

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-2849-I

Appeal MA11-520

Township of Hamilton

February 22, 2013

Summary: The appellant sought access to an email sent to the township about his permit application. After notifying the affected parties of the request and obtaining their views, the township relied on the mandatory exemption in section 10(1) (third party information) to withhold the record in its entirety. The appellant appealed the township's decision and the township then issued a revised decision denying access to the record under the mandatory exemption in section 14(1) (personal privacy). This interim order finds that some information in the record qualifies for exemption under section 38(b) and it directs the township to exercise its discretion under this section. It also finds that the public interest override in section 16 does not apply, and orders the township to disclose to the appellant the portions of the record that do not qualify for exemption 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), 2(2.1), 16 and 38(b).

Orders and Investigation Reports Considered: M-352 and P-541.

OVERVIEW:

[1] The appellant applied to the Township of Hamilton (the township) for a building permit and began construction on his property. The township's chief building official advised the appellant of the requirements for the issuance of the permit and subsequently confirmed that the permit would be issued. However, after receiving email

correspondence from a lawyer representing a third party, the chief building official advised the appellant that the permit would not be issued.

[2] The appellant then made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the township for access to "the letter of October 19 from [named lawyer] to [the chief building official] concerning my application for a building permit."

[3] The township located one responsive record, an email. The township notified the lawyer who wrote the email and sought his views on disclosure. The lawyer did not consent to disclosure of the record.

[4] The township then issued a decision denying access to the record in its entirety, based on the mandatory exemption in section 10(1) (third party information) of the *Act*.

[5] The appellant appealed the township's decision to this office.

[6] During mediation, the township issued a revised decision letter to the appellant denying access to the record on the basis of the mandatory personal privacy exemption in section 14(1). The township also advised that it was no longer relying on the section 10(1) exemption to withhold the record.

[7] Also during mediation, this office notified the lawyer who wrote the letter to obtain his clients' (the affected parties) views on disclosure. The lawyer advised that the affected parties do not consent to disclosure of the record.

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

[9] During the inquiry into this appeal, this office sought representations from the township, the affected parties and the appellant.

[10] The affected parties and the appellant provided representations which were shared in accordance with section 7 of this office's *Code of Procedure and Practice Direction 7*. The township did not provide representations.

[11] The appeal was subsequently transferred to me for disposition.

[12] After reviewing the appeal file, I sought representations from the township and the affected parties on the application of the discretionary exemption in section 38(b) (invasion of privacy). Neither party provided representations on this issue.

[13] In this interim order, I find that section 38(b) applies to the record, and I order the township to exercise its discretion under this section.¹

RECORDS:

[14] The sole record at issue is an email dated November 19, 2011, from the affected parties' lawyer to the township's chief building official. The email consists primarily of zoning by-law provisions, their interpretation and their alleged application to the appellant's property and permit application.

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 personal privacy exemption in section 38(b) apply to the information at issue?
- C. Is there a compelling public interest in disclosure of the record under section 16 of the *Act* which clearly outweighs the purpose of the section 38(b) exemption?
- D. Did the township 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?

[15] 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,

...

¹ The ability of this office to issue orders based on a part of the *Act* which an institution has not referred to in its decision, but which part it was directed to and invited to provide representations on by this office, was set out in detail in Order M-352. Subsequent orders have adopted the approach taken in Order M-352, establishing that where a record contains the personal information of the requester and another individual, the request falls under Part II of the *Act* and the applicable exemption is found under section 38(b).

- (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,
- ...
- (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;

[16] 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.²

[17] Section 2(2.1) also relates to the definition of personal information. It states:

Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[18] 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.³

[19] 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.⁴

[20] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁵

² Order 11.

³ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[21] In their representations, the affected parties submit that the record contains their personal information. In support of this position, the affected parties argue that the record contains their names, along with information about their property and property-related activities, as well as, their views and opinions. The lawyer for the affected parties also submits that his personal information is contained in the record, specifically, his name and the name of his law firm.

[22] In his representations, the appellant does not directly address this issue. Instead he provides a chronology which details when he became aware of the email, and the impact of the email on his building permit application with the township.

