

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3556

Appeal MA16-690

City of Toronto

January 31, 2018

Summary: The City of Toronto (the city) received a request for access to the name and contact information of a complainant who made a complaint about garbage on the requester's property. In this order, the adjudicator upholds the city's decision under section 38(b) (personal privacy) and finds that the information identifying the complainant is exempt.

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), 14(1)(b), 14(3)(b), 14(2)(f) and (h).

Orders and Investigation Reports Considered: Orders PO-3608 and PO-3026-I.

OVERVIEW:

[1] The City of Toronto (the city) received a request, under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA or the *Act*) for access to the following information:

The notification and report the city received from someone about [specified address] stated that the conditions on [the] property are in contravention of the city of Toronto Municipal Code - it indicated litter and Dumping of refuse accumulation of Garbage [provides file #].

[2] The city issued a decision granting partial access to the responsive record.

Access to the withheld information was denied pursuant to the mandatory personal privacy exemption in section 14(1).

[3] The requester, now the appellant, appealed the city's decision.

[4] During the course of mediation, the city confirmed that an affected party (the complainant) had not been notified of the request. The mediator raised the possible application of the discretionary personal privacy exemption in section 38(b) of the *Act* to the record at issue, since the record appears to also contain the personal information of the appellant. The city agreed and section 38(b) has been included in the circumstance of this appeal.

[5] The appellant requested that the mediator contact the complainant to obtain their consent to disclose their personal information.

[6] The mediator notified the complainant. The mediator was unable to obtain consent to release the personal information.

[7] No further mediation was possible. Accordingly, this file was transferred to the adjudication stage of the appeals process where an adjudicator conducts an inquiry.

[8] I sought the representations of the parties in accordance with the IPC's *Practice Direction 7* and section 7 of the *Code of Procedure*.

[9] In this order, I uphold the city's decision under section 38(b) that the information identifying the complainant is exempt.

RECORD:

[10] At issue is the name and contact information of the complainant set out in a property standards form.

ISSUES:

- A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary personal privacy 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?

DISCUSSION:

A. Does the record contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?

[11] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

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

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

personal information.¹

[13] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.²

[14] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.³

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

[16] The city states the personal information at issue includes the identity of an individual other than the appellant who has made complaints against the property in question. It submits that this information meets the requirements of paragraphs (d) and (h) of the definition of "personal information" in section 2(1) of *MFIPPA*. It states that the personal information severed from the record is personal information of an individual other than the appellant.

[17] The city also states that the record contains some personal information relating to the appellant.

[18] The appellant did not address this issue in her representations.

Analysis/Findings

[19] Based on my review of the record, I agree with the city that the record contains the personal information of the complainant, specifically their name, personal email address, home phone number and address in accordance with paragraphs (c), (d) and (h) of the definition of personal information.

[20] The record also contains the personal information of the appellant, including her personal opinions or views that do not relate to another individual in accordance with paragraph (e) of the definition of personal information.

¹ Order 11.

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

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

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

[21] 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.

[22] 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.

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

[24] If the information fits within any of paragraphs (a) to (e) of section 14(1) or paragraphs (a) to (c) of section 14(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[25] In this appeal, the information does not fit within these paragraphs.

[26] In making this finding, I have considered the appellant’s submission that section 14(1)(b) applies. This section reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

In compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates.

[27] The appellant states that she has been harassed and her property vandalized many times, for unknown reasons. She wonders why this has happened and by whom.

[28] The appellant submits that she has the right to know the identity of the complainant, as they made false accusations against her. She states that she needs to know if they are looking to hurt her, affect her reputation as a person or the reputation of her property. She states that she requires this information to defend herself and her property.

[29] In Order PO-3608, the information at issue included the identity of individuals

associated with a complaint made to the police. In that order, the adjudicator stated with respect to the application of section 14(1)(b) (section 21(1)(b) of *FIPPA*)⁵ that:

The purpose of this exception is to allow for the disclosure of personal information in compelling circumstances where the health and safety of an individual is at risk unless the individual is notified of the existence of certain information, for example, in the case where an individual requires significant or potentially life saving medical information.⁶ The appellant has not provided sufficient evidence that the circumstances surrounding this request are compelling enough to affect the health or safety of an individual, or how the disclosure of the personal information of other individuals would be necessary for that individual's health or safety.

[30] The appellant provided me with the complaint that is the subject matter of the record in this appeal. The complaint is set out in the city's notice to the appellant and reads:

[The] city was made aware that conditions on your property are in contravention of the City of Toronto Municipal Code, Chapter 548 - Litter and Dumping of Refuse. It was indicated that there is an accumulation of refuse material (garbage).

