

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3408-I

Appeal MA15-532

City of Brampton

February 8, 2017

Summary: The appellant made a request to the City of Brampton (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to complaints made about his property. The city disclosed the responsive records to him, but withheld the names, addresses and telephone numbers of other individuals named in the records, relying on the mandatory personal privacy exemption found at section 14(1) of the *Act*. The appellant appealed. The adjudicator finds that the records at issue contain the personal information of both the appellant and the other individuals. Therefore, the appropriate personal privacy exemption to consider is the discretionary exemption at section 38(b) of the *Act*, not the mandatory exemption at section 14(1). She finds that the section 38(b) exemption applies to the information at issue and orders the city to exercise its discretion under section 38(b). The adjudicator also upholds the city's search for records as reasonable.

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

Orders Considered: Order M-352.

BACKGROUND:

[1] The appellant submitted the following access request to the City of Brampton (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

I need all complaints made on [the appellant's address]. Emails. All information.

[2] The city issued a decision in which it granted partial access to 39 pages of responsive records, relying on the mandatory personal privacy exemption at section 14(1) of the *Act* to withhold some information in the records. Some of the information was also redacted as it was deemed not responsive to the request.

[3] The appellant appealed the city's decision to this office. During the course of mediation, the appellant clarified for the mediator that he is interested in records relating to all property standards complaints made about his property. He is not seeking access to any portions of those records marked as non-responsive or pertaining to unrelated enforcement matters. Those portions of the records are therefore not at issue.

[4] The appellant asked the mediator to notify three affected parties whose information is contained in the records in order to seek consent to disclose their personal information contained in the records. The city had not notified the affected parties. The mediator sent notice of this appeal to the affected parties, but none of the affected parties replied to the mediator's correspondence.

[5] The appellant also raised the issue of reasonable search, articulating his belief that some correspondence relating to the complaint has not yet been located or identified by the city as responsive records. The city sent the mediator an email describing its search and asserting that its search had produced all responsive records, and that any supplementary search would not produce any additional responsive records. With permission from the city, this written description of the search was shared with the appellant.

[6] The appellant then advised the mediator that he wished to proceed with the appeal on both the search issue and the personal privacy exemption claimed by the city. No further mediation was possible and the file was, therefore, moved to the adjudication stage, where an adjudicator conducts an inquiry under the *Act*. In her mediation report, the mediator added the discretionary personal privacy exemption at section 38(b) as an issue in this appeal, since the records remaining at issue appear to contain the personal information of the appellant (the discretionary exemption at section 38(b), rather than the mandatory exemption at section 14(1), is the appropriate personal privacy exemption to consider where a record contains the requester's personal information along with the personal information of other individuals).

[7] I invited representations from the city, the affected parties and the appellant. The city and one affected party provided representations; the appellant did not. In accordance with this office's *Practice Direction 7: Sharing of Representations*, a copy of the city's representations was provided to the appellant, with confidential portions removed. The affected party's representations were withheld from the appellant in their

entirety due to confidentiality concerns. The affected party objected to disclosure of their information in the records.

[8] In this order, I find that the discretionary personal privacy exemption at section 38(b) applies to the information at issue and I order the city to exercise its discretion under section 38(b). I uphold the city's search for records as reasonable.

RECORDS:

[9] The records at issue are complaint information sheets found at pages 1, 4, 18 and 20 of the records listed on the index that the city prepared and provided to the appellant and this office. The information at issue consists of the names, addresses and telephone numbers of individuals other than the appellant.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(b) apply to the information at issue?
- C. Did the institution exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?
- D. Did the city conduct a reasonable search for records?

DISCUSSION:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[10] The city claims that the mandatory personal privacy exemption at section 14(1) of the *Act* applies to the information at issue. 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 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] 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 To qualify as personal information, it must also be reasonable to expect that an individual may be identified if the information is disclosed.²

[12] Sections 2(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.

¹ Order 11.

² Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

(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] 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.³ 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.⁴

Do the records at issue contain the appellant's personal information?

[14] The city submits that the information at issue consists of the names, addresses and phone numbers of identifiable individuals, and that none of this information is the appellant's. Therefore, the city submits, the appropriate personal privacy exemption to consider is the mandatory personal privacy exemption at section 14(1), and not the discretionary personal privacy exemption at section 38(b).

[15] From my review of the records at issue, I find that all of them contain the personal information of the appellant. They contain the appellant's name, address and telephone number, which is his personal information under paragraphs (d) and (h) of the definition.

