

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-2858-F

Appeal MA12-208

Town of Bracebridge

March 25, 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. Interim Order MO-2840-I determined that the records qualify for exemption under section 38(b), and ordered the town to exercise its discretion with respect to the records under section 38(b). In this final order, the town's exercise of discretion is upheld and the withheld information is found to be exempt under section 38(b).

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 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] I then issued Interim Order MO-2840-I, in which I found that the undisclosed portions of the records qualify for exemption under the discretionary exemption in section 38(b), and I ordered the town to exercise its discretion under this section.

[10] In accordance with provision 2 of Interim Order MO-2840-I, the town provided the appellants and this office with the results of its exercise of discretion and related representations by March 1, 2013. While I granted the appellants 21 days after March 1, 2013, to provide representations in response to the town's exercise of discretion representations, they chose not to do so.

[11] In this order, I find that the town properly exercised its discretion to withhold the portions of the records that qualify for exemption under section 38(b).

DISCUSSION:

Exercise of discretion

[12] 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.

[13] 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.

[14] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹ This office may not, however, substitute its own discretion for that of the institution.²

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

- 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

¹ Order MO-1573.

² Section 43(2).

- 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.

[16] In its representations, the town states that it considered the purposes of the *Act*, including: that information should be available to the public; that individuals should have the right to access their own personal information; that exemptions from the right of access should be limited and specific; and that the privacy of individuals should be protected.

[17] The town adds that the applicable discretionary exemption in section 38(b) seeks to protect the privacy of complainants, and is consistent with Resolution 07-AF-086 which its Council ratified on June 27, 2007. The town explains that the resolution requires all complainants to provide their personal information as a precondition for the town investigating a complaint, and assures complainants that their personal information will be kept confidential in accordance with the *Act*. The town submits that disclosure of the personal information of the affected parties in this appeal would be inconsistent with the resolution and would decrease public confidence in the town's operation and accountability. Finally, the town submits that the affected parties objected to disclosure of their personal information, and the town does not disclose personal information that was provided to it in confidence.

Analysis and findings

[18] Having considered the circumstances of the appeal, including the town's representations on its exercise of discretion, I am satisfied that the town properly exercised its discretion in deciding to withhold the personal information of the affected parties that qualifies for exemption under section 38(b). The town took relevant factors into consideration, including the protection of privacy of those individuals who lodge complaints with the town.

[19] As I found in Interim Order MO-2840-I, disclosure of the withheld information is presumed to be an unjustified invasion of the affected parties' personal privacy under the presumption in section 14(3)(b). The section 14(3)(b) presumption protects personal information that is "compiled and identifiable as part of an investigation into a possible violation of law" and its application in this appeal is, therefore, significant.

[20] Based on the above, I find that the town properly exercised its discretion to withhold the affected parties' personal information in accordance with the purposes of the *Act*. I find that the withheld information is exempt under section 38(b).

ORDER:

I uphold the town's exercise of discretion and its decision to withhold the undisclosed information.

Original Signed by: _____
Stella Ball
Adjudicator

_____ March 25, 2013