[31] The city required the appellant to clean and clear the property of all refuse garbage.

[32] The appellant believes that the complaint at issue in this appeal is related to previous damage that her residential property sustained concerning a broken window and graffiti. According to the documents provided by the appellant, the property appeared to be vacant when the complaint that is the subject matter of this appeal was made. The appellant states that:

The city protected the person who provided them with fraudulent information and protect him/her from stress without taking into consideration how the false report could affect the other party, wrongfully accused.

The threat, the insecurity and inability to identify the assailant create an extraordinary fear and sense of helplessness. How I can defend myself or my property from the unknown, the unpredictable and the degree of damage that an unknown person could inflict...

⁵ Section 21(1)(b) of the *Freedom of Information and Protection of Privacy Act (FIPPA)* is the equivalent of section 14(1)(b) of *MFIPPA*.

⁶ See Order PO-2541.

[33] I do not agree with the appellant that not knowing the identity of the complainant who made a complaint about garbage on the appellant's property gives rise to compelling circumstances affecting the appellant's health or safety within the meaning of section 14(1)(b). As noted in Order PO-3608, this is not a compelling circumstance where the health and safety of the appellant or any other person is at risk unless the appellant is notified of the identity on the complainant. Therefore, I find that section 14(1)(b) does not apply to allow disclosure of the information at issue in this appeal.

[34] 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 will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.⁷

[35] 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 relies on the presumption at section 14(3)(b). This section 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.

[36] The city relies on Order M-382, where Inquiry Officer John Higgins stated that:

It has been previously established that personal information relating to investigations of alleged violations of municipal by-laws falls within the scope of the presumption provided by section 14(3)(b) of the *Act*.⁸

[37] The city also relies on Order MO-1496, where former Senior Adjudicator David Goodis found that section 14(3)(b) applied to information compiled by the City of Toronto as part of its investigation into a possible violation of the Building Code and the City's zoning by-law. Similarly, it states that Adjudicator Donald Hale upheld the City of Peterborough's decision to deny access to information that was compiled and identifiable as part of an investigation into a property standards by-law complaint and possible contravention of the Building Code.⁹

[38] The city submits that in the current appeal, all of the personal information at

⁷ Order MO-2954.

⁸ See Order M-181.

⁹ See Order MO-1845.

issue was compiled by the city as part of its investigation into an alleged contravention of the City's Municipal Code Chapter No. 548, Littering and Dumping of Refuse Accumulation of Garbage. It states that it advises complainants that their personal information will be kept confidential and therefore, they have an expectation of this confidentiality.

[39] The appellant did not address the issue as to whether the presumption in section 14(3)(b) applies.

[40] Concerning section 14(3)(b), even if no criminal proceedings were commenced against any individuals, this section may still apply. The presumption only requires that there be an investigation into a possible violation of law.¹⁰ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.¹¹

[41] Section 14(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.¹²

[42] The presumption can apply to a variety of investigations, including those relating to by-law enforcement¹³ and violations of environmental laws or occupational health and safety laws.¹⁴

[43] I agree with the city that the personal information in the record was compiled and is identifiable as part of an investigation into a possible by-law infraction resulting from the complaint concerning the appellant's property. I find that the presumption in section 14(3)(b) applies, as the personal information in the record was compiled and is identifiable as part of an investigation into a possible violation of law.

[44] 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.¹⁵

[45] The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).¹⁶

[46] The city relies on the factors in section 14(2)(f) and (h), which favour privacy protection and read:

¹⁰ Orders P-242 and MO-2235.

¹¹ Orders MO-2213, PO-1849 and PO-2608.

¹² Orders M-734, M-841, M-1086, PO-1819 and PO-2019.

¹³ Order MO-2147.

¹⁴ Orders PO-1706 and PO-2716.

¹⁵ Order P-239.

¹⁶ 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,

(f) the personal information is highly sensitive; and

(h) the personal information has been supplied by the individual to whom the information relates in confidence.

[47] To be considered highly sensitive under section 14(2)(f), there must be a reasonable expectation of significant personal distress if the information is disclosed.¹⁷

[48] For the factor in section 14(2)(h) to apply, both the individual supplying the information and the recipient must have had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.¹⁸

[49] The city submits that in the circumstances of this appeal, the disclosure of the name and contact information of the complainant could lead to unwanted contact and could reasonably cause extreme distress. The city also states that it advises complainants that their personal information will be kept confidential and, therefore, they have an expectation of this confidentiality.

