

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3060

Appeal MA13-50

City of Toronto

June 17, 2014

Summary: This order addresses an appeal arising from an individual's access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Toronto (the city) for a copy of a complaint letter written about him. The city denied access to the letter, in its entirety, relying on section 38(b) (personal privacy), together with the presumption in section 14(3)(b) (compiled and identifiable as part of an investigation into a possible violation of law) and the factors in sections 14(2)(e) (unfair harm), 14(2)(f) (highly sensitive) and 14(2)(h) (supplied in confidence). This order upholds the city's access decision, in part.

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(2)(e), 14(2)(f) & 14(2)(h) 14(3)(b) and 38(b).

Orders and Investigation Reports Considered: Order MO-2954.

OVERVIEW:

[1] This order addresses the issues raised by the decision of the City of Toronto (the city) in response to the following access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

I was told by the program supervisor of [a specified city shelter] where I'm staying that he was in possession of a letter of complaint against me written by a lawyer. When I asked what is the name of the lawyer, he responded "that is none of your business". I am requesting a copy of this letter. The program supervisor who is in possession of this letter and was the person speaking to me is [named individual] at [a specified address].

[2] The city located the letter identified as responsive to the request and issued a decision denying access to it, in its entirety, pursuant to section 38(b) (discretion to refuse requester's personal information) and section 14(1) (invasion of privacy) of the *Act*. The requester (now the appellant) appealed the city's decision to this office, and a mediator was appointed to explore the possibility of resolution.

[3] At the appellant's request, the mediator attempted to obtain consent for the disclosure of the record from the individual who had written it. This individual (the affected party) declined to provide consent.

[4] The city clarified its access decision during mediation to confirm that it was relying on section 38(b), together with the factors in sections 14(2)(e), (f), (h) and (i), as well as the presumption against disclosure in section 14(3)(g), to deny access to the record. As a mediated resolution of the appeal was not possible, it was transferred to the adjudication stage, in which an adjudicator conducts an inquiry.

[5] I started my inquiry by sending a Notice of Inquiry outlining the issues to the city, seeking its representations. The city's representations indicated that it was not relying on section 14(3)(g), but rather section 14(3)(b), and it also withdrew its reliance on the factor in section 14(2)(i). I sent a non-confidential copy of the city's representations to the appellant, along with the Notice of Inquiry, inviting him to make submissions. The appellant did not submit representations.

[6] In this decision, I order the city to disclose the appellant's personal information to him. Additionally, I uphold the city's decision to deny access under section 38(b) only in relation to certain personal information about the individual who wrote the letter, the affected party.

RECORDS:

[7] The record at issue is a one-page letter, accompanied by a fax cover sheet (2 pages).

ISSUES:

- A. Do the records contain "personal information" according to the definition in section 2(1) of the *Act*?
- B. Does the personal privacy exemption in section 38(b) apply to the withheld information?
- C. Did the city properly exercise its discretion under section 38(b)?

DISCUSSION:

A. Do the records contain "personal information" according to the definition in section 2(1) of the *Act*?

[8] In order to determine if section 38(b) applies, I must first decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) of the *Act* as "recorded information about an identifiable individual," that falls within one of the eight types of information in paragraphs (a) to (h).

[9] The list of examples of personal information under section 2(1) is not exhaustive and information that does not fall under paragraphs (a) to (h) may still qualify as personal information.

[10] 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.¹ However, 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.²

[11] The city takes the position that the letter contains the appellant's personal information and the personal information of "other identifiable individuals, including the Affected Party," as defined in paragraphs (e) and (f) of the definition. As stated, the appellant did not provide representations. However, in earlier correspondence with this office, he suggested that if the letter was written by a lawyer, that information should not be considered personal information because it was written in a professional capacity.

¹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

² Orders P-1409, R-980015, PO-2225 and MO-2344.

