

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3795

Appeal MA18-88

Regional Municipality of Durham

June 27, 2019

Summary: The adjudicator finds that the withheld portions of a councillor's cell phone invoices qualify as personal information under the *Act*, and she upholds the Regional Municipality of Durham's decision to deny access to the information under the mandatory personal privacy exemption in section 14(1) of the *Act*.

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).

OVERVIEW:

[1] This order addresses the issues raised by an individual's access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for "a true copy of [an identified councillor's] township and regional cell phone records for 2016 and 2017. Including all calls made and received." The individual initially submitted the request to the Township of Scugog, which forwarded it to the Regional Municipality of Durham (the region), pursuant to section 18(3) of the *Act*.¹

¹ Section 18(3) of *MFIPPA* states "If an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in

[2] The region located 53 pages of responsive records, which are wireless services (cell phone) invoices for the named councillor dating from 2016 and 2017.

[3] Prior to issuing its access decision, the region notified the identified councillor (the affected party) to seek her views concerning the disclosure of the information in the records. The region subsequently issued a decision to the requester partially disclosing the responsive records. The region relied on the mandatory personal privacy exemption in section 14(1) of the *Act* to deny access to some phone numbers, and the corresponding information in the "Call from" and "Location called" columns, because the affected party had identified this information as relating to personal calls. The requester, now the appellant, appealed the region's access decision to this office, and a mediator was appointed to explore the possibility of resolution.

[4] During mediation, the mediator attempted to resolve the appeal by seeking the affected party's consent to disclose to the appellant the withheld information under the "Location called" column for the personal calls. The affected party did not provide consent. The appellant advised the mediator that he continues to seek access to the "Call from" and "Location called" columns of the cell phone invoices. In addition, the appellant narrowed the date range of his request to September 2016 to April 2017. No further mediation was possible. Since the appellant wished to pursue access to the withheld information, the appeal was transferred to the adjudication stage for an inquiry.

[5] I sent a Notice of Inquiry outlining the issues in the appeal to the region and the affected party to invite representations. Once I received representations from both of those parties, I sent a complete copy of them, along with a Notice of Inquiry, to the appellant who provided me with brief submissions.

[6] In this order, I confirm that the scope of the appeal is limited to determining access to information that the region withheld. I find that the information in the three withheld invoice columns qualifies as personal information according to the definition of the term in section 2(1) of the *Act*. I uphold the region's decision to deny access to the personal information under section 14(1), and I dismiss the appeal.

RECORDS:

[7] In the inquiry documentation sent to the parties, the information remaining at issue in this appeal was described as the information withheld from the columns "Call from" and "Location called" of the affected party's cell phone invoices dating from

which case the head transferring the request shall give written notice of the transfer to the person who made the request."

September 2016 to April 2017. I also address one more column, "Number called," below.

ISSUES:

- A. Is the information at issue in the cell phone invoices "personal information" under the *Act*?
- B. Does the mandatory personal privacy exemption in section 14(1) apply to the cell phone invoice information withheld by the region?

DISCUSSION:

Is the information at issue in the cell phone invoices "personal information" under the *Act*?

[8] The region has withheld certain entries under the cell phone invoice headings titled "Call from," "Number called," and "Location called" based on its claim that this information is exempt under section 14(1) of the *Act*. In order to determine whether the withheld information is exempt under section 14(1) of the *Act*, however, I must first decide whether it qualifies as the personal information of identifiable individuals. This is because the personal privacy exemption in section 14(1) only applies to "personal information."²

[9] In seeking representations from the region and the affected party, as the parties opposing disclosure of the withheld information, I specifically asked them to address how this information fits within the definition of "personal information."

[10] "Personal information" is defined in section 2(1) of the *Act* as "recorded information about an identifiable individual" that fits within a list of examples, such as,

- a. information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual, ...
- c. any identifying number, symbol or other particular assigned to the individual,
- d. the address, telephone number, fingerprints or blood type of the individual, ...
[and]

² Section 14(1) states, in part, that "A head shall refuse to disclose personal information to any person other than the individual to whom the information relates ..."

- 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.³

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

[13] There are exceptions to the definition of "personal information" for the information of individuals long deceased, as well as for business or professional identity information.⁵ None of the exceptions are relevant in this appeal.

[14] Most potentially relevant is section 2(2.1), which states that "business identity information," such as name, title, contact information or designation of an individual in a business, professional or official capacity is not included in the definition of personal information. I am satisfied, however, that the region did not deny access to any business identity information in issuing its access decision to the appellant. It disclosed the affected party's name and cell phone number where it appears on the invoices. I find that the exceptions to the personal information definition do not apply to the information that is at issue in this appeal.

Representations

[15] The region submits that, as a matter of practice, there is no assumption that councillors will use their assigned cell phones for business reasons only. Rather, there is an understanding that councillors may incidentally make personal phone calls. The region notes that upon receipt of the access request, it made inquiries to determine, in consultation with the affected party, which calls were made in her personal capacity versus those made in her business capacity. According to the region, the affected party indicated that some of the calls were made to personal contacts and her medical professionals. The region maintains that after satisfying itself that the affected party understood the need to separate the two types of call, it issued its decision to disclose as much information from the cell phone invoices to the appellant as possible. The region submits that the appellant is now specifically requesting access to the affected party's personal information and it explains that the "outstanding records requested are only her personal calls and are only the call from, number called, and location called

³ Order 11.