Analysis and Findings

[23] Having reviewed the record, I find that it contains the personal information of the affected parties and the appellant, but not the affected parties' lawyer.

[24] The record contains the affected parties' names along with other personal information relating to them, including details of their actions and occurrences that affected them. This qualifies as personal information under paragraph (h) of the definition of that term in section 2(1) of the *Act*. The record also contains information that identifies where the affected parties reside, which qualifies as personal information under paragraph (d) of section 2(1).

[25] As well, the record contains the appellant's personal information. This includes his address, engaging paragraph (d) of the definition in section 2(1), and his name along with other personal information relating to him, such as information describing actions taken by him at specified times, which qualify as his personal information under paragraph (h).

[26] The record does not contain the personal information of the affected parties' lawyer, as he is identified solely in his professional, and not his personal, capacity. The lawyer's name and the name of the law firm he belongs to are not personal information for the purposes of the *Act*. The record is an email that the lawyer sent in his professional capacity as the legal representative of the affected parties, and there is nothing on its face that reveals something of a personal nature about the lawyer.

[27] As I have found that the record does not contain the personal information of the affected parties' lawyer, the lawyer's name and contact information cannot qualify for exemption under section 38(b). I also find that the appellant is entitled to receive his personal information contained in the record. In addition, I find that the portions of the record which discuss various by-law provisions and their application to the appellant's property, do not qualify for exemption under section 38(b) as they do not meet the criteria for "personal information." I will order the township to disclose these portions of the record to the appellant.

[28] With respect to the remaining withheld portions of the record, comprised solely of the personal information of the affected parties, I will consider whether they qualify for exemption under section 38(b).

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

[29] 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.

[30] 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.

[31] 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.

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

[33] 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).

[34] With respect to records claimed to be exempt under section 38(b), in *Grant v. Cropley*,⁶ 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.

[35] The presumption in section 14(3)(b) reads as follows:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

⁶ [2001] O.J. 749.

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;

[36] In order for the section 14(3)(b) presumption to apply, an investigation into a possible violation of law is required.⁷ The presumption can apply to a variety of investigations, including those relating to by-law enforcement.⁸

[37] Section 14(2) lists various factors that may be relevant in determining whether the unjustified invasion of personal privacy under section 38(b) is met.⁹ The list of factors under section 14(2) is not exhaustive, and the institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).¹⁰

Representations

[38] In their representations, the affected parties state that they became aware of the appellant's building permit application and wanted to ensure that the township was aware of their position on the application. They argue that the record constitutes a complaint lodged by them with the township, and accordingly, the presumption at section 14(3)(b) applies to exempt the record from disclosure.

[39] The affected parties also submit that they would be exposed unfairly to pecuniary or other harm as contemplated by section 14(2)(e) should the record be disclosed. They further submit that they supplied their personal information to the township in confidence as set out in section 14(2)(h). Accordingly, the affected parties submit that these factors apply and weigh in favour of a determination that disclosure would result in an unjustified invasion of their privacy. The affected parties further state that the building permit matter discussed in the record is the subject of litigation, and disclosure of the record would prejudice them in any proceeding before the Ontario Municipal Board.

[40] In his representations, the appellant states that the chief building official of the township had advised him that his permit would be issued. However, upon receiving the email from the affected parties' lawyer, the official reneged on his advice and did not issue the permit. The appellant relates that the chief building official told him the email was from his neighbour's lawyer and read the email to him during a telephone conversation.

⁷ Orders P-242 and MO-2235.

⁸ Order MO-2147.

⁹ Order P-239.

¹⁰ Order P-99.

[41] The appellant submits that because the township misled him and rescinded its agreement to grant the permit after it received the email, disclosure of the record is desirable in order to subject the township's activities to scrutiny as set out in section 14(2)(a). The appellant argues that he is entitled to a copy of the record in order to know all of the circumstances which influenced or may have influenced the official or institution in the processing of his permit application.

[42] Finally, the appellant argues that the record is relevant to a fair determination of his rights in accordance with section 14(2)(d), as he is in the process of appealing the township's decision to not grant the permit or the subsequent variance he sought through the committee of adjustment, to the Ontario Municipal Board.

