

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-3293

Appeals MA14-543, MA-544, MA14-545

Town of Innisfil

March 1, 2016

**Summary:** The appellant made three access requests to the town under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records of complaints or inquiries made by certain individuals (the affected parties) about various items on or near the appellant's property. Relying on section 14(5) of the *Act*, the town refused to confirm or deny the existence of a record on the basis that to do so would be an unjustified invasion of the personal privacy of the affected parties. The appellant appealed. In this order, the adjudicator finds that the town properly applied section 14(5) of the *Act* and dismisses the appeal.

**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), 38(b) and 14(5).

**Orders Considered:** Orders M-615 and MO-1761.

### OVERVIEW:

[1] The appellant submitted three requests to the Town of Innisfil (the town) pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information about any complaints certain named individuals (the affected parties) may have made about various matters relating to the appellant and her property. Specifically, the appellant requested the following information:

[2] Request #1:

"All complaints/inquiries made against [the appellant] and [the appellant's address], from June 2011 to Aug. 2014, regarding removal of footbridge, trees on [the appellant's street] due to complaints made from [identified addresses] and [named individuals]. Also railing, located driveway on [identified street] and potter plant that was placed at [the appellant's address] off [named street] driveway".

Request #2:

"All complaints/inquiries made against [the appellant] and [the appellant's address], from June 2011 to August 2014, regarding fence located on north/east side of property at [appellant's address] and [an identified address]. Complaints from: [named addresses and individuals]. Fence complaints at [the appellant's address]".

Request #3:

"All complaints/inquiries made against [the appellant] and [the appellant's address], from June 2011 to August 2014 regarding port-a-potty, located at [an identified address]. Complaints from [named addresses and individuals]. Any and all complaints regarding port-a-potty located across from [appellant's address]".

[3] The town issued three decisions in which it refused to confirm or deny the existence of a record responsive to any of the requests, stating in each decision:

In accordance with section 14(5) of [the *Act*], the Town of Innisfil may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy. Due to the nature of the request and that it directly requests information about identifiable individuals that, if any such record exists, would have been supplied in confidence, the Town refuses to confirm or deny the existence of a record in this case.

[4] The appellant appealed the town's decisions to this office, and three appeal files were opened. A mediator was appointed to attempt to reach a resolution, but as mediation was not successful, the appeals were moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I began my inquiry by seeking and receiving one set of representations from the town for all three appeals.

[5] In its representations, the town advised that, after re-evaluating the appellant's third request, which is the subject of appeal MA14-545, it had established that the last paragraph indicates that the appellant is also requesting "any and all" complaints about the port-a-potty, and not just complaints made by the affected parties. The town located records responsive to this aspect of the request and advised in its representations that copies would be disclosed to the appellant, with a few severances of personal information under section 14(1) of the *Act*. However, the appellant subsequently informed this office that she is not interested in these records and is not

appealing the town's decision to provide her with redacted copies of them. She seeks only records of complaints made by the affected parties.

[6] In its representations, the town made submissions not only on section 14(5) but also on section 8(3), arguing that disclosure of the records, if they exist, could reasonably be expected to reveal the identity of a confidential source of information in respect of a law enforcement matter or disclose information furnished only by the confidential source, as contemplated by section 8(1)(d). Therefore, I added the application of section 8(3) and the late raising of this discretionary exemption as issues in this appeal.

[7] The town agreed to share its representations with the appellant, save for certain portions that I agreed should be withheld as they met the criteria for withholding under section 7 of the *Code of Procedure*. The appellant then made representations, portions of which she asked not to be shared with the town.

[8] In this order, I find that the institution has properly applied section 14(5) of the *Act* in refusing to confirm or deny the existence of any records response to the appellant's requests. Given my conclusion, it is not necessary for me to consider the applicability of section 8(3) of the *Act*.

## **ISSUES:**

- A. Would the records, if they exist, 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(b), read in conjunction with section 14(5) of the *Act*, apply to the records, if they exist?

## **DISCUSSION:**

### **Issue A: Would the records, if they exist, contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?**

[9] Under part one of the section 14(5) test (discussed under Issue B below), the institution must demonstrate that disclosure of the record, if it exists, would constitute an unjustified invasion of personal privacy. An unjustified invasion of personal privacy can only result from the disclosure of personal information. It is necessary, therefore, to decide whether the record, if it exists, contains "personal information" and, if so, to whom it relates.