[12] Based on my review of the record, I find that it contains information pertaining to the appellant that qualifies as his personal information within the meaning of paragraphs (d) (address), (g) (views or opinions about him) and (h) (name, with other personal information) of the definition in section 2(1) of the *Act*. I also find that there is personal information about the affected party that falls under the following paragraphs of the definition: (d) (address or phone number), (f) (confidential correspondence sent to an institution) and (h) (name, with other personal information relating to the individual). However, the record does not contain personal information fitting within paragraph (e); nor does it contain the personal information of any "other identifiable individual," as suggested by the city.

[13] Regarding other submissions made by the parties, I note that there is no indication on the face of the record that it was written by a lawyer, or by an individual in a professional capacity. Accordingly, I find that the personal information of the affected party does not fit within the exception to the definition of personal information in sections 2(2.1) and 2(2.2) of the *Act*.³

[14] Finally, I note that the record also contains the name, address and other contact information about the shelter. I find that this information does not qualify as "personal information" because it is not *about* an identifiable individual. As only personal information qualifies for exemption under section 38(b), I will order the information about the shelter disclosed to the appellant.

[15] In circumstances where a record contains both the personal information of the appellant and another individual, the relevant personal privacy exemption is the discretionary exemption at section 38(b).⁴ In this appeal, it is also not necessary for me to consider whether the appellant's own personal information qualifies for exemption under section 38(b) since its disclosure to him cannot be an unjustified invasion of *another* individual's personal privacy, as required under that section. Accordingly, I will order the disclosure of the appellant's own personal information to him.

[16] I must now review whether the personal information remaining at issue, which relates only to the affected party, qualifies for exemption under the discretionary exemption at section 38(b) of the *Act*.

³ Section 2(2.1) 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. (2.2) For greater certainty, subsection (2.) 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.

⁴ Order M-352.

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

[17] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. 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. This approach 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.

[18] Sections 14(1) to (4) are considered in determining whether the unjustified invasion of personal privacy threshold is met. The exceptions in sections 14(1)(a) to (e) are relatively straightforward. None of them apply in this appeal. The exception in section 14(1)(f) (where “disclosure does not constitute an unjustified invasion of personal privacy”), is more complex and requires a consideration of additional parts of section 14.

[19] Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Finally, section 14(4) identifies information whose disclosure is not an unjustified invasion of personal privacy.

[20] For records claimed to be exempt under section 38(b), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.⁵ This represents a shift away from the previous approach under both sections 38(b) and 14, whereby a finding that a section 14(3) presumption applied could not be rebutted by any combination of factors under section 14(2). As explained by Adjudicator Laurel Cropley in Order MO-2954:

... [I]t is apparent that the mandatory and prohibitive nature of section 14(1) is intended to create a very high hurdle for a requester to obtain the personal information of another identifiable individual where the record does not also contain the requester’s own information. On the other hand, section 38(b) is discretionary and permissive in nature, which, in my view, reflects the intention of the legislature that careful balancing of the privacy rights versus the right to access one’s own personal information is

⁵ Order MO-2954.

required in cases where a requester is seeking his own personal information.⁶

[21] I will approach my review of the information at issue under section 38(b) with this rationale in mind.

Representations

[22] Although the city initially denied access to the record under section 38(b), in conjunction with sections 14(3)(g), 14(2)(e), (f), (h) & (i), this position was modified in its representations. The city relies instead on the presumption against disclosure in section 14(3)(b), along with the previously listed factors in section 14(2), with the exception of paragraph (i), which it abandoned.

[23] According to the city, disclosure of the affected party's personal information would constitute an unjustified invasion of personal privacy because the affected party did not consent. Further, the city submits that section 14(3)(b) applies because the affected party's letter was retained by the city and would form part of a "possible investigation" into an alleged misuse of city property "that could be a possible offence under the *Criminal Code*."⁷

[24] The city maintains that none of the factors in sections 14(2)(a) to (d), which favour disclosure, apply. Regarding the factor in section 14(2)(e), the city submits that if the record is disclosed to the appellant, the affected party "whose personal information is included in the records (consisting of his personal views, opinions and complaints) could be exposed unfairly to emotional and physical harm and harassment [because] ... it is reasonable to expect that disclosure would lead to unwanted contact" from the appellant.

