

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3591

Appeal MA17-179

City of Vaughan

April 20, 2018

Summary: The appellant submitted a request to the city for a copy of a letter sent to the mayor in early December 2016 from a named individual. The city located a responsive record but denied access to it citing the discretionary exemption at section 38(b) (personal privacy). On appeal, the adjudicator upholds the city's decision.

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

Orders and Investigation Reports Considered: MO-3549.

BACKGROUND:

[1] A request was made to the City of Vaughan (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of a letter sent to the city's Mayor in early December 2016 from a named individual.

[2] The city issued a decision denying access to the requested record pursuant to sections 38(b) and 14(1) of the *Act*.

[3] The requester, now the appellant, appealed that decision.

[4] As mediation did not resolve the dispute, this appeal was transferred to the adjudication stage, where an adjudicator conducts a written inquiry under the *Act*. As

the adjudicator in this appeal, I invited the parties, including the affected party, to provide representations. Representations were received and shared in accordance with section 7 of the IPC's *Code of Procedure* and Practice Direction 7.

[5] In this order, I uphold the city's decision and dismiss the appeal.

RECORDS:

[6] A 39-page record comprised of emails and attachments.

[7] In her representations, the appellant takes issue with the city's characterization of the one email that she requested consisting of 39 pages. However, in my review of the record, the one email includes a number of attachments and also appears in three duplicate email chains which makes up the total of 39 pages.

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 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?

[8] 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), which states, in part, 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,

(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[.]

[9] 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

[10] As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.² 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.³

Representations:

[11] In its representations, the city cites paragraphs (e), (f), (g) and (h) of the definition of "personal information" in section 2(1) and states that it is reasonable to expect that if the information in the record is disclosed, it would constitute an unjustified invasion of an affected party's privacy, in that disclosure would identify the affected party not only by name and address but also by content of the record.

[12] The city notes that during mediation, the appellant stated that she believes a record that originated from a professional email does not fall under the definition of personal information. The city submits that past orders have found that 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. The city states that although the affected party utilized a professional email address, the content of the record is personal in nature.

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.

[13] The appellant made representations in this appeal, after being provided with a copy of the city's representations. In her representations, she speaks of an ongoing neighbour dispute involving a fence issue. She refers to several orders-to-comply which she states the neighbour has ignored.

[14] The appellant speaks of transparency "in all this government employee to government employee communications." She notes that she would like to know what her neighbour, a federal government employee, is saying about her to the mayor. It appears that the appellant is implying that because the email was sent from a professional email address it cannot be personal information and should therefore be disclosed.

Finding:

[15] After reviewing the record, it is clear that it is an email from an affected party who also included a number of attachments with her email.

[16] The record contains the personal information of an affected party, including her name, home address and personal views and opinions that do not relate to another individual. Although the record contains small portions of the appellant's personal information, she is not actually named in the record.

[17] As I stated in Order MO-3549, I do not agree with the appellant that the record contains the professional information of the affected party simply because the affected party utilized a professional email account to communicate with the city. As Senior Adjudicator DeVries stated in MO-3215, "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

[18] After reviewing the record, I do not find that the information relates to an individual in a professional, official or business capacity, and instead contains the affected party's personal opinions and views regarding a specified incident. Despite the use of her work email, which was her professional/work email address, the information still qualifies as the affected party's personal information. To confirm, the fact that the affected party sent correspondence by utilizing a work email is not relevant to this appeal.

[19] As I have found that the record contains 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).

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

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

[20] Since I found that the record contains the personal information of both the appellant and the affected party, section 36(1) applies to this appeal. Section 36(1) of the *Act* give 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.

[21] 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

[22] Sections 14(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy under section 38(b).

[23] In making this determination, this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.⁶ 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). If the information fits within any of paragraphs (a) to (h) of section 14(3), disclosure of the information is presumed to be an unjustified invasion of personal privacy.

