

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-2840-I

Appeal MA12-208

Town of Bracebridge

January 31, 2013

Summary: The town received a request for all complaint information related to the appellants' address. The town relied on the mandatory exemption in section 14(1)(invasion of privacy) to withhold portions of two records. The appellants appealed the town's decision and the town acknowledged that the discretionary exemption in section 38(b)(invasion of privacy) applied instead. This interim order finds that section 38(b) applies, and directs the town to exercise its discretion with respect to the two records under section 38(b).

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

OVERVIEW:

[1] The Town of Bracebridge (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

ALL records pertaining to occurrence / inspection located at [specified address] in Bracebridge, Ontario. This request is to include ALL Inspection Reports for said address. Please include date and time when complaint was issued and date and time when inspection was completed. [*sic*]

[2] The requester, a paralegal who represented two individuals residing at the specified address, subsequently narrowed the request to the previous ten years.

[3] The town located 26 records responsive to the request and issued a decision granting full access to some of them, and partial access to others. The town, which processed the access request in the name of the paralegal requester, relied on the mandatory personal privacy exemption in section 14(1) of the *Act* to withhold portions of the records.

[4] The requester appealed the decision to this office on behalf of his clients, the appellants, to whom some of the personal information in the records relates.

[5] During mediation, the town reconsidered the access request, this time treating it as originating with the appellants. The town then issued a supplementary decision that granted the appellants partial access to record 18. As a result, the appellants confirmed that they only sought access to the withheld information in records 1 and 20. The town then acknowledged that the discretionary personal privacy exemption in section 38(b) of the *Act* applies.

[6] Also during mediation, several individuals whose rights may be affected by disclosure of the records (the affected parties) were notified and their consent to disclosure was sought. The affected parties did not consent to disclosure of their personal information.

[7] As further mediation was not possible, the file was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[8] I sought representations from the town, the appellant and the affected parties. I received representations from the affected parties and the appellants, which were shared in accordance with section 7 of this office's *Code of Procedure and Practice Direction Number 7*. The town did not submit representations.

[9] For the reasons set out below, I find that the undisclosed portions of the records qualify for exemption under section 38(b) and I order the town to exercise its discretion under this section.

RECORDS:

[10] The records remaining at issue are the severed portions of an email exchange (record 1) and a letter of complaint (record 20).

ISSUES:

- A. Do the records 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?
- B. Did the institution exercise its discretion under section 38(b)?

DISCUSSION:

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

[11] 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,
- (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 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;

[12] 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

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

[14] In their representations, the appellants do not address this issue with reference to the definition of personal information in section 2(1) of the *Act*. They assert that the information contained in the records relates to an individual, and they relate details of incidents involving their family and the individual.

[15] In their representations, the affected parties acknowledge that their personal information is contained in the records, however, they do not refer to any of the paragraphs in the definition of that term in section 2(1) of the *Act*.

[16] As noted above, the town did not provide representations.

Analysis and Findings

[17] Having reviewed the records at issue, I find that they contain the personal information of the appellants and the affected parties.

[18] Record 1 is an email exchange between the town's chief by-law enforcement officer and the town's chief building official, following up on a complaint about the state of the appellants' yard. It contains the appellants' address, their views, details about their actions, and information about the investigation of a complaint against them, which qualify as personal information as that term is defined in paragraphs (d), (e) and (h) respectively, of section 2(1). Record 1 also identifies one of the affected parties by name as the complainant in a by-law enforcement matter against the appellants, which qualifies as the personal information of this affected party under paragraph (h) of the definition in section 2(1).

[19] Record 20 is a letter of complaint from one of the affected parties to the town's chief building official. On its face therefore, record 20 contains information that qualifies as the personal information of the affected party under paragraph (f) of the definition in section 2(1). It also contains the names of all of the affected parties along with other personal information about them, engaging paragraph (h) of section 2(1). In addition, record 20 includes the address and telephone number of one of the affected parties, thereby engaging paragraph (d). Finally, record 20 contains the address and names of the appellants, along with details about their activities and complaints made against

¹ Order 11.

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

them, and the opinion of one of the affected parties about them. Accordingly, this record contains the personal information of the appellants under paragraphs (d), (h) and (g) respectively, of the definition in section 2(1).

[20] Having found that the records contain the personal information of the appellants and the affected parties, I will now consider whether the withheld portions of the records qualify for exemption under section 38(b).

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

[21] 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.

[22] 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.

[23] 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 or her own personal information against the other individual’s right to protection of their privacy.

[24] 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 section 38(b). 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 38(b).

[25] 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). In *Grant v. Copley*,³ the Divisional Court said the Commissioner could:

. . . consider the criteria mentioned in s.21(3)(b) [the equivalent provision in the provincial *Act* to section 14(3)(b)] in determining, under s. 49(b) [which is equivalent to section 38(b)], whether disclosure . . . would constitute an unjustified invasion of [a third party’s] personal privacy.