[50] The appellant states that she does not agree that the disclosure constitutes an unjustified invasion of personal privacy or could reasonably be expected to cause excessive distress to the complainant under section 14(2)(f) as the complainant disclosed false information about her property.

[51] Instead, the appellant submits that this false accusation about garbage at her property caused her a great deal of stress, anxiety and fear and caused her to wonder if the complainant was acting for a malicious purpose. She states that denying her this information would be treating her unfairly. She seems to rely on an unlisted factor about inherent fairness issues.¹⁹

[52] Even if I were not to accept the city's position that the personal information is highly sensitive, I do not agree with the appellant that not knowing the identity of the complainant in the circumstances of this appeal is a factor favouring disclosure. In particular, I do not agree with the appellant that not knowing the identity of the complainant is inherently unfair.

¹⁷ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

¹⁸ Order PO-1670.

¹⁹ See Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014.

[53] In Interim Order PO-3026-I, the information at issue included the personal contact information of the complainants. In that order, the appellant suggested that it was unfair and unreasonable to withhold information about him. He had been provided with a detailed incident report and other information from the records containing the allegations made by the complainant against him. In that order, I stated that:

...the appellant is aware of the allegations made against him and was given the ability to respond to these allegations. Accordingly, I find that it is not unreasonable or unfair that he is not being provided with the withheld personal information in the records that is related to the complaint made against him. Accordingly, the unlisted factor raised by the appellant carries little weight in favour of disclosure.

[54] In this appeal, the complaint is about garbage on a perceived vacant residential property. The appellant has received access to the details of the complaint. Therefore, I find that it is not inherently unfair that the appellant does not have access to the personal identifying information about the complainant.

[55] I also accept the city's submission that the complainant in this appeal was advised that their information would be kept confidential.

[56] As set out above, 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 will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.²⁰

[57] In this appeal, I have found that the presumption in section 14(3)(b) applies. I have also found that the factor favouring privacy protection in section 14(2)(h) applies. I further find that this outweighs any unlisted factor related to fairness raised by the appellant.

[58] Therefore, on balance, I find that the discretionary personal privacy exemption in section 38(b) applies to the personal information which identifies the complainant in this appeal.

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

[59] The sections 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.

²⁰ Order MO-2954.

[60] 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.

[61] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²¹ This office may not, however, substitute its own discretion for that of the institution.²²

[62] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²³

- 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

²¹ Order MO-1573.

²² Section 43(2).

²³ Orders P-344 and MO-1573.

- the age of the information
- the historic practice of the institution with respect to similar information.

[63] The city submits that in denying access to the name and contact information of the complainant, it considered all the relevant factors including the following:

- the wording of the exemption in section 38(b) in conjunction with sections 14(1)(f),²⁴ 14(2)(f) and (h), and 14(3)(b);
- that individuals should have the right to access their own personal information and that in this case, the appellant's personal information has been disclosed;
- that the privacy of individuals should be protected. The appellant is seeking the name and telephone number of another individual where the disclosure of this personal information could reasonably cause distress;
- compelling or sympathetic reason: the appellant has not indicated any compelling reason for access to the personal information;
- substantive portions of the records at issue have been disclosed to the appellant;
- it is the historic practice of the institution to withhold this type of information in similar circumstances.

[64] The appellant states that the city did not consider the compelling or sympathetic reasons. She argues that access in the case of a false accusation will discourage the misuse of the process and of the filing of false reports as a way of revenge or to cause another person anxiety and stress.

[65] The appellant further states that the city did not consider that access to the personal information is relevant to a fair determination of rights affecting the person who made the request.

Analysis/Findings

[66] I find that the city exercised its discretion in a proper manner under section 38(b), taking into account relevant considerations and not taking into account irrelevant considerations.

[67] I do not agree with the appellant that the city failed to take into account relevant

²⁴ Section 14(1)(f) reads:

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.

sympathetic and compelling circumstances. I do not agree with the appellant that her reason for wanting access, namely, that the complaint in 2016 about garbage on her property is somehow related to previous occurrences involving a broken window in 2016 and graffiti in 2011, give rise to sympathetic or compelling reasons to obtain access to the personal information of the complainant.

[68] Accordingly, I am upholding the city's exercise of discretion and find that the name and contact information of the complainant is exempt under the discretionary personal privacy exemption in section 38(b).

ORDER:

I uphold the city's decision and dismiss the appeal.

Original Signed by: _____
Diane Smith
Adjudicator

_____ January 31, 2018