

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3210

Appeal MA14-359

The City of Oshawa

June 26, 2015

**Summary:** The appellants submitted a request for information relating to a complaint the city received about their property. The city withheld portions of the municipal officers' notes and reports, claiming that the personal privacy and law enforcement exemptions under the *Act* apply. This order finds that the disclosure of the withheld information would constitute an unjustified invasion of personal privacy under section 38(b) and dismisses the appeal.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss.2(1) definition of "personal information", 14(2)(d), 14(3)(b), 17, and 38(b).

### OVERVIEW:

[1] A husband and wife (the appellants) submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Oshawa (the city) for records relating to complaints and investigations about their home address during a specified period of time.

[2] The city located responsive records and granted the appellants partial access to the records. The city claimed that disclosure of the withheld portions of the records would constitute an unjustified invasion of personal privacy. The city also submits that disclosure of some portions of the records would disclose the identity of a confidential source of information in respect of a law enforcement matter. Finally, the city submits that some of the withheld records contain non-responsive information.

[3] The appellants appealed the city's decision to this office and a mediator was assigned to the appeal.

[4] Shortly after the appellants filed their appeal with this office, they submitted two more requests to the city for similar information. The city issued two decision letters in response to these requests. The appellants, in turn, confirmed with the mediator that they would not be appealing these decisions, but advised that they continue to believe that additional records responsive to this request and appeal exist.

[5] During mediation, the parties exchanged information describing the types of additional records the appellants believe should exist. In response, the city agreed to conduct a further search for responsive records. At the end of the city's additional search, it issued a supplemental decision and affidavit to the appellants advising that no further records responsive to the request were located.

[6] At the conclusion of mediation, the appellants confirmed that they continue to believe that additional records exist. The appellants also confirmed that they continue to seek access to the information withheld under the personal privacy and law enforcement exemptions.

[7] The issues in dispute at the end of mediation were transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. During my inquiry, the parties provided representations to this office. The appellant submitted voluminous representations, only a small portion of which address the issues identified in the Notice of Inquiry sent to the parties. Most of the appellants' representations contain background information relating to their concerns about the city's complaint process which resulted in a charge being filed against them. However, concerns about how the city conducts its investigation and related matters handled by the city's prosecutor are not within the jurisdiction of this office. Accordingly, the appellant's written, photographic and video evidence in this regard will not be addressed in this order.

[8] While the appellants indicated at the end of mediation that they continue to have questions as to whether the portions of the records were identified as non-responsive, I did not require the city's representations on this issue. The mediator's report indicates that the appellants question whether the withheld portions of the pages 90-98, 101, 128-133 and 141-143 identified as "out of scope" contain non-responsive information. These portions of the records are the handwritten notebook entries for four municipal law enforcement officers (municipal officers).

[9] I have carefully reviewed the portions of the notebooks the city claims are "out of scope" and am satisfied that these portions of the records do not "reasonably relate"

to the request.<sup>1</sup> Instead, they refer to unrelated complaints or investigations and administrative matters the municipal officers made notes about during the course of their work day. As I have found that this information is not responsive to the request, I uphold the city's decision to not disclose it to the appellants.

[10] In this order, I uphold the city's decision to withhold the information it redacted from the copies of records disclosed to the appellants. I also find that the city's search for responsive records was reasonable.

## **RECORDS:**

[11] The records at issue are the portions of complaint reports, municipal officers' notes and an appendix to a search warrant withheld pursuant to the personal privacy and law enforcement exemptions under the *Act*.

## **ISSUES:**

- A. Did the city conduct a reasonable search for records?
- B. Do the records contain "personal information" as defined in section 2(1)?
- C. Would disclosure of the portions of the records found to contain "personal information" constitute an unjustified invasion of personal privacy under section 38(b)?
- D. Did the city properly exercise its discretion under sections 38(b)?

## **DISCUSSION:**

### **A. Did the city conduct a reasonable search for records?**

[12] The city advised that it received a complaint about the appellants' property in relation to possible by-law infractions. The appellants, in turn, filed an access request to obtain as much information as they could about the complaint and the city's investigation. The city conducted two searches for responsive records during the request and mediation stages of the appeal.

[13] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.<sup>2</sup> If I am satisfied that the

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<sup>1</sup> Orders P-880 and PO-2661.