[24] 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.⁷ Some of the factors listed in section 14(2), if present, weigh in favour of disclosure, while others weigh in favour of non-disclosure. 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).⁸

Representations:

[25] The city submits that none of the exceptions in section 14(1)(a) to (e) applies to the release of the personal information and that none of the presumptions in section 14(3) applies.

[26] In reference to the section 14(2) factors, the city submits that section 14(2)(f)

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

⁶ Order MO-2954.

⁷ Order P-239.

⁸ Order P-99.

(highly sensitive) applies. It refers to Order MO-3060 where it was held that for personal information to be classified as "highly sensitive," the IPC must be satisfied that the release of the withheld information would cause significant distress to an affected party. The city compares the issues in this appeal to that in Order MO-3060 because the record at issue also stem from a series of complaints made to the city's by-law department. The city submits that in MO-3060, it was found that the appellant's personal information could be released, with the remainder of the record severed. The city suggests that this same result is not possible in this appeal because releasing any part of the record would be an unjustified invasion of the affected party's personal privacy.

[27] The city also submits that section 14(2)(h) (supplied in confidence) is another relevant factor in this appeal. It refers again to MO-3060 where the adjudicator held that under section 14(2)(h) it is reasonable to conclude from the circumstances that the affected party "expected some level of confidentiality or discretion regarding at least, the use of his own personal information." The city states that in this instance, the affected party sent the record at issue to the mayor and other recipients in confidence, with an expectation that it would not be shared with the appellant.

[28] The city refers to Order MO-3210 where the adjudicator found that the absurd result principle did not apply as there was insufficient evidence to support that the appellants were aware of the specific details contained with the complaints from the affected parties. In this instance, the city submits that the appellant is not aware of the specific content of the record and is only aware that the record exists.

[29] In the appellant's representations, she refers to the ongoing neighbour dispute that has resulted in court appearances and orders-to-comply in reference to alleged by-law violations. She suggests that the letter that she is requesting prevented building standards from completing an inspection for several months.

Analysis and finding:

[30] The city points to the factors at section 14(2)(f) (highly sensitive) and (h) (supplied in confidence) as relevant in this appeal.

[31] The appellant did not specifically identify any of the provisions favouring disclosure at section 14(2)(a) to (d) as relevant. However, the appellant's representations suggest that section 14(2)(a) (public scrutiny) may be relevant to my consideration.

14(2)(a): public scrutiny

[32] Although the appellant did not specifically raise this factor as weighing in favour of disclosure, I am including it in my analysis as a result of my review of the appellant's representations.

[33] This section contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.⁹ The information at issue, comprises information the city has in its possession as a result of receiving an email (along with attachments) from an affected party. After a review of the record, I am satisfied that the dispute between the affected party and the appellant is a private matter and disclosure would not assist in subjecting the activities of the government to scrutiny.

14(2)(f): highly sensitive

[34] In order for personal information to be considered highly sensitive in the manner contemplated by section 14(2)(f), I must be satisfied that disclosure of the information could reasonably be expected to cause significant personal distress to the affected party.¹⁰ Based on the circumstances set out in the representations, I accept that the relationship between the appellant and the affected party is a difficult one and that disclosing the information in the record could reasonably be expected to cause significant personal distress to the affected party. Therefore, the factor at section 14(2)(f) applies to the affected party's personal information.

14(2)(h): supplied in confidence

[35] The relevance of the factor in section 14(2)(h) is determined by an evaluation of whether the personal information was supplied by the affected party in confidence. The city indicated that it did not contact the affected party for consent to release the record because it did not intend to release the record. During the course of this appeal, the affected party provided representations indicating that she does not consent to the release of her information in the record.

[36] In the circumstances of this appeal, I find that it is reasonable to conclude that the affected party expected some level of confidentiality or discretion regarding, at least, the use of her own personal information when sending her correspondence to the city. Therefore, I find that section 14(2)(h) factor applies to the personal information of the affected party that appears in the record.