[25] The city argues that section 14(2)(f) is a relevant consideration in favour of non-disclosure because the "personal information at issue concerns serious allegations ... [about] the Requester, such information is of a sensitive nature, and its disclosure will only serve to exacerbate [the situation for] the Affected Party."

[26] With regard to its claim that section 14(2)(h) is relevant, the city submits that:

Although the record at issue, a complaint letter, does not contain a notation asking that it be kept confidential, during the mediation process,

⁶ Order MO-2954 at page 24, paragraph 74.

⁷ The city identifies a specific provision of the *Criminal Code*, R.S.C. 1985, c. C-46, as amended. The specific provision and other portions of the city's representations are not outlined in this order because they are confidential and reference to them would either disclose personal information about the appellant or disclose the content of the record.

the affected party did not consent to the release of the document, asserting that it had confidentially been supplied to the city.

[27] Given the appellant's indication that shelter staff had read the letter to him, but refused to show it to him, I asked the city to address the possible application of the absurd result principle. In response, the city professes to have been unaware of this claim prior to learning of it in the Notice of Inquiry. Regardless, this information did not affect the city's position on access. The city maintains that the absurd result principle does not apply because there is no evidence to support the appellant's assertion that the letter was read to him. The city submits that "if the requester can provide proof, such as an affidavit from the shelter worker that he indeed read the letter to the requester, the city will consider this evidence at that time." According to the city, therefore, disclosure of the record would be inconsistent with the purpose of the personal privacy exemption in this situation.

Analysis and findings

[28] The appellant's interest in this appeal lies with accessing the information in the letter to understand what he is alleged to have been doing wrong and to learn the source of those accusations. Previously in this order, I found that the appellant's personal information must be disclosed to him since its disclosure would not result in an unjustified invasion of *another individual's* personal privacy. In this analysis, therefore, I am concerned only with the personal information of the individual who wrote the letter, the affected party.

[29] As outlined above, this office's approach to reviewing the possible application of the discretionary personal privacy exemption follows the more nuanced approach explained in Order MO-2954. Order MO-2954 post-dates the inquiry into this appeal, but it incorporates and expands upon the view of the analysis to be conducted under the discretionary exemption in section 38(b) that was acknowledged by the Divisional Court in *Grant v. Cropley* in 2001, which was referred to in the Notice of Inquiry sent to the city and the appellant.⁸ This view acknowledges the special nature of requests for one's own personal information under section 38(b). Following Order MO-2954, therefore, I will consider the factors and presumptions in sections 14(2) and (3) to balance the interests of the parties in determining whether the disclosure of the personal information in the records *would* constitute an unjustified invasion of personal privacy under section 38(b).

⁸ As set out in the Notice of Inquiry: In *Grant v. Cropley* ([2001] O.J. 749), 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."

[30] I begin by addressing the city's claim that the presumption against disclosure in section 14(3)(b) applies to the record. Section 14(3)(b) states:

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;

[31] Apart from identifying a particular section of the *Criminal Code* that apparently might apply to the activity alleged in the letter, the city tenders no persuasive evidence to support the application of section 14(3)(b). Of note, the city can only point to a "possible offence" and suggests that the record could form part of a "possible investigation" into the alleged misuse of city property. This is not sufficient. Since the city has not provided the requisite evidence to establish that the personal information in these records was compiled and is identifiable as part of an investigation into a possible violation of law, I find that section 14(3)(b) does not apply.

[32] I will now review whether any of the factors in section 14(2) apply, either in favour of, or against, disclosure. The factors listed at paragraphs (a) through (d) of section 14(2) of the *Act* are those which may be relied upon to support the disclosure of information at issue in an appeal. In this case, however, the appellant has not provided representations to support the application of any of these factors to the information remaining at issue. I find that none of the section 14(2) factors favouring disclosure is applicable in the circumstances of this appeal.