[10] "Personal information" 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,

(e) the personal opinions or views of the individual except if 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;

[11] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed. 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.<sup>1</sup>

[12] 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.

[13] 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.<sup>2</sup>

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<sup>1</sup> Order 11.

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

### ***Representations***

[14] The town submits that customer service complaints and inquiries are usually the first step in municipal law enforcement investigations. The town relies upon complaints and inquiries to enforce by-laws, with information being provided to the town confidentially.

[15] The town further submits that when a complaint or inquiry is opened, personal information is collected from the confidential source, such as their name, address, contact information, and information relating to an incident or situation from the source's perspective, including their views and opinions about the incident or situation. The town submits that all of this information would be considered personal information pursuant to the definition of that term in section 2(1) of the *Act*.

[16] The appellant filed representations which touch on a variety of topics, but do not specifically address the issue of whether the records, if they exist, contain personal information.

### ***Analysis and findings***

[17] I find that the records, if they exist, would contain the personal information of the appellant. The appellant's access requests were specifically for complaints/inquiries not only about her property but also about herself. Further, based on my review of the appellant's representations, it is apparent that there exists a history of acrimony between the appellant and the affected parties. In my view, therefore, it is likely that the records, if they exist, would include the affected parties' observations about the appellant's activities. Such information constitutes the appellant's personal information pursuant to paragraph (h) of the definition of personal information in conjunction with the introductory wording of the definition.

[18] The records, if they exist, would also contain the personal information of the affected parties (i.e. the individuals named in the appellant's request for information). First, I find that the affected parties' names appearing in a record of a complaint or query would reveal the fact that they made such complaints or inquiries. This constitutes personal information about these individuals pursuant to paragraph (h) of the definition in conjunction with the introductory wording of the definition.

[19] I also agree with the town that the types of records requested would contain other personal information of the affected parties, such as their address and their views relating to an incident or situation. This is personal information under paragraphs (d) and (e), respectively. Finally, the records, if they exist, would likely contain correspondence from the affected parties to the town that would be explicitly or implicitly of a confidential nature, falling under paragraph (f) of the definition of personal information.

[20] I conclude that the records, if they exist, contain the personal information of the

appellant and the affected parties.

**B: Does the discretionary exemption at section 38(b), read in conjunction with section 14(5) of the *Act*, apply to the records, if they exist?**

[21] Under the *Act*, different exemptions may apply depending on whether or not a record contains the personal information of the requester. Where records contain the requester's own personal information, access to the records is addressed under Part II of the *Act* and the discretionary exemptions at section 38 may apply. Where the records contain the personal information of individuals other than the requester but not that of the requester, access to the records is addressed under Part I of the *Act* and the exemptions at section 14(1) may apply.

[22] 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 right.

[23] 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, or 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 own personal information against the other individual's right to protection of their privacy.

[24] Section 14(5), which is found in Part I of the *Act*, allows an institution to refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

[25] Section 38 contains no parallel provision to section 14(5). Since I have found that if any responsive records exist, they would contain the appellant's personal information as well as that of the affected parties, the question arises whether the town can rely on section 14(5) in this case. Previous orders have established that it can. Specifically, in Order M-615, Adjudicator John Higgins stated:

Section 37(2) provides that certain sections from Part I of the Act (where section 14(5) is found) apply to requests under Part II (which deals with requests such as the present one, for records which contain the requester's own personal information). Section 14(5) is not one of the sections listed in section 37(2). This could lead to the conclusion that section 14(5) cannot apply to requests for records which contain one's own personal information.

However, in my view, such an interpretation would thwart the legislative intention behind section 14(5). Like section 38(b), section 14(5) is intended to provide a means for institutions to protect the personal

privacy of individuals other than the requester. Privacy protection is one of the primary aims of the Act.

Therefore, in furtherance of the legislative aim of protecting personal privacy, I find that section 14(5) may be invoked to refuse to confirm or deny the existence of a record if its requirements are met, even if the record contains the requester's own personal information.

[26] I agree with Adjudicator Higgins' reasoning, and note that it has since been followed in several subsequent orders.<sup>3</sup> Accordingly, I will consider whether the town properly applied section 14(5) in the circumstances of this appeal.