<sup>2</sup> Orders P-85, P-221 and PO-1954-I.

search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[14] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.<sup>3</sup> To be responsive, a record must be "reasonably related" to the request.<sup>4</sup>

[15] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.<sup>5</sup>

[16] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.<sup>6</sup>

[17] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.<sup>7</sup>

#### *Representations of the parties*

[18] The city advised that upon receipt of the appellants' request, its staff conducted "thorough and effective searches of the records for each of the appellant's requests".

[19] The city advised that its Records Analyst liaised with relevant city staff in various departments to process the request. In support of city's position, the Records Analyst provided an affidavit<sup>8</sup> which states that:

- upon receipt of the request, the appellants were contacted by the city to discuss the scope of the request;
- initially, the Records Analyst contacted the city's Municipal Law Enforcement and Licensing Services (MLELS) department which conducted a search for responsive records and located records;

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<sup>3</sup> Orders P-624 and PO-2559.

<sup>4</sup> Order PO-2554.

<sup>5</sup> Orders M-909, PO-2469 and PO-2592.

<sup>6</sup> Order MO-2185.

<sup>7</sup> Order MO-2246.

<sup>8</sup> The city's initial affidavit, dated November 25, 2014 was provided to this office and the appellant during mediation. The updated version of the same affidavit is dated February 5, 2015 and was provided to this office as part of the city's representations in response to the Notice of Inquiry. The affidavits essentially contain the same information. References in this order to the city's affidavit relates to the updated version.

- MLELS advised the Record Analyst that there was a pending proceeding relating to the appellants' property and thus the city's prosecutor may have additional responsive records;
- the Record Analyst directed the prosecutor's office to conduct a search for responsive records;
- the municipal prosecutor located records but advised that she already provided the appellants with copies as a result of the pending prosecution;
- the city issued a decision to the appellants granting partial access to 67 pages of records. In an effort to avoid duplicating records, the city did not provide the appellants with copies of the records it had received from the prosecutor's office; and
- in response, the appellant requested copies of the records located in the prosecutor's office and copies of these documents were subsequently provided to them.

[20] As noted above, shortly after the appellants filed their request which resulted in the present appeal, they submitted two more requests to the city for similar information. The city conducted one additional search relating to the second request.<sup>9</sup> Though the appellants did not appeal the city's decision letter regarding their second request, the city's search efforts to locate additional responsive records is relevant in determining whether the city's search efforts in the present appeal were reasonable.

[21] In her affidavit, the city's Records Analyst advised that upon her receipt of the appellants' second request, she conducted a search for responsive records in the city's MLELS department, but also expanded the area of search to include the city's Building Permits and Inspection Services (Buildings), Fire Services (Fire) and Legal Services (Legal) departments. However, no further records were located as a result of this second search.

[22] During mediation, the city agreed to conduct a third search. The city's Records Analyst advised in her affidavit that the city's MLELS, Building, Fire and Legal Services departments conducted a further search for responsive records, but none were located.

[23] The appellants' submissions do not appear to specifically address this issue. However, one of the main themes arising from the appellants submissions is that the

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<sup>9</sup> Upon receipt of the appellants' third request for similar information, the city did not conduct another search but claimed that the third request was frivolous on the grounds that the first and second requests already sought access to the same information.

city's municipal officers over patrolled their property. In particular, they submit that the city's municipal officers at times would go around their property "several times a day including parking and staking out in front". It appears that the appellants take the position that additional records recording these patrolling activities should exist.

*Decision and Analysis*

[24] I have carefully reviewed the submissions of the parties and find that the city's search for responsive records was reasonable. Based on the city's affidavit evidence, I am satisfied that its searches were conducted by experienced employees, knowledgeable in the subject matter of the request. I am also satisfied that a reasonable effort was expended to locate responsive records. In this regard, I note that the city conducted three separate searches for the responsive records and in two of those searches expanded the original area of search. Without discrediting the appellants recollection of how many times the city's municipal officers attended the proximity of their property, there is no evidence before me suggesting that such attendances would have resulted in the production of additional records, logs or notes. Accordingly, I find that the evidence adduced by the appellants fails to establish a reasonable basis for concluding that additional records exist.

[25] Having regard to the above, I find that the city's three separate searches for responsive records is reasonable.