[33] The factors listed in section 14(2)(e) through (i), which serve to protect the privacy of an individual to whom the withheld personal information relates, must also be considered in balancing the factors under section 14(2). The city relies on paragraphs (e), (f) and (h) of section 14(2). In this appeal, I am satisfied that several of the factors are relevant.

[34] Regarding the factor in section 14(2)(e) (unfair exposure to harm), this office has held that although the disclosure of personal information may be uncomfortable for those involved in an acrimonious relationship, this does not mean that harm would result, or that any resulting harm would be unfair.⁹ In this appeal, the city argues that disclosure of the affected party's personal information, "consisting of his personal views, opinions and complaints" could reasonably be expected to expose the affected party "unfairly to emotional and physical harm and harassment." The city provides no evidence to support the basis of this argument, and it appears that the city's position on

⁹ Order PO-2230.

section 14(2)(e) is based on speculation that the allegations about the appellant in the letter are true. Moreover, the "personal views, opinions and complaints" in the letter are not the personal information of the affected party because they relate to the appellant's alleged behaviour and constitute *his* personal information. Based on the evidence before me, I am not satisfied that disclosure of the withheld personal information relating to the affected party could lead to unfair exposure to the harm contemplated by section 14(2)(e). Accordingly, I find that the factor at section 14(2)(e) is not a relevant consideration.

[35] According to the city, section 14(2)(f) weighs in favour of non-disclosure because the "personal information at issue concerns serious allegations ... [about] the Requester, such information is of a sensitive nature, and its disclosure will only serve to exacerbate [the situation for] the Affected Party." The allegations about the appellant in the letter may be serious, but I found above that these constitute personal information about the appellant only. This content, which pertains only to the appellant's conduct, is not at issue under section 38(b). Regardless, for personal information to be considered highly sensitive in the manner contemplated by section 14(2)(f), I must be satisfied that disclosure of the information could reasonably be expected to cause significant personal distress to the subject individual.¹⁰ It is not necessary that the truth of the matter be established, and so, based on the nature of the affected party's personal information in the record, including contact information, and the surrounding circumstances of this matter, I accept that disclosure of it could cause significant personal distress to the affected party. I find that the factor at section 14(2)(f) applies to the affected party's personal information.

[36] The relevance of the factor in section 14(2)(h) is determined by an evaluation of whether the personal information was supplied by the individual to whom the information relates in confidence. The city argued that although the record did "not contain a notation asking that it be kept confidential," the affected party had not consented and had asserted an expectation of confidentiality over it. On my review of this record, I note that there is, in fact, an explicit assertion of confidentiality on the fax cover sheet that accompanied the letter to the shelter's management team. In my view, it is also reasonable to conclude from the circumstances that the affected party expected some level of confidentiality or discretion regarding, at least, the use of his own personal information. Given that I have already ordered the personal information of the appellant disclosed to him, I find that the section 14(2)(h) factor applies to the personal information of the affected party that appears in the record.

[37] Having balanced the competing interests of the appellant's right to disclosure of information against the privacy rights of the affected party, I conclude that there are no factors weighing in favour of the disclosure of the personal information of the affected party that is contained in these records. However, in view of my finding that the

¹⁰ Order PO-2518.

affected party's information merits the application of the privacy protective factors in sections 14(2)(f) & (h), I conclude that its disclosure to the appellant would constitute an unjustified invasion of the personal privacy of the affected party. Therefore, this personal information qualifies for exemption under section 38(b).