[27] Section 14(5) reads:

A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

[28] A requester in a section 14(5) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 14(5), the institution denies the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases.<sup>4</sup>

[29] Before an institution may exercise its discretion to invoke section 14(5), it must provide sufficient evidence to establish both of the following requirements:

1. Disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy; and
2. Disclosure of the fact that the record exists (or does not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[30] The Ontario Court of Appeal has upheld this interpretation of section 21(5) of the *Freedom of Information and Protection of Privacy Act*, which is identical to section 14(5) of the *Act*, explaining this office's approach as follows:

The Commissioner's reading of s. 21(5) requires that in order to exercise his discretion to refuse to confirm or deny the report's existence the

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<sup>3</sup> See, for example, Orders MO-2891 and MO-2984.

<sup>4</sup> Order P-339.

Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy.<sup>5</sup>

***Part one: Would disclosure of the records (if they exist) be an unjustified invasion of personal privacy?***

[31] The factors and presumptions in sections 14(2) and (3)<sup>6</sup> help in determining whether disclosure would or would not be “an unjustified invasion of privacy” under section 14(5).

[32] For records that contain the requester’s personal information, 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.<sup>7</sup> The list of factors under section 14(2) is not exhaustive. The institution must also consider any other factors that are relevant in the circumstances of the case, even if they are not listed under section 14(2).<sup>8</sup>

*Representations*

[33] The town relies on the presumption listed in paragraph 14(3)(b), which 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;

[34] The appellant’s representations do not expressly address whether the disclosure of the records, if they exist, would be an unjustified invasion of another individual’s personal privacy. However, in the non-confidential portion of the appellant’s representations, she has submitted copies of the pleadings exchanged in her Human Rights Tribunal of Ontario application against the town. This suggests to me that the appellant may implicitly be raising the factor favouring disclosure at paragraph 14(2)(d), which states:

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<sup>5</sup> Orders PO-1809 and PO-1810, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813 (C.A.), leave to appeal to S.C.C. dismissed (May 19, 2005), S.C.C. 30802.

<sup>6</sup> Neither party has submitted that any of the circumstances listed in section 14(4) are present, and I find that they are not.

<sup>7</sup> Order MO-2954.

<sup>8</sup> Order P-99.



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;

*Analysis and findings*

Factors weighing in favour of non-disclosure

[35] I agree with the town that the presumption at paragraph 14(3)(b) applies in the circumstances of this appeal. The records, if they exist, relate to complaints or inquiries about a footbridge, a fence and a portable toilet. I find that these are matters that would be investigated as possible violations of town by-laws. Previous orders of this office have found that the term "law" in section 14(3)(b) includes a municipal by-law.<sup>9</sup>

[36] Moreover, in listing this factor as a presumption in favour of non-disclosure, the legislature has signaled an intention that this factor is significant. I find that it is particularly so in the circumstances of this appeal, given the apparent history of acrimony between the appellant and the affected parties.

Factors weighing in favour of disclosure

[37] While the appellant has not specifically argued that she needs the records, if they exist, for her Human Right Tribunal (HRT) application against the town such that the factor favouring disclosure at section 14(2)(d) (fair determination of rights) applies, she included the pleadings from that application in her representations. It is apparent from my review of those pleadings that the appellant wishes to file the records, if they exist, as evidence in the HRT application. I will, therefore, address the factor at section 14(2)(d).

[38] In Order P-312, the former Assistant Commissioner Tom Mitchinson held that, in order for section 14(2)(d) to be a relevant consideration, it must be established that:

- The right in question is a legal right based on the concepts of common law or statute and not a non-legal right based on morality or ethics;
- The right relates to an existing or contemplated proceeding, not one that has been completed;
- The personal information being sought has some significance to the determination of the right; and

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<sup>9</sup> See, for example, Order MO-1761.

- The personal information is necessary for the individual in question to prepare for the proceeding or to ensure an impartial hearing.

[39] Applying this test, I find that the factor at section 14(2)(d) is not relevant to the circumstances in the appeal before me. In this instance, I am not satisfied that the third or fourth criteria required to establish the application of section 14(2)(d) have been met. Although the appellant has provided evidence that she has commenced a human rights application against the town and wishes the records, if they exist, for that application, she has not explained the significance of the records, if they exist, to the determination of her rights in that application, nor has she described how the information, if it exists, is necessary for her to prepare for the proceeding or to ensure an impartial hearing. Further, my own review of her access requests and the HRTO pleadings does not persuade me that these criteria are met.

