

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-2861-F

Appeal MA11-520

Township of Hamilton

March 27, 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). Interim Order MO-2849-I determined that some information in the record qualifies for exemption under section 38(b) and directed the township to exercise its discretion under this section. Interim Order MO-2849-I also determined that the public interest override in section 16 does not apply, and ordered the township to disclose to the appellant the portions of the record that do not qualify for exemption under section 38(b). In this final order, the township'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).

BACKGROUND:

[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. 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.

[7] 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*.

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

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

[10] 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.

[11] I then issued Interim Order MO-2849-I, in which I found that some information in the record qualifies for exemption under the discretionary exemption in section 38(b) and I ordered the township to exercise its discretion under this section. I also determined in Interim Order MO-2849-I that the public interest override in section 16 does not apply in this appeal, and I ordered the township to disclose to the appellant the portions of the record that do not qualify for exemption under section 38(b).

[12] In accordance with provision 2 of Interim Order MO-2849-I, the township provided the appellant and this office with the results of its exercise of discretion and related representations by March 15, 2013. I then granted the appellant the opportunity to provide representations in response to the township's exercise of discretion representations by March 26, 2013; the appellant provided his representations on March 25, 2013.

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

DISCUSSION:

[14] 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.

[15] 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.

[16] 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

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

¹ Order MO-1573.

² Section 43(2).

- 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
- 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.

[18] In its representations, the township states that it has considered its responsibility to balance the appellant's right to access his personal information, and the affected parties' right to protection of their personal privacy, and it accepts that only some information in the record qualifies as the personal information of the affected parties. The township further states that the affected parties' personal information contained in the record should be withheld under section 38(b) because its disclosure would constitute an unjustified invasion of their privacy. The township adds that its normal practice is not to disclose personal information and to protect the "complaint process" for its residents, and this needs to be respected. Finally, the township argues the information in the record has lost some of its sensitivity due to the passage of time, and

that the appellant and the township have negotiated the matter and are awaiting approval of minutes of settlement from the Ontario Municipal Board.

[19] In his representations, the appellant submits that he has a sympathetic or compelling need to receive the information, namely, so that the complete record is before the Ontario Municipal Board during his upcoming hearing. He also argues that disclosure of the record would increase public confidence in the township. The appellant takes issue with the fact that the objections noted in the record were submitted to the township's building department but not disclosed to him. He submits that disclosure would be seen as fair by the general public. The appellant also notes that the affected parties did not request confidentiality, and the chief building official disclosed the affected parties' names, their lawyer's name, and some of the information in the record to him on more than one occasion. Moreover, he argues that the township has previously disclosed to him two documents that could be construed as containing personal information. Finally, the appellant responds that if the township believes the information in the record has lost its sensitivity, the record should be disclosed.

Analysis and Findings

[20] Although I requested the representations of the parties only on the issue of exercise of discretion, both the appellant and the township included information in their submissions that goes beyond this issue. I will only deal with the representations of the parties on the exercise of discretion, as I have already determined the remaining issues regarding the application of section 38(b) to the record in this appeal in Interim Order MO-2849-I.

[21] Having considered the circumstances of the appeal, including the relevant representations of the parties on the township's exercise of discretion, I am satisfied that the township properly exercised its discretion in deciding to withhold the personal information of the affected parties that qualifies for exemption under section 38(b). The township considered the appellant's right to access his own personal information and balanced it against the affected parties' right to have their privacy protected. The township recognizes that the appellant is entitled to receive most of the information in the record and will disclose what is not exempt under section 38(b) to him. I also note that the appellant will receive most of the record by virtue of provision 1 of Interim Order MO-2849-I, including all of his personal information contained in the record.

[22] I find that the township properly exercised its discretion to withhold the affected parties' personal information in accordance with the purposes of the *Act*.

ORDER:

I uphold the township's exercise of discretion and its decision to withhold the information that is exempt under section 38(b).

Original Signed by: _____
Stella Ball
Adjudicator

_____ March 27, 2013