

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2942

Appeal MA12-457

Regional Municipality of Halton

September 10, 2013

Summary: The appellant sought access to records of complaints made about him to the municipality's health department, which investigated him for alleged violations of the *Smoke-Free Ontario Act*. The municipality located responsive records and relied on the discretionary exemption in section 38(a), in conjunction with the law enforcement exemption in section 8(1)(d), to deny access to some information in the records. This order upholds the decision of the municipality.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1), 8(1)(d) and 38(a); *Smoke-Free Ontario Act*, S.O. 1994, c. 10.

OVERVIEW:

[1] The Regional Municipality of Halton (the municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "copies of all the complaints received by [the municipality] regarding violations of the Smoke-Free Ontario Act allegedly committed by the tenant of [specified address and unit number] and any other unit in the building . . . including the complaints listed in [a specified email]." The requester, who was the tenant of the specified unit, specifically requested the names, addresses and unit numbers of the complainants.

[2] The municipality located records responsive to the request, three complaint investigation reports, and issued a decision granting partial access to them. The municipality relied on the discretionary law enforcement exemption in section 8(1)(d) to withhold portions of some of the records, and other records in their entirety. The municipality also advised the requester that three older investigation reports were responsive to his request, however, they were retained in off-site storage and their retrieval would therefore cost \$15.00; the municipality asked the requester whether he wished to obtain copies of these reports.

[3] The requester, now the appellant, appealed the municipality's decision to this office.

[4] During mediation, the appellant advised that he was interested in the names of the complainants so that he could pursue legal action against them. The appellant also confirmed he was not interested in pursuing access to the additional responsive records that the municipality advised were maintained off-site.

[5] Also during mediation, the mediator alerted the municipality to the possible application of the discretionary exemption in section 38(a) (discretion to refuse requester's own information) to the responsive records.

[6] A mediated resolution of the appeal was not possible, and it was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[7] During my inquiry, I sought and received representations from the municipality and shared these with the appellant. Although I sought representations from the appellant as well, he did not submit representations.

[8] In this order, I uphold the decision of the municipality and dismiss the appeal.

RECORDS:

The records at issue consist of the withheld portions of the following:

1. Health Department Investigation Report, August 23/24, 2012
2. Health Department Investigation Report, June 28, 2012
3. Health Department Investigation Report, December 12, 2011

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(a), in conjunction with the section 8(1)(d) exemption, apply to the information at issue?
- C. Did the municipality exercise its discretion under section 38(a)? 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,

...

- (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,

...

- (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] 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) of section 2(1) may still qualify as personal information.¹

[11] 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.

[12] 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.²

[13] 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.³

[14] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁴

[15] In its representations, the municipality states that the records contain the personal information of the appellant. As noted above, the appellant did not submit representations.

[16] Based on my review of the records, I find that they contain the personal information of the appellant including his name, his work address and telephone number, and details of complaints about him by certain individuals. While some of this information could arguably be said to be information about the appellant in a business capacity, it nonetheless reveals something of a personal nature about the appellant, namely, information about allegations made about his conduct, and the fact that he was investigated by the municipality for possible contravention of the *Smoke-Free Ontario Act (SFOA)*. The information therefore qualifies as the appellant’s personal information as that term is defined in paragraphs (d) and (h) of section 2(1) of the *Act*.

[17] The records also contain the names, telephone numbers and email addresses of the individuals who complained about the appellant, the names and locations of their

¹ Order 11.

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

workplaces, as well as their emails to the health department complaining about the appellant's smoking. All of this qualifies as the personal information of these individuals under paragraphs (d), (f) and (h) of section 2(1) of the *Act*.

B. Does the discretionary exemption at section 38(a), in conjunction with the section 8(1)(d) exemption, apply to the information at issue?

[18] Section 38 provides a number of exemptions from the general right of individuals under section 36(1) to access to their own personal information held by an institution.

[19] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.⁵ It reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[20] In this case, the municipality relies on section 38(a), in conjunction with section 8(1)(d).