³ [2001] O.J. 749.

[26] Section 14(3)(b) 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;

[27] In their representations, the appellants assert that the affected parties have caused their family "undue stress and hardship" by making inappropriate comments to them, yelling at them, lodging multiple complaints against them with the town, and damaging their home. The appellants also argue that the access request "was provided without prior written request of consent of the individual to whom the information relates contrary to Section 14(1)(a)."[*sic*]

[28] In their representations, the affected parties state that disclosure of their personal information in the records to the appellants would expose them to consequences, including harassment by the appellants.

Analysis and Findings

[29] While the appellants argue that the exception in section 14(1)(a) is relevant, I do not agree. Section 14(1)(a) requires an institution to disclose personal information related to an individual other than the requester, to the requester, where the individual has provided prior written request or consent. The affected parties in this appeal have not provided such a consent, and therefore, this exception does not apply.

[30] Although the town did not raise the applicability of the presumption in section 14(3)(b) in its access decisions or during mediation, the nature of the records at issue requires that I consider this section.

[31] I find that records 1 and 20 contain personal information that was compiled and is identifiable as part of the town's by-law enforcement activities, specifically, the possible breach of the town's clean yard and fence by-laws. The email exchange in record 1 which reports the outcome of an investigation into a complaint about the appellants' yard, identifies the complainant, as does the complaint letter in record 20 that commenced an investigation of the appellants' fence. Previous orders of this office have established that by-law enforcement investigations qualify as law enforcement investigations for the purposes of the presumption in section 14(3)(b),⁴ and that the

⁴ Orders M-16, MO-1295, MO-2147 and MO-2759.

presumption only requires that there be an investigation into a possible violation of law.⁵

[32] Accordingly, I find that the section 14(3)(b) applies to the records at issue and that disclosure of the affected parties' personal information in records 1 and 20 is presumed to constitute an unjustified invasion of personal privacy.

[33] I turn now to the possible application of the factors under section 14(2). Although the appellants and the affected parties do not specify any of the factors, their representations allude to the possible application of sections 14(2)(e) and (f). Section 14(2)(e) considers whether the individual to whom the information relates will be exposed unfairly to pecuniary or other harm. If I find that the affected parties will unfairly be exposed to harm through disclosure of the withheld information, this factor applies. Similarly, if I find that the undisclosed personal information of the affected parties is highly sensitive in that its disclosure would cause extreme personal distress to the affected parties, section 14(2)(f) applies. Both of these factors weigh in favour of non-disclosure.

[34] Based on my review of the representations and the records in this appeal, including the numerous records previously disclosed, there is longstanding acrimony between the parties which has intensified over many years and has involved a number of by-law enforcement complaints and investigations, and possible retaliatory actions. In the circumstances, I am satisfied that sections 14(2)(e) and (f) apply, and weigh strongly in favour of non-disclosure.

[35] I have found that the presumption in section 14(3)(b) applies, and that the only applicable factors, sections 14(2)(e) and (f), also favour privacy protection. Accordingly, I find that the personal information remaining undisclosed in records 1 and 20 is exempt under section 38(b).

C. Did the institution 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. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[37] 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

⁵ Orders P-242 and MO-2235.

- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[38] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁶ This office may not, however, substitute its own discretion for that of the institution.⁷

[39] As noted above, the town did not provide representations in this appeal, nor did it address the application of the discretionary exemption in section 38(b) in any meaningful way throughout the processing of the access request and the mediation stage of this appeal. Accordingly, I order the town to exercise its discretion in applying section 38(b) to records 1 and 20. I will require that the town provide me with representations on this exercise of discretion, taking into consideration the following factors:

- 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

⁶ Order MO-1573.

⁷ Section 43(2).

- 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.

INTERIM ORDER:

1. I order the town to exercise its discretion with respect to records 1 and 20 taking into account the factors set out above in paragraph 39 and to advise the appellants and this office of the results of this exercise of discretion, in writing.
2. If the town continues to withhold part of these records, I also order it to provide the appellants with an explanation of the basis for exercising its discretion to do so and to provide a copy of that explanation to me. The town is required to send the results of its exercise of discretion, and its explanation to the appellants, with a copy to this office, by no later than **March 1, 2013**.
3. If the appellants wish to respond to the town's exercise of discretion and/or its explanation for exercising its discretion to withhold the information, they must do so within 21 days of the date of the town's correspondence by providing me with written representations.
4. I remain seized of this matter pending the resolution of the outstanding issues in this appeal.

Original signed by: _____
Stella Ball
Adjudicator

_____ January 31, 2013