 either sections 38(b) or 14. Once a presumed unjustified invasion of personal privacy under section 14(3) is established for records which are claimed to be exempt under section 14(1), it can only be overcome if section 14(4) or the “public interest override” at section 16 applies.²

² *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

[20] With respect to records claimed to be exempt under section 38(b), in *Grant v. Cropley*,³ the Divisional Court said that the Commissioner could:

. . . consider the criteria mentioned in s.21(3)(b) [the provincial equivalent to section 14(3)(b)] in determining, under s.49(b) [the equivalent to section 38(b)], whether disclosure . . . would constitute an unjustified invasion of personal privacy.

[21] Section 14(3)(b) reads:

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;

[22] Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.⁴ The presumption can apply to a variety of investigations, including those relating to by-law enforcement⁵ and violations of the Ontario Human Rights Code.⁶

[23] Section 14(2)(d) reads:

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,

the personal information is relevant to a fair determination of rights affecting the person who made the request;

[24] For section 14(2)(d) to apply, the appellant must establish 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; and

³ [2001] O.J. 749.

⁴ Orders P-242 and MO-2235.

⁵ Order MO-2147.

⁶ Orders PO-2201, PO-2419, PO-2480, PO-2572 and PO-2638.

- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.⁷

[25] In its representations, the municipality states that the record is an email between the fire chief and a by-law enforcement officer about an incident on the appellant's property, and is, therefore, part of a by-law enforcement matter. The municipality submits that the presumption in section 14(3)(b) applies since the record was created as part of an investigation into a possible violation of law, the applicable municipal by-law.

[26] The municipality also submits that the factors favouring withholding the information at sections 14(2)(e) and (h) are applicable. It asserts that disclosure of the record would expose the affected party unfairly to pecuniary or other harm, as contemplated by section 14(2)(e). The municipality also asserts that the affected party lodged a complaint with it about the appellant with the expectation that his personal information would be kept confidential from the appellant, as contemplated by section 14(2)(h). Finally, the municipality states that the disclosure of the affected party's name would constitute a presumed unjustified invasion of personal privacy, and the withheld information therefore qualifies for exemption under section 38(b).

[27] In his representations, the appellant sets out his reasons for wanting to know the identity of the affected party. Being mindful of the appellant's request that I keep his representations confidential from the affected party, I limit my description of the appellant's comprehensive representations to stating that he relies on section 14(2)(d) to argue that the affected party's personal information should be disclosed to him. The appellant also argues in his representations that the absurd result principle applies as the information is clearly within his knowledge, and therefore, it should be disclosed to him.

⁷ Order PO-1764; see also 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.).

Analysis and Findings

[28] Regarding the application of the discretionary exemption in section 38(b), I accept the representations of the municipality that the disclosure of the record would be a presumed unjustified invasion of personal privacy under section 14(3)(b). Previous orders of this office have consistently found that a municipality's by-law enforcement activities qualify as "law enforcement" and that the disclosure of personal information compiled and identifiable as part of the investigations into these matters would constitute a presumed unjustified invasion of personal privacy under section 14(3)(b) of the *Act*.⁸ I have reviewed section 14(4) and find that it does not apply in this appeal.

[29] Having found that disclosure of the affected party's name would constitute a presumed unjustified invasion of personal privacy under section 14(3)(b), I now turn to the parties' submissions on the applicability of the factors in section 14(2).

[30] Dealing first with the appellant's submission that section 14(2)(d) should apply to permit the disclosure of the affected party's personal information despite the presumption of an unjustified invasion of personal privacy, I find that this is not a relevant consideration as the application of section 14(2)(d) has not been established. I come to this decision after carefully reviewing all the material before me, including the confidential representations of all three parties. Without revealing the substance of the appellant's representations on this issue, I am not satisfied that the appellant has established that all four parts of the test under section 14(2)(d) are met. Specifically, I find that the last part of the test which states that the personal information at issue is required in order to prepare for the proceeding or to ensure an impartial hearing, is not met in this appeal as the appellant, by his own admission, is able to pursue access to the information he seeks through civil proceedings. My finding is supported by the affected party's confidential representations as well.

[31] Turning to the appellant's submission on the applicability of the absurd result principle, I do not accept it. The absurd result principle applies where the requester originally supplied the information, or is otherwise aware of it. Under this principle, the information may be found not exempt under sections 14 or 38(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption.⁹ The very reason for this appeal is for the appellant to ascertain the identity of the affected party, which indicates that he does not know or is unsure of the complainant's identity. In these circumstances, I find the absurd result principle cannot apply.

⁸ Orders M-16, M-582, MO-1295 and MO-2147.

⁹ Orders M-444 and MO-1323.

[32] I find that disclosure of the affected party's personal information is presumed to constitute an unjustified invasion of personal privacy as per section 14(3)(b), and the sole factor favouring disclosure, section 14(2)(d), is not applicable. Accordingly, the personal information at issue qualifies for exemption under section 38(b).

C. Did the municipality exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

General principles

[33] 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.

[34] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁰

- 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

¹⁰ Orders P-344, MO-1573.

- 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.

[35] In its representations, the municipality states that in responding to the appellant's request, it "did not disclose the information at issue despite the fact that it could have been withheld." The municipality also points out that it disclosed all of the appellant's personal information in the record to the appellant, and that it only withheld the personal information of the affected party. The municipality further submits that the withheld information should not be available to the public.

[36] In his representations, the appellant asserts that he is not a member of the public; rather, he is the person to whom the information pertains.

[37] Based on my review of the representations of the municipality and the appellant, I am satisfied that the municipality properly exercised its discretion in denying the appellant access to the affected party's name. In this regard, I note that the municipality has disclosed most of the record to the appellant recognizing that it contains his personal information. I also note that I am upholding the municipality's decision to withhold the personal information of the affected party in accordance with section 38(b), with specific reference to the presumption in section 14(3)(b), and there is a significant basis for this. Accordingly, I find that the municipality's exercise of discretion was appropriate, and I uphold it on appeal.

ORDER:

I uphold the decision of the municipality and dismiss this appeal.

Original signed by: _____
Stella Ball
Adjudicator

_____ November 29, 2012