

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2955

Appeal MA13-58

City of Ottawa

September 30, 2013

Summary: This appeal arises from a number of bylaw complaints made about the appellant's actions and/or property. The appellant requested records relating to the complaints, including the complainant's identifying information, reasons for calls and the results. The city granted access to much of the information, but denied access to the name, address, telephone number and gender of the caller for each of the complaints on the basis of the exemptions in sections 14(1) and 38(b) (personal privacy), section 8(1)(d) (law enforcement) and section 38(a) (discretion to deny requester's own information). The city also denied access to the substance of a portion of one of the complaints on the basis of these exemptions.

This order finds that the substance of a portion of one of the complaints is not the personal information of an identifiable individual, and therefore is not exempt under the *Act*, but that the identifying information about the complainant in each of the complaints is 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, sections 2(1) (definition of personal information), 14(1), 14 (2)(d), 14(3)(b), 38(b).

OVERVIEW:

[1] The City of Ottawa (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to calls made to the city regarding by-law violations about a specified address during a defined period of

time. The request stated that it specifically sought access to the caller's name, address, phone number, and reasons for call, as well as the by-law officer's assessment/disposition.

[2] In response to the request, the city issued a decision granting partial access to the requested records. It also stated that portions of some records were denied on the basis of the exemptions in section 8(1)(d) (law enforcement) and 14(1) (personal privacy) of the *Act*.

[3] The appellant appealed the decision.

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

[5] On my review of this appeal, I noted that some of the records may contain the personal information of the appellant, and invited the parties to address the possible application of the discretionary exemptions in section 38(a) (discretion to deny requester's own information) and 38(b) (personal privacy).

[6] I sent a Notice of Inquiry identifying the facts and issues in this appeal to the city, initially, and received representations in response. I then sent the Notice of Inquiry, along with a copy of the representations of the city, to the appellant, who also provided representations to me. After reviewing the representations of the appellant, I decided to invite an affected party who may have an interest in the disclosure of the records (the affected party) to provide representations on the issues, and the affected party also provided representations in response.

[7] In this order, I find that the substance of a portion of one of the complaints is not the personal information of an identifiable individual, and therefore is not exempt under the *Act*. I also find that the identifying information (name, address, telephone number, gender) about the complainant in each of the complaints is exempt under section 38(b).

Preliminary matter

[8] The information sought by the appellant in this appeal relates to bylaw violations, and the appellant specified that he is seeking the complainant's name, address, phone numbers, and reasons for call, as well as the by-law officer's assessment/disposition for each of the complaints.

[9] The city denied access to certain portions of the records that relate to the identifying information about the complainant for each of the complaints, and the substance of a portion of one of the complaints. In addition, the city severed the names of two individuals from page 6 of the records, and stated that these individuals

were involved in certain construction activity occurring in the neighbourhood. The involvement of these individuals in the complaint is peripheral as they are not involved in the complaint, and the appellant's representations do not address issues regarding access to the names of these individuals. In the circumstances, I will not address issues relating to these named individuals in this order.

RECORDS:

[10] The records at issue are the brief, withheld portions of the responsive records relating to a number of possible violations of city bylaws. The withheld portions on pages 1, 2, 4, 7 and 12 contain the name, address and/or telephone number of the complainant for each of the various complaints. The brief withheld portions of page 9 contain information about an individual's gender and a brief statement made by the individual.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1)?
- B. Does the discretionary exemption at section 38(b) apply to the information at issue?

DISCUSSION:

Issue A. Do the records contain "personal information" as defined in section 2(1)?

[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) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where 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 if 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] Sections (2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2.1) 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.

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[14] 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

¹ Order 11.

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

[15] 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

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

Representations and findings

[17] By referring to the exemption in section 38(b), the city acknowledges that the records contain the personal information of the appellant.

[18] The city also takes the position that the withheld portions of the records contain the personal information of other identifiable individuals. It states:

... the name, telephone number, and municipal address [of the] complainant(s) that appear on the ... By-law Services Occurrence Reports [pages 1, 2, 4, 7 and 12] constitute personal information as defined under section 2(1) of the *Act*. ...

[19] Regarding the brief withheld portions of page 9 of the records, which contain information about an individual's gender and a brief statement made by the individual, the city states:

In respect of information in the ... entries on the Action Detail Summary page [page 9], the City submits that the personal information also identifies complainant(s). Similar to by-law complainant information that was the subject of IPC Orders MO-2814 dated November 29, 2012 and MO-2860 dated March 27, 2013, the information at issue in these records identifies the individual(s) who complained to the City about activity that was occurring within the municipality. The information therefore constitutes personal information under section 2(1)(h) of the definition of personal information.