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

[26] 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. The records at issue in this appeal relate to the city's investigation of a possible by-law infraction. The city advises that during its investigation it conducted interviews with the appellants and obtained a search warrant. The city also advises it interviewed a small number of other individuals about the complaint it received. The city claims that the records contain the personal information of the appellants and other identifiable individuals who provided information to its municipal officers. In support of its position, the city states that some of the information at issue:

...relates directly to those individuals who complained about [the appellants' property] to the City with the expectation and understanding that their personal information, primarily their identities, would be confidential.

[27] The appellants' representations did not specifically address this issue. However, the appellants maintain that they are aware that their neighbors filed a complaint against them and they are aware of their identities.

[28] Having regard to the submissions of the parties and the records themselves, I find that the records contain the personal information of the appellants and other identifiable individuals within the meaning of the definition of that term in section 2(1). This information relates to the address and telephone numbers of the other individuals [paragraph (d)], their views and opinions [paragraph (i)], along with their names [paragraph (h) of the definition of the term "personal information" in section 2(1)].

[29] As I have found that the records contain the personal information of the appellant, along with other identifiable individuals, I will go on to consider whether disclosure of this information would constitute an unjustified invasion of personal privacy under section 38(b).

**C. Would disclosure of the portions of the records found to contain "personal information" constitute an unjustified invasion of personal privacy under section 38(b)?**

[30] Section 38(b) 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. 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.

[31] Because of the wording of section 38(b), the correct interpretation of "personal information" in the preamble is that it includes the personal information of other individuals found in the records which also contain the requester's personal information.<sup>10</sup>

[32] In other words, where a record contains personal information of both the requester and another individual, and the 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.

[33] In the circumstances of this appeal, it must be determined whether disclosing the personal information of the other individuals would constitute an unjustified invasion of their personal privacy under section 38(b).

[34] Sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Section 14(2) provides some criteria for the police to consider in making this determination; section 14(3) lists the types of

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<sup>10</sup> Order M-352.

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. The parties have not claimed that any of the exclusions in section 14(4) apply and I am satisfied that none apply.

[35] 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). Given that the affected individuals have not consented to the release of their information, the only exception that could apply is section 14(1)(f), which states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except if the disclosure does not constitute an unjustified invasion of personal privacy.

[36] If the information at issue falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her personal information against the other individual's right to protection of their privacy.

***14(3)(b): investigation into violation of law***

[37] The city submits that the presumption at section 14(3)(b) applies in the circumstances of this appeal. 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

[38] 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.<sup>11</sup> The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.<sup>12</sup>

[39] The city submits that the withheld information on pages 10, 11, 82-86, 88, 89, 92, 94, 106, 129 and 142 relates to "one or more individuals interviewed by [a municipal] officer during the investigation of allegations made by one or more complainants". The city advises that as a result of its investigation, the complaint was

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<sup>11</sup> Orders P-242 and MO-2235.

<sup>12</sup> Orders MO-2213, PO-1849 and PO-2608.



elevated to a municipal prosecution. The representations of both parties confirm that the prosecution is ongoing.

[40] Having regard to the submissions of the parties and the records themselves, I am satisfied that the personal information at issue was collected as part of an investigation into a possible violation of law, namely a property related by-law infraction. Accordingly, I find that the presumption at section 14(3)(b) applies in the circumstances of this appeal.

***14(2)(d): fair determination of rights***

[41] As noted above, the appellants provided extensive representations to this office, most of which comprise of background information relating to their concerns about the city's conduct in investigating and prosecuting the complaint. Though this office does not have the jurisdiction to review the city's complaint process, I am satisfied that the appellants' concerns give rise to the possible application of the factor favouring disclosure at section 14(2)(d). Section 14(2)(d) states:

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

[42] 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
- (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.<sup>13</sup>

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<sup>13</sup> 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.).

[43] Given that the city conducted an investigation into a possible violation of its by-laws relating to the appellants' property, I am satisfied that the circumstances surrounding this appeal relate to matters which affect the appellants' legal rights. I am also satisfied that this legal right is related to an existing proceeding, namely the pending prosecution matter the parties refer to in their representations. Accordingly, I find that the first and second parts of the four part test under section 14(2)(d) has been met.