[16] In Order M-352, Adjudicator John Higgins stated:

In order to give effect to the legislature's intention to distinguish between requests for an individual's own personal information and other types of requests, the Commissioner's office has developed an approach for determining whether Part I or Part II of the *Act* applies. In that approach, the unit of analysis is the record, rather than individual paragraphs, sentences or words contained in a record.

This approach has been applied in many past orders, and it is set out in detail in the October 1993 edition of IPC Practices entitled "Responding to Requests for Personal Information". That publication states, in part, as follows:

Generally, an individual seeking access to a record that contains his or her personal information has a greater right of access than if the record does not contain any such information. ... Part II of

³ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

the municipal *Act* oblige[s] institutions to consider whether records should be released to an individual, regardless of the fact that they may otherwise qualify for exemption under the legislation.

In my view, the record-by-record analysis best reflects the special character of requests for records containing one's own personal information, and it provides a practical, uniform procedure which all institutions can apply in a consistent manner.

It requires institutions to analyze records which are identified as responsive to a request in order to determine whether any of them contain personal information pertaining to the requester. For records which are found to contain the requester's own personal information, the institution's access decision is to be made under Part II of the *Act*. For records which do not contain the requester's own personal information, the decision would be under Part I.

[17] This approach, that is, using the entire record at issue as the unit of analysis, is the approach generally followed in determining whether a request for access should be addressed under Part I of the *Act*, where section 14(1) is found, or Part II of the *Act*, which addresses requests for one's own personal information and where section 38(b) is found.

[18] Following the above approach, I find that, since the records contain the appellant's own personal information, the discretionary personal privacy exemption at section 38(b) is the appropriate personal privacy exemption to consider if the information at issue also contains the personal information of other individuals.

Does the information at issue contain the personal information of other individuals?

[19] The information at issue consists of the names, addresses and telephone numbers of individuals who are identified as having a particular role in the by-law complaint process. The city submits that this is the personal information of those individuals as there is no indication that they were involved in the process in any professional capacity.

[20] From my review of the records and the information at issue, I find that this is the personal information of those individuals under paragraphs (d) and (h) of the definition of personal information.

[21] I will now consider whether the information at issue is exempt from disclosure pursuant to the discretionary personal privacy exemption at section 38(b) of the *Act*.

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

[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 exemptions from this right. 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;

[23] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.⁵

[24] Sections 14(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy.

[25] If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). None of the parties raised the application of any of these paragraphs and I find that none apply. In particular, none of the individuals to whom the personal information relates has consented to the disclosure of their personal information (paragraph 14(1)(a)).

Would disclosure be "an unjustified invasion of personal privacy" under section 38(b)?

[26] Sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy. None of the circumstances set out in section 14(4) applies here.

[27] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), this office considers, and weighs, the factors and presumptions in sections 14(2) and (3) and

⁵ See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).

balances the interests of the parties.⁶

Section 14(3)(b) presumption: investigation into violation of law

[28] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). The city submits that the information at issue is subject to the presumption at section 14(3)(b), which 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;

[29] 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.⁷ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁸

[30] The presumption can apply to a variety of investigations, including those relating to by-law enforcement⁹ and violations of environmental laws or occupational health and safety laws.¹⁰ However, section 14(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.¹¹

[31] From my review of the records at issue, I agree with the city's submission that the information at issue falls within section 14(3)(b), because it was collected by the city in the course of its investigation into potential by-law violations.

Do any of the section 14(2) factors apply?

[32] 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.¹² Four of the listed factors, if present, generally weigh in favour of disclosure, while five of the factors, if present, generally weigh in favour of non-disclosure. However, the list of factors under section 14(2) is not exhaustive. The institution must

⁶ Order MO-2954.

⁷ Orders P-242 and MO-2235.

⁸ Orders MO-2213, PO-1849 and PO-2608.

⁹ Order MO-2147.

¹⁰ Orders PO-1706 and PO-2716.

¹¹ Orders M-734, M-841, M-1086, PO-1819 and PO-2019.

¹² Order P-239.

also consider any circumstances that are relevant, even if they are not listed under section 14(2).¹³

[33] The appellant has not raised the potential application of any factors which would weigh in favour of disclosure of the information at issue. From my independent review of the records, I find that there are no factors favouring the disclosure of the information at issue in this case.