[20] The city also submits that subsection 2(2.2) of the *Act* is not applicable because "the complaint(s) were all made in a personal rather than professional, official, or business capacity."

[21] The appellant takes the position that the information in the records relates to him, and that he ought to have access to the withheld portions of the records. He also appears to acknowledge that some of the information is the personal information of the

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.)

complainant(s). However, with respect to the information on page 9 of the record, the appellant's representations identify his concern that the withheld statements made by the complainant on that page were personal to the appellant, based on the other information disclosed to him.

[22] The affected party takes the position that the records contain that individual's personal information, and ought not to be disclosed. Although invited to do so in the Notice of Inquiry, the appellant does not specifically address the withheld statement on page 9 of the records.

[23] After reviewing the records at issue in this appeal, I am satisfied that they contain the personal information of the appellant. The records relate to complaints made about the actions or activities of the appellant, and I find they contain the appellant's personal information under paragraph (h) of the definition in section 2(1) of the *Act*.

[24] Furthermore, on my review of the withheld portions of the records, I agree with the city that the portions containing the name, address, telephone number and gender of the complainant(s) constitutes their personal information under paragraphs (a), (d) and (h) of section 2(1) of the *Act*.

[25] Regarding the statement made by an individual about the appellant contained on page 9 of the records, I find that this statement is clearly the personal information of the appellant, as it contains the views or opinions of another individual about the individual under paragraph (g) of the definition. However, I am not satisfied that it contains the personal information of the individual who made the statement.

[26] I have considered the city's position that disclosure of this statement would identify the individual who made the statement, and that it therefore constitutes this individual's personal information. I also note that the affected party does not address this specific issue in their representations. In the circumstances, I have not been provided with sufficient evidence to satisfy me that the disclosure of the statement withheld on page 9 of the records would reveal the identity of the individual who made this statement. Accordingly, I find that this withheld portion of page 9 of the records does not contain the personal information of an identifiable individual, as it does not contain information about an "identifiable individual."

[27] Because this portion of page 9 does not contain the personal information of an identifiable individual other than the appellant, it cannot qualify for exemption under sections 14(1) or 38(b). Furthermore, it cannot qualify for exemption under section 38(a) in conjunction with section 8(1)(d), because it does not "disclose the identity of a confidential source of information," nor does it "disclose information furnished only by the confidential source."

[28] Because of my finding that this statement on page 9 of the records cannot qualify for exemption under the *Act*, I will order that it be disclosed to the appellant.

[29] I will review the application of the exemption in section 38(b) to the portions of the records which I have found contain the personal information of the appellant and the complainant(s).

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

[30] 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 exceptions to this general right of access, including section 38(b). Section 38(b) introduces a balancing principle that must be applied by institutions where a record contains the personal information of both the requester and another individual. In this case, the city must look at the information and weigh the appellant's right of access to his own personal information against the affected person's right to the protection of their privacy. If the city determines that release of the information would constitute an unjustified invasion of the affected person's personal privacy, then section 38(b) gives the city the discretion to deny access to the appellant's personal information.

[31] In determining whether the exemption in section 38(b) applies, sections 14(1), (2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the affected person's personal privacy. Section 14(2) provides some criteria for the police to consider in making this determination; section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. In addition, if the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy under section 38(b).

Section 38(b)

[32] Section 38(b) states:

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

if the disclosure would constitute an unjustified invasion of another individual's personal privacy

[33] The city states that section 38(b) applies to the information remaining at issue. It refers to the presumption in section 14(3)(b) in support of its decision. The appellant provides material in support of his position that the withheld information ought to be released to him.

The presumption in section 14(3)(b)

[34] Section 14(3)(b) reads:

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;

[35] Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.⁵ Section 14(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.⁶

[36] The presumption can apply to a variety of investigations, including those relating to by-law enforcement.⁷

[37] The city states that:

... disclosure of complainant name(s) would constitute an unjustified invasion of the privacy of the complainant(s). There is a presumed invasion of privacy under section 14(3)(b) of the *Act* due to complainant information having been collected as part of an investigation into a possible violation of law.

[38] The city then identifies the nature of the potential violations and the specific city by-laws which apply to these actions.

[39] The appellant does not address the possible application of the presumption in section 14(3)(b).

⁵ Orders P-242 and MO-2235.

⁶ Orders M-734, M-841, M-1086, PO-1819 and PO-2019.

⁷ Order MO-2147.