[44] However, in order for the factor at section 14(2)(d) to be given any consideration in this appeal, the appellants' evidence must establish that all four parts of the test has been met. In my view, the appellants' have failed to establish that the personal information at issue has some bearing on or is significant to the determination of the right in question. The personal information at issue comprises of the names, contact information and statements of one or more individuals who spoke to the city's municipal officers in relation to a complaint about the appellants' property. In my view, disclosure of the personal information these individuals provided to the municipal officers is not significant to the determination of whether or not the appellants' infringed the by-law charge laid by the prosecutor. Though this information provided the impetus for the city to commence its investigation, attend the appellants' residence and obtain a search warrant, it is the results of the city's investigation, most notably the municipal officers' findings, conclusions and search evidence which will determine whether the charge against the appellants was properly laid. Furthermore, there is no evidence before me suggesting that the individuals interviewed by the municipal officers presented evidence during the prosecution. Instead, it appears that the prosecution's case entirely relies on the evidence the municipal officers gathered as a result of their investigation, which included their search of the appellants' property.

[45] Having regard to the above, I find that the personal information at issue is not significant to the appellants' right in question. For similar reasons, I also find that the appellants have not established that personal information at issue is required for them to prepare for the proceeding or ensure an impartial hearing. Accordingly, I am not satisfied that parts 3 and 4 of the test in section 14(2)(d) has been met.

### *Summary*

[46] Given the application of the presumption in section 14(3)(b) and the fact that no factors in favour of disclosure have been claimed or established, I am satisfied that disclosure of the withheld personal information to the appellants would constitute an unjustified invasion of personal privacy under section 38(b).

[47] In making my decision, I considered whether the absurd result principle could apply in the circumstances of this appeal. However, based on my review of the records along with the appellants evidence regarding which neighbors they believed spoke to the municipal officers, I am satisfied that the absurd result principle has no application

in the application of this appeal.<sup>14</sup> In arriving at this decision, I also took into consideration that there is insufficient evidence before me to make a finding that the appellants are aware of the exact nature of information the complainants provided the municipal officers.

[48] Having regard to the above, I find that the personal information at issue is exempt from disclosure under section 38(b), subject to my assessment of whether the city exercised its discretion properly. Given my finding, it is not necessary for me to also determine whether some of the withheld information also qualifies for exemption under section 38(a) in conjunction with the law enforcement provision at section 8(1)(d).

**D. Did the city properly exercise its discretion under sections 38(b)?**

[49] 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.

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.

[50] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>15</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>16</sup>

[51] The city submits that it properly exercised its discretion to withhold the personal information at issue. In support of its position, the city submits that the appellants:

... [were] not privy to any discussions between the [municipal officers] and the affected person[s], and as such, the privacy of the affected person[s] is very much at issue in this appeal .... The City conducted thorough and effective searches, judiciously reviewed the records and

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<sup>14</sup> Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under sections 14(1), because to withhold the information would be absurd and inconsistent with the purpose of the exemption (see Orders M-444 and MO-1323).

<sup>15</sup> Order MO-1573.

<sup>16</sup> Section 43(2).

severed an absolute minimum amount of information in an attempt to exercise its discretion with a view to preserving the spirit and content of the *Act*, the collection of personal information and the privacy interests of individuals.

[52] The appellants' representations did not specifically address the issue of whether the city properly exercised their discretion under section 38(b). Having regard to the city's evidence and the nature of the appeal, I am satisfied that the city properly exercised its discretion and in doing so took into account relevant considerations such as the sensitive nature of the withheld information. I also am satisfied that the city did not exercise their discretion in bad faith or for an improper purpose, nor is there any evidence that they took into account irrelevant considerations.

[53] In making my decision, I note that one of the purposes of the *Act* includes the principle that requesters should have a right to access their own information. However, in my view, the nature of the personal information at issue and the sensitivity of it outweigh this principle, particularly when I also consider the amount of information the city has already disclosed to the appellants, along with the fact that the information at issue was collected as part of an investigation into a law enforcement matter.

[54] Having regard to the above, I find that the city properly exercised its discretion to withhold the personal information I found exempt under section 38(b).

**ORDER:**

I uphold the city's decision to withhold the personal information I found exempt under section 38(b) and find that the city's searches for responsive records was reasonable.

Original signed by: \_\_\_\_\_  
Jennifer James  
Adjudicator

\_\_\_\_\_ June 26, 2015