Analysis and Findings

[43] Under section 38(b) of the *Act*, the personal information of the affected parties may be withheld if its disclosure would constitute an unjustified invasion of the affected parties' personal privacy. I will therefore rely on the representations of the appellant and the affected parties on the applicable factors and presumptions under sections 14(2) and (3) in considering whether section 38(b) applies to the record.

[44] Having reviewed the record and the materials in this appeal, I do not accept the affected parties' contention that the section 14(3)(b) presumption applies to the record. A requirement for the application of the section 14(3)(b) presumption is the existence of an investigation into a possible violation of law, including the possible violation of a by-law. There is no evidence before me that the township conducted any type of investigation, or that the record was "compiled and is identifiable" as part of an investigation.

[45] There is similarly no evidence of the presence of a law enforcement matter in this appeal, by-law or otherwise. While I note that the revised decision letter of the township states that disclosure of the record "may jeopardize a possible future by-law enforcement matter," without the benefit of any representations from the township on the meaning of this statement and details on the "possible future by-law enforcement matter" referred to, this statement does not assist me in my determination of this issue. Accordingly, I find that the presumption in section 14(3)(b) does not apply to the record.

[46] I must therefore consider the factors in section 14(2) to assist me in determining whether disclosure of the remaining portions of the record would constitute an unjustified invasion of the affected parties' personal privacy.

[47] The parties have raised the possible application of sections 14(2)(a), (d), (e) and (h), which state:

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,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
- ...
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- ...
- (h) the personal information has been supplied by the individual to whom the information relates in confidence;

[48] Dealing first with the factor in section 14(2)(a) which favours disclosure, I find that it is not an applicable factor. This factor contemplates the situation where disclosure is desirable in order to subject the activities of the government, as opposed to the views or actions of private individuals, to public scrutiny.¹¹ While I appreciate the appellant's frustration with the township, I am not persuaded by the appellant's representations that disclosure of the portions of the record which will remain undisclosed as a result of this interim order would shed light on the township's activities.

[49] The appellant also relies on section 14(2)(d), which favours disclosure. For this section 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
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and

¹¹ Order P-1134.

- (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.¹²

[50] In his representations, the appellant asserts that disclosure of the record is relevant to a fair determination of his rights as contemplated by section 14(2)(d). He refers to his ongoing efforts to appeal the township's decision to deny him a building permit. The appellant may be aided in his building permit appeal efforts by disclosure of the parts of the record which I order below. However, I am not satisfied that the remaining portions of the record, which contain only the affected parties' personal information, meet the last two parts of the test under section 14(2)(d) outlined above. As the appellant has not established all four elements required for section 14(2)(d), I find that this factor also has no application in this appeal.

[51] The factor in section 14(2)(e) relates to pecuniary or other harm, and if found to apply, weighs against disclosure. In order for this section to apply, the evidence tendered by the party resisting disclosure must demonstrate that the damage or harm envisioned by it is present or foreseeable, and that this damage or harm would be "unfair" to the individual involved. Beyond asserting that section 14(2)(e) applies, the affected parties have not provided any representations or tendered any evidence in support of their position that this factor applies. Absent any such evidence, I find that this factor does not apply in this appeal.

[52] Section 14(2)(h) applies to a record 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 expectation of confidentiality.¹³

[53] The affected parties assert they did not intend to have their identity and personal information in the record disclosed; they assert this despite the fact that on its face, the record contains no indication of its confidential nature. I also note that there is no evidence before me that the township treated the record as confidential or that it gave the affected parties any assurance that the record would be treated confidentially. In fact, the evidence is the opposite; the affected parties' lawyer submitted the unsolicited email to the township, and the chief building official upon receiving it, told the appellant who the author was and who the author represented, and then proceeded to read the

¹² 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.).

¹³ Order PO-1670.

email to the appellant. Nonetheless, having reviewed the record and considered the circumstances for which it was prepared, I accept that the affected parties, through their counsel, submitted the email in confidence, even though it was not treated confidentially by the township. Therefore, I find that section 14(2)(h) is a relevant consideration, however, I give it little weight.