[21] Section 8(1)(d) states:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

[22] The term "law enforcement" is defined in section 2(1) as follows:

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or

⁵ Order M-352.

(c) the conduct of proceedings referred to in clause (b)

[23] The term "law enforcement" has been found to apply in the following circumstances:

- a municipality's investigation into a possible violation of a municipal by-law⁶
- a police investigation into a possible violation of the *Criminal Code*⁷
- a children's aid society investigation under the *Child and Family Services Act*⁸
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997*⁹

[24] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.¹⁰

[25] It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption.¹¹

[26] The municipality submits that the records at issue relate to investigations of violations of the *SFOA* by the appellant. The municipality states that upon conviction under the *SFOA*, charges and fines can be levied under section 15 of the *SFOA*. The municipality asserts that the withheld information consists of the identities of the complainants who supplied information to it about the appellant. It continues that the withheld information may identify the complainants and therefore, the section 8(1)(d) exemption applies to it.

[27] The municipality adds that complainants have an expectation of confidentiality when they contact the municipality to complain. It states that if the complainants had wanted to be identified by the appellant, they would have approached him directly about their concerns regarding his smoking in a non-smoking workplace. The municipality states that the complainants chose to report their concerns to its health department because they wished to remain unknown to the appellant.

⁶ Orders M-16 and MO-1245.

⁷ Orders M-202 and PO-2085.

⁸ Order MO-1416.

⁹ Order MO-1337-I.

¹⁰ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

¹¹ Order PO-2040; *Ontario (Attorney General) v. Fineberg*.

Analysis and findings

[28] I accept the municipality's assertion that the complaints were lodged with an expectation that the identity of the complainants and the information they provided would be kept confidential.

[29] Having reviewed the records and the representations of the municipality, I find that the municipality has provided adequate evidence to establish that disclosure of the withheld information in the records could reasonably be expected to disclose the identity of a confidential source of information in a law enforcement matter. Specifically, disclosure of the withheld information would reveal information provided by the complainants to a tobacco enforcement inspector of the municipality responsible for the enforcement of the *SFOA*.

[30] The three health department investigations documented in the records were initiated after the complainants contacted the health department and provided information to it about the appellant's smoking. The investigations relate to possible violations of the *SFOA*, a provincial statute that prohibits the smoking of tobacco in any enclosed public place or enclosed workplace. The investigations were conducted pursuant to the regulatory and enforcement powers granted under the *SFOA*, which also provide that a person who contravenes the smoking prohibition is guilty of an offence and on conviction, may be fined.

[31] Having found that disclosure of the withheld information in the records could reasonably be expected to disclose the identity of a confidential source of information in respect of a law enforcement matter within the meaning of section 8(1)(d), I find that this information qualifies for exemption under section 38(a), subject to my consideration of the municipality's exercise of discretion below.

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

[32] As noted above, section 38(a) is a discretionary exemption. Having claimed this discretionary exemption, the municipality must exercise its discretion in deciding whether to disclose the information at issue, despite the fact that it could withhold it. On appeal, the Commissioner may determine whether the institution failed to do so.

[33] 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.

[34] In such cases, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹² This office may not, however, substitute its own discretion for that of the institution.¹³

[35] In its representations, the municipality submits that it considered several factors in applying the discretionary exemption, including: its long-standing practice of withholding information on the identities of complainants and informants regarding health department investigations; the implied expectation of confidentiality that complainants and informants have when providing information to the health department; the possible adverse effect on the complainants in question if the withheld information were disclosed, such as retaliatory action by the appellant; and the likelihood that disclosure of the complainants' identities and complaints would make the public more hesitant in filing complaints, providing information and assisting in investigations in the future.

[36] Considering the circumstances, I am satisfied that the municipality did not err in exercising its discretion to deny the appellant access to the withheld information. I find that the municipality considered all relevant factors and exercised its discretion under section 38(a) of the *Act* appropriately.

ORDER:

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

Original signed by: _____ September 10, 2013
Stella Ball
Adjudicator

¹² Order MO-1573.

¹³ Section 43(2) of the *Act*.