[38] I also considered whether the absurd result principle applies in the circumstances of this appeal. According to the principle, whether or not the factors or circumstances in section 14(2) or the presumptions in section 14(3) apply, where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 14(1), because to find otherwise would be absurd and inconsistent with the purpose of the exemption.¹¹ One of the grounds upon which the absurd result principle has been applied in previous orders is where the information is clearly within the requester's knowledge.¹² This basis for the application of the absurd result was raised in this appeal by the appellant's assertion that shelter staff read the letter to him. In response to this assertion, the city argued that the appellant could have provided affidavit evidence from the shelter supervisor, attesting to the veracity of the appellant's claim that the letter was read out to him. I reject the city's proposed suggestion of third party affidavit evidence to support this claim because it would impose too high an evidentiary burden on the appellant in the circumstances. Having said that, I find that there is insufficient evidence before me to persuade me that the letter, in its entirety, is "clearly within the appellant's knowledge." Under the circumstances, I find that refusing to disclose this specific information to the appellant would not lead to an absurd result. Therefore, this information is exempt under section 38(b).

[39] Subject to my review of the city's exercise of discretion, I find that the discretionary exemption in section 38(b) applies to the personal information of the affected party.

C. Did the city properly exercise its discretion under section 38(b)?

[40] As I have upheld the decision of the city to deny access, in part, under section 38(b), I must now consider whether the city properly exercised its discretion in doing so. Since section 38(b) is a discretionary exemption, the city had the discretion to disclose the withheld information, even if it qualified for exemption. This is the essence of a discretionary exemption.

[41] On appeal, an adjudicator may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so. In doing so in this appeal, I may find that the city erred in exercising its discretion where, for example, I find that they did so in bad faith or for an improper purpose, took into account irrelevant considerations, or failed to take into account

¹¹ Orders M-444 and MO-1323.

¹² Orders MO-1196, PO-1679, MO-1755 and PO-2679.

relevant considerations. In such a case, I may send the matter back to the city for an exercise of discretion based on proper considerations. However, section 43(2) of the *Act* states that I may not substitute my own discretion for that of the city.¹³

Representations

[42] The city indicates that it considered the following factors to be relevant in the exercise of its discretion to deny access to the record: the nature of the personal privacy exemption; the principle that individuals should have a right of access to their own personal information; the fact that the requester is seeking access to an "individual's complaint against him about a possible violation of law"; and that the appellant has not conveyed "any compelling reason for access to the personal information." Further, the city submits that it "has historically maintained the confidentiality of the identities of complainants to alleged law enforcement/investigation matters, as this information is highly sensitive." In this context, the city asserts that its exercise of discretion was carried out in good faith.

[43] As stated, the appellant did not provide representations. However, his communications with this office earlier in the appeal process suggest a sympathetic or compelling need to access the information to know the specific nature of the allegations against him.

Findings

[44] To begin, I note that my review of the exercise of discretion by the city relates only to the information in the records for which I have upheld the claim of section 38(b), with reference to the factors in sections 14(2)(f) and (h).

[45] Given that the city denied access to a record of this nature – a complaint about the appellant - *in its entirety*, it is not clear to me that the city clearly understood its obligation under section 38(b) to balance the appellant's interests in seeking access to this information with protecting the privacy interests of the individual who wrote the letter. In particular, I did not uphold the city's claim that the presumption against disclosure in section 14(3)(b) applied because the city did not establish that there had been any investigation into a possible violation of law. However, I accept that it is the city's usual practice to withhold the identity of complainants in similar circumstances, and I have upheld their decision to deny access to this particular information under section 38(b), with reference to the factors in section 14(2)(f) and (h). Overall, given the disclosure that will result from this order, I conclude that the city otherwise considered relevant factors in exercising its discretion to withhold the portions of the record that I have found exempt. In the circumstances, therefore, I will not interfere with the city's exercise of discretion on appeal.

¹³ Order MO-1573.

ORDER:

1. I uphold the city's decision to not disclose the portions of the records that I have found to be exempt under section 38(b). For certainty, I have highlighted the exempt information in orange on the copy of the record provided with this order.
2. I order the city to disclose the non-exempt portions of the record to the appellant by **July 22, 2014** but not before **July 17, 2014**.

To verify compliance with this provision, I reserve the right to require the city to provide me with a copy of the record disclosed to the appellant.

Original signed by: _____
Daphne Loukidelis
Adjudicator

_____ June 17, 2014