[54] In summary, I find that the factors in sections 14(2)(a) and (d), favouring disclosure, and the factor in section 14(2)(e) favouring privacy protection, do not apply. I find that the only factor that applies is section 14(2)(h), but I give this factor little weight.

[55] Balancing the appellant's right to access his personal information against the affected parties' right to have their privacy protected, I find that the sole applicable factor in this appeal favours privacy protection, and there are no factors that weigh in favour of disclosure. Accordingly, I find that the personal information of the affected parties in the record is exempt under section 38(b) as its disclosure would result in an unjustified invasion of the affected parties' personal privacy.

C. Is there a compelling public interest in disclosure of the record under section 16 of the *Act* which clearly outweighs the purpose of the section 38(b) exemption?

[56] Section 16 states:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.¹⁴

[57] For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the record. Second, this interest must clearly outweigh the purpose of the exemption.

[58] The *Act* is silent as to who bears the burden of proof in respect of section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.¹⁵

¹⁴ Although section 16 of the *Act* does not list the section 38(b) exemption, previous orders of this office have accepted that an appellant is able to raise the possible application of section 16 in an appeal under section 38(b). See Order P-541.

¹⁵ Order P-244.

[59] In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act’s* central purpose of shedding light on the operations of government.¹⁶ Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.¹⁷

[60] A public interest does not exist where the interests being advanced are essentially private in nature.¹⁸ Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.¹⁹

[61] The word “compelling” has been defined in previous orders as “rousing strong interest or attention.”²⁰

[62] In his representations, the appellant argues that the public interest override in section 16 applies because it is in the public interest to know all of the factors which influenced the chief building official in the handling of his permit application. He states that this is a compelling interest because the public has a strong interest in knowing all the circumstances that influenced a public official’s exercise of his duties. He adds that the township is a smaller community where personal considerations may have greater influence on the discharge of duties, and that there is a great community interest in understanding the township’s selective enforcement of applications for building variances.

[63] The affected parties argue that there is no public interest in this appeal as no person other than the appellant is detrimentally affected by the township’s decision to deny the building permit and minor variance applications. They submit that the interests being advanced in the appeal are solely those of the appellant, and therefore, the interest is a private one. The affected parties further argue that even if a public interest was found to exist in this appeal, it is not so compelling as to override the applicable exemption.

Analysis and Findings

[64] Having reviewed the record and the representations of the parties, I find that there is no public interest in disclosure of the remaining portions of the record. I agree with the submission of the affected parties that the interests being advanced in this

¹⁶ Orders P-984 and PO-2607.

¹⁷ Orders P-984 and PO-2556.

¹⁸ Orders P-12, P-347 and P-1439.

¹⁹ Order MO-1564.

²⁰ Order P-984.

appeal are solely the private interests of the appellant. I am not persuaded that disclosure of the personal information of the affected parties in the record would shed light on the operations of the township or inform the citizenry about government activities.

[65] Accordingly, I find that section 16 does not apply to override the application of the exemption in section 38(b).

D. Did the township exercise its discretion under section 38(b)?

[66] 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.

[67] 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.

[68] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²¹ This office may not, however, substitute its own discretion for that of the institution.²²

[69] As noted above, the township did not provide representations on the applicability of the discretionary exemption in section 38(b). Accordingly, I order the township to exercise its discretion in applying section 38(b) to the record. I will require that the township 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

²¹ Order MO-1573.

²² Section 43(2).

- 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 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.

INTERIM ORDER:

1. I order the township to disclose to the appellant the portions of the record that are not highlighted on the copy of the record that I have attached to the township's copy of this interim order, by **March 29, 2013** but not before **March 22, 2013**.
2. I order the township to exercise its discretion with respect to the remaining portions of the record, taking into account the factors set out above in paragraph 69 and to advise the appellant and this office of the result of this exercise of discretion in writing by **March 15, 2013**. For clarity, I have highlighted these portions on the copy of the record attached to the township's copy of this interim order.
3. If the township continues to withhold these parts of the records, I also order it to provide me with representations on its exercise of discretion by **March 15, 2013**.

4. I remain seized of this matter pending the resolution of the outstanding issues in this appeal.

Original signed by: _____
Stella Ball
Adjudicator

_____ February 22, 2013