[40] In addition, I find that the decision-maker at the HRTO will have the benefit of the parties' submissions in the context of that application and will be better placed than I to determine what evidence is relevant and necessary to decide the issues in that proceeding. The HRTO decision-maker can use his or her own powers to obtain information as he or she sees fit.<sup>10</sup> While the availability of alternative means of disclosure does not preclude disclosure under the *Act*, I find it to be a relevant factor in this appeal, given that the appellant has not made comprehensive representations on the section 14(2)(d) issue. I find, therefore, that the factor at section 14(2)(d) does not apply as a factor favouring disclosure.

### *Conclusion*

[41] Since the presumption favouring non-disclosure at section 14(3)(b) applies and there are no factors favouring disclosure, I find that disclosure of the records, if they exist, would be an unjustified invasion of the personal privacy of the affected parties. Part one of the test under section 14(5) has, therefore, been met.

### ***Part two: Would disclosure of the fact that the records exist (or do not exist) be an unjustified invasion of personal privacy?***

[42] Under part two of the section 14(5) test, the institution must demonstrate that disclosure of the fact that a record exists (or does not exist) would in itself convey information to the appellant, and that the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

### *Representations, analysis and findings*

[43] The town submits that to confirm or deny the existence of records would in itself be an unjustified invasion of personal privacy. For the following reasons, I agree with

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<sup>10</sup> *Human Rights Code*, R.S.O. 1990, c. H.19, section 44.

the town's submission.

[44] The appellant's request was for information related to complaints made by the affected parties (as opposed to, for example, information related to any and all complaints, regardless of by whom they were made). As a result of this wording, information would be conveyed to the appellant if the town were to either confirm or deny the existence of records. Confirming that there are responsive records would convey the fact that the affected parties made complaints or queries to the town, while denying that there are responsive records would convey the fact that the affected parties did not make such complaints or queries.

[45] I find that this constitutes the personal information of the affected parties. Whether the affected parties did or did not make complaints or queries about the items listed in the appellant's request for information constitutes the personal information of the affected parties, as it is information about identifiable individuals in their personal capacities.

[46] I find, further, that the disclosure of this information would be an unjustified invasion of the affected parties' personal privacy. I have found above that there are no factors weighing in favour of disclosure of the records, if they exist. For similar reasons, I also find that there are no factors weighing in favour of disclosure of the fact that the affected parties did or did not make complaints or inquiries to the town about the matters listed in the appellant's request for information.

[47] I find, therefore, that it would be an unjustified invasion of the personal privacy of the affected parties for the town to either confirm or deny the existence of records responsive to the appellant's request.

[48] Accordingly, I find that the town has met the second part of the section 14(5) test.

[49] I now turn to the question of whether the town properly exercised its discretion in invoking section 14(5). As noted above, this office has found that the discretionary power to refuse to confirm or deny the existence of a record should only be exercised in rare cases.<sup>11</sup>

[50] 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, or it fails to take into account relevant considerations. Where an institution has failed to exercise its discretion or has exercised it improperly, this office may send the matter

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<sup>11</sup> Order P-339.

back to the institution for an exercise of discretion based on proper considerations.<sup>12</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>13</sup>

[51] In its representations, the town acknowledges that access to one's own personal information is a fundamental purpose of the *Act*. It submits, however, that the sources of information in by-law enforcement investigations are meant to be confidential. The town also made additional confidential representations relating to its exercise of discretion.

[52] Based on my review of the town's representations, I am satisfied that it properly exercised its discretion to invoke section 14(5) and in doing so, took into account relevant considerations. I am also satisfied that it did not exercise its discretion in bad faith or for an improper purpose, nor is there any evidence that it took into consideration irrelevant considerations.

[53] I conclude, therefore, that the town properly exercised its discretion in invoking section 38(b), in conjunction with 14(5), to refuse to confirm or deny the existence of a record.

[54] Given my conclusion on the application of section 14(5), I do not need to consider whether the town properly applied section 8(3) to refuse to confirm or deny the existence of a record.

**ORDER:**

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

Original Signed by: \_\_\_\_\_  
Gillian Shaw  
Adjudicator

\_\_\_\_\_ March 1, 2016

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<sup>12</sup> Order MO-1573.

<sup>13</sup> Section 43(2).