Balancing the presumption and factors

[34] Since there is a presumption weighing against disclosure, and there are no factors weighing in favour of disclosure, I find that the disclosure of the information at issue would be an unjustified invasion of the personal privacy of the individuals to whom the information relates. As a result, the section 38(b) exemption applies to the information. In light of my conclusion, I do not need to also consider whether there are any section 14(2) factors weighing in favour of non-disclosure.

[35] Subject to my findings below on the city's exercise of discretion, I conclude that the information at issue is exempt from disclosure pursuant to the discretionary exemption at section 38(b) of the *Act*.

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

[36] 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.

[37] 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.

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

¹³ Order P-99.

Relevant considerations

[39] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:

- the purposes of the Act, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

Analysis and findings

[40] In deciding to withhold the information at issue, the city relied on the mandatory personal privacy exemption at section 14(1) of the *Act*, rather than the discretionary personal privacy exemption at section 38(b). In its representations, the city continued to take the position that section 14(1) applies. The city did not provide any representations on its exercise of discretion under section 38(b). Moreover, my review of the representations as a whole makes it evident that the city was unaware that it had the discretion to disclose the information, despite the fact that it could withhold it.

[41] Under the circumstances, I find that the city did not exercise its discretion under section 38(b). Therefore, I will order that the city exercise its discretion based on proper considerations.¹⁴

D. Did the city conduct a reasonable search for records?

[42] 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 17.¹⁵ If I am satisfied that the 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.

[43] 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.¹⁶ To be responsive, a record must be "reasonably related" to the request.¹⁷

[44] 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.¹⁸ 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.¹⁹

[45] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.²⁰

Representations

[46] The city submits that the appellant was very clear that his request was to gain access to the property standards file related to complaints about his property. The city states:

The search for responsive records was assigned to the Manager of By-Law Enforcement (who is responsible for Property Standards). She completed

¹⁴ I note that, should the city decide to exercise its discretion in favour of disclosure, it would be required to provide notice to the affected parties in accordance with section 21 of the *Act* before disclosing the records.

¹⁵ Orders P-85, P-221 and PO-1954-I.

¹⁶ Orders P-624 and PO-2559.

¹⁷ Order PO-2554.

¹⁸ Orders M-909, PO-2469 and PO-2592.

¹⁹ Order MO-2185.

²⁰ Order MO-2213.

and signed a tracking sheet, which details information about the search and confirms that:

- A reasonable effort was made to identify and locate all records responsive to this request;
- Staff with sufficient qualifications and knowledge of records was assigned to search for responsive records; and,
- Complete, unaltered, original records were conveyed to the Freedom of Information and Privacy Coordinator.

The tracking sheets detail the following:

The AMANDA database was searched for responsive records. Multiple records were located which were retrieved from the Enforcement and By-Law Services file room and from archived (off site) storage.

[47] The city submits that it is city practice to place any records relating to a property standards matter in the city's paper file system, and all properties and the relevant files are then tracked in the city's digital system, AMANDA. The city goes on to submit:

All of the located records were provided to the Freedom of Information Coordinator. The Freedom of Information Coordinator then reviewed the records and compiled the records for disclosure to the requester. All records provided to the Freedom of Information Coordinator were disclosed in some form.

It is clear from this evidence that the City assigned the search to the person in charge of the specific files the requester sought, the Manager of By-Law Enforcement. There is no one at the City more qualified than the Manager to oversee a search of the Property Standards files. The searches were then conducted by actual By-Law staff with direct experience with the Property Standards files.

In the end, all records that were located and related to the property in question were provided to the head for review. All records were released to the requester, albeit with some severances. This constitutes a reasonable, thorough search by the most qualified individuals at the institution. No further search is required.

Analysis and findings

[48] 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.²¹ The appellant did not file representations. Although he stated during mediation that he believes that further correspondence and emails should exist, he has not, in my view, provided a reasonable basis for concluding that further records exist. From my review of the responsive records and the city's representations, I am satisfied that the individuals who conducted the search, the Manager of By-Law Enforcement and her staff, are knowledgeable in the subject matter of the request and expended a reasonable effort to locate records which were reasonably related to the request.

[49] I uphold the city's search as reasonable.

ORDER:

1. I order the city to exercise its discretion under section 38(b) of the *Act* by **March 9, 2017** and to provide this office with written notification of its decision regarding the exercise of discretion.
2. I uphold the city's search for records as reasonable.
3. I remain seized of this appeal.

Original Signed by: _____
Gillian Shaw
Adjudicator

February 8, 2017 _____

²¹ Order MO-2246.