[40] As set out above, the presumption in section 14(3)(b) can apply to records even if no proceedings were commenced against any individuals. The presumption only requires that there be an investigation into a possible violation of law.⁸

[41] With respect to the application of the presumption in section 14(3)(b) to the information at issue in this appeal, based on the records and the city's representations, I am satisfied that the information in the records was compiled by the city in the course of its investigations into possible by-law violations. The name, address, telephone number and gender of the complainant(s) are contained in By-law Services Occurrence Reports, and were compiled by the city in the process of conducting its investigations into possible by-law violations. In my view, this information was compiled as part of a number of investigations into a possible violations of law, and fits within the presumption in section 14(3)(b). Accordingly, I find that the disclosure of the personal information remaining at issue is presumed to constitute an unjustified invasion of the personal privacy of identifiable individuals under section 14(3)(b) of the *Act*.⁹

The factors in section 14(2)

[42] The city refers to a number of the factors in section 14(2) in support of its decision to deny access to the withheld information. Because of my findings in this order, it is not necessary for me to review these factors in detail.

[43] The appellant provides representations in support of his position that he ought to have access to the information at issue. He states that under "the principles of procedural fairness" he has a right to be made aware of the details in the records. This indirectly raises the possible application of the factor in section 14(2)(d), which reads:

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,

the personal information is relevant to a fair determination of rights affecting the person who made the request;

[44] As set out in the Notice of Inquiry sent to the parties, for section 14(2)(d) 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

⁸ Orders P-242 and MO-2235.

⁹ See also MO-1420.

- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
- (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.¹⁰

[45] The appellant does not address this four-part test. He states that the "duty of procedural fairness requires that I be made aware of the details concerning any attack on my good name." In support of his position, he states that the heart of the matter is "the blatant disregard for the fundamental principles of our society" and refers to the Magna Carta¹¹ in support of his position.

[46] Based on the appellant's representations, I am not satisfied that the requirements set out above for section 14(2)(d) to apply have been established. Specifically, although the appellant identifies his concerns that his name has been "besmirched" by the complaints, and refers to the duty of procedural fairness, he does not relate this right to any existing or contemplated proceeding as required by the second part of the test set out above.

[47] In the circumstances of this appeal, I am not satisfied that the personal information at issue is relevant to the fair determination of the appellant's rights, and find that the factor in section 14(2)(d) does not apply. I also find that there are no other factors favouring disclosure of the personal information remaining at issue to the appellant.

[48] Because the presumption in section 14(3)(b) applies to the withheld information, and because there are no factors favouring disclosure, I am satisfied that the disclosure of this information would constitute an unjustified invasion of the personal privacy under section 38(b).

Exercise of Discretion

[49] The section 38(b) exemption is discretionary and permits the city to disclose information, despite the fact that it could be withheld. On appeal, this office may

¹⁰ 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.).

¹¹ Particularly section 39 of that document.

review the city's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.¹²

[50] In its representations the city submits that it has applied the exemptions in the *Act* "in accordance with the purposes of the *Act* and for no improper/irrelevant purposes and considered all relevant circumstances." It states that:

... the application of these exemptions was consistent with the protection of privacy purposes of the *Act* and purpose of ensuring that by-law enforcement officers are able to effectively investigate and enforce potential contraventions of City bylaws.

The City further submits that the severances are consistent with section 4(2) of the *Act* because the City disclosed as much of the responsive record as possible without disclosing material which was exempt. In other words, the appellant has still been provided with a full description of the complaint including when exactly it was made.

[51] The appellant does not directly address this issue, although the appellant does refer to concerns about the impact these complaints have on him and the concerns about access to information relating to him, set out above.

[52] As a result of this order I am requiring the city to disclose the substance of one portion of one of the complaints to the appellant. The city has disclosed the remaining information relating to the specifics of each of the bylaw complaints, including their outcomes. The only information remaining at issue is the identifying information about the complainant(s). I have found that disclosure of this information would constitute an unjustified invasion of personal information, and that it qualifies for exemption under section 38(b). In the circumstances, based on the nature of the information remaining at issue and on the representations of the parties, I am satisfied that the city properly exercised its discretion to deny access to the information remaining at issue.

[53] Having found that the remaining information qualifies for exemption under section 38(b), it is not necessary for me to review the possible application of sections 38(a) and 8(1)(d) to this information.

ORDER:

- 1) I order the city to disclose to the appellant the brief withheld statement contained on page 9 of the records (being the last (third) line in the first entry of the "caller

¹² Orders PO-2129-F and MO-1629.

contacted" notation on that page) by **November 4, 2013** but not before **October 31, 2013**.

- 2) I uphold the decision of the city that the remaining portions of the records are exempt from disclosure under section 38(b).

Original Signed By: _____ September 30, 2013
Frank DeVries
Adjudicator