Conclusion

[37] After considering the competing interests of the appellant's right to disclosure of information against the privacy rights of the affected party, I conclude that there are no factors weighing in favour of the disclosure of the affected party's personal information. However, in view of my finding that the factors at sections 14(2)(f) and (h) are relevant, I conclude that disclosure of the record to the appellant would constitute an unjustified invasion of the affected party's personal privacy. Therefore, this personal

⁹ Order P-1134.

¹⁰ Order PO-2518.

information qualifies for exemption under section 38(b).

[38] Under section 4 of the *Act*, if the city receives an access request that falls within one of the exceptions under sections 6 to 15, the city “shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.” The city submits that it could not effectively release the document with minor severances because the personal information of the appellant is minor and the remaining severances would remove substantial informational value and context from the remainder of the record. In my review of the record, I agree that the personal information of the appellant is so limited that to sever out the personal information of the affected party and provide the appellant with her own personal information would only result in the disclosure of “disconnected snippets”, or “worthless”, “meaningless” or “misleading” information.¹¹

[39] I acknowledge that the appellant is aware of the identity of the affected party, as she has requested a letter from the named affected party, and the city has identified the record as responsive. However, as the appellant is clearly seeking the substance of the letter, the disclosure of the name of the affected party without additional information would also only result in the disclosure of disconnected snippets in the context of this appeal.

Absurd Result

[40] I also considered whether the absurd result principle applies in the circumstances of this appeal. According to the principle, whether or not the factors or circumstances in section 14(2) or the presumptions in section 14(3) apply, where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 14(1), because to find otherwise would be absurd and inconsistent with the purpose of the exemption.¹² One of the grounds upon which the absurd result principle has been applied in previous orders is where the information is clearly within the requester’s knowledge.¹³

[41] In her representations, the appellant implies that she is unaware of the specific contents of the record. Therefore, under the circumstances, I find that refusing to disclose this specific information to the appellant would not lead to an absurd result.

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

¹¹ See Order PO-1735, Order PO-1663 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

¹² Orders M-444 and MO-1323.

¹³ Orders MO-1196, PO-1679, MO-1755 and PO-2679.

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

[43] 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.

[44] 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

[45] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁴ This office may not, however, substitute its own discretion for that of the institution.¹⁵

[46] The city noted that while exercising its discretion, it took into account relevant factors which included:

- The purpose of the *Act*, including the principle that the privacy of individuals should be protected
- Whether the requester is seeking his or her own personal information
- Whether the requester has a sympathetic or compelling need to receive the information
- 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 persons
- The historic practice of the institution with respect to similar information

[47] The city points to Orders MO-3388 and MO-3418 which articulate the importance

¹⁴ Order MO-1573.

¹⁵ Section 43(2).

of ensuring public confidence in an institution. It also refers to Order MO-3421-F, where the adjudicator found that the consideration of "public confidence" was a relevant factor in the appeal and that it was appropriate for the city to consider the outcome on public perception of their complaint process should the withheld information be disclosed.

[48] The city states that it is of the opinion that for residents to be confident in their relationship with elected officials and city staff, they need to feel a certain level of confidentiality with respect to the complaint process currently in place.

[49] The city notes that it also considered the relationship between the appellant and the affected party and since the record relates to ongoing litigation, it properly exercised its discretion under section 38(b) to deny the record in full.

[50] The appellant does not address whether the city exercised its discretion properly under section 38)(b). She refers to transparency and the roundabout actions of the city which she views as confusing and an intent to avoid providing the one email that she requested.

Finding:

[51] I have considered the circumstances surrounding this appeal and the party's representations and I am satisfied that the city has properly exercised its discretion with respect to section 38(b) of the *Act*. I am satisfied that it did not exercise its discretion in bad faith or for an improper purpose. The city considered the purposes of the *Act* and has given due regard to the nature and sensitivity of the information in the specific circumstances of this appeal, and I have upheld its decision with respect to the information they have claimed is exempt. Accordingly, I find that the city took relevant factors into account and I uphold its exercise of discretion in this appeal.

ORDER:

The appeal is dismissed.

Original Signed by: _____
Alec Fadel
Adjudicator

_____ April 20, 2018