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

⁵ Sections 2(2), 2(2.1) and 2(2.2).

columns.”

[16] The region acknowledges that for information to qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed. The region conveys its concern about identifiability as follows:

The individual identified would be persons contacted by the affected party in her personal capacity. They would be easily identified simply by calling the phone number. Whether they answer or not, there will likely be a voicemail identifying the individual.

[17] The affected party echoes the region’s position that it is a normal and acceptable practice for councillors to use the cell phone issued to them by the region for business and personal use. She states that while she uses hers primarily for business purposes, she also uses it for making and receiving the occasional personal call. The affected party’s representations are also based on her belief that all three severed columns – the “Call from,” “Number called” and “Location called” columns – of the invoices are at issue, and she argues that these columns contain personal information that should not be disclosed. She explains that these “logs” of her personal use calls indicate the personal or home number of various people in her life, including her friends and family. Regarding the information in the “Call from” column of the cell phone invoices, specifically, the affected party states that “the location from which I made certain calls also would allow the requestor or others to determine where I physically was at certain points in time, be it on vacation or elsewhere.”

[18] Having reviewed the region’s and the affected party’s representations, the appellant states that he is “only requesting the area where the call was made to, the area code and the first three digits” and he provides an example of what this information would look like. The appellant suggests that the possibility of identifying any of the individuals called by the affected party personally is slim. He maintains that:

... the number of combinations being 10,000 it would take one person almost five months of dialling and documenting seven hours per day to find the right combination of numbers.

[19] Next, the appellant states that he “requests audited proof the affected party has made restitution for the personal calls made and also requests a copy of the policy and practices mentioned in the response.”

Analysis and findings

[20] Before explaining my findings about whether the information at issue qualifies as personal information, I will address the scope of the request. At the beginning of this order, I set out the appellant’s access request, which was for “a true copy of [an identified councillor’s] township and regional cell phone records for 2016 and 2017. Including all calls made and received.” I also noted that the appellant narrowed the

scope of his appeal at the mediation stage to the period between September 2016 and April 2017.

[21] The appellant's representations mention access to "audited proof" of restitution for personal calls made by the affected party, as well as the "policy and practices" mentioned in her representations. This statement indicates to me that the appellant wishes to seek access to different, additional information that I find is not within the scope of the access request before me in this appeal. In other words, it is not reasonably related to the access request. If the appellant seeks access to this particular information, he will have to submit a new access request to the region for it.

[22] What is also clear from reading the parties' representations is that they are based on disclosure of information that differs from the information identified in the mediator's report, which was sent to all three parties at the close of mediation. There having been no objections from the region, affected party or appellant to this description after receiving the mediator's report, I reiterated the same description in the Notice of Inquiry sent to the parties during my inquiry. Under the heading for Records, I stated:

Remaining at issue in this appeal is the withheld information in the columns "Call from" and "Location called" in the affected party's wireless services invoices dating from September 2016 to April 2017.

[23] The information in the "Number called" column of the affected party's cell phone invoices was not listed as being at issue. And yet, as noted, the representations of the parties all contemplate disclosure of the "Number called" information by this order, even if the appellant's argument is that only the "area code and the first three digits" of the number called is required.

[24] It may not be possible to reconcile the parties' submissions during the inquiry with the statement of the information at issue in the Notice of Inquiry I sent to each of them to invite representations. Including the "Number called" information in my analysis for the sake of completeness, however, I find that both that information and the location information qualify as the affected party's personal information for the following reasons.

[25] Regarding the telephone numbers to which the affected party placed cell phone calls that I accept were personal, based on the evidence before me, I find that the numbers qualify as "personal information" under paragraph (d) of the definition of that term in section 2(1) of the *Act*. In reaching this conclusion, I accept the region's submission that the individuals to whom the numbers belong could reasonably be identified by calling those telephone numbers, meaning that the telephone number is

about an identifiable individual. Indeed, past orders of this office have held that disclosure of this information could permit the identification of the individual to whom the number belongs by either referring to Canada 411 or calling the numbers.⁶ I am also persuaded that the fact that the affected party made calls to those specific telephone numbers could reasonably be expected to reveal other personal information about her if disclosed, which means that these telephone numbers also fit within paragraph (h) of the definition in section 2(1) as the affected party's personal information.

[26] Next, I am also satisfied that the information in the "Call from" and "Location called" columns of the affected party's cell phone invoices constitute her personal information. Clearly, the appellant already knows the affected party: she was named in the request and the disclosed cell phone invoices relate to her. The region has already disclosed the date and time of all of the calls made by the affected party, both business and personal, to the appellant. In this context, I find that the locations from which the affected party made the personal calls and the corresponding location to which she made the personal calls (even without the associated telephone numbers) qualify as her personal information according to paragraph (h) of the definition in section 2(1).

[27] The appellant argues that the telephone numbers could be severed and could not reasonably be linked to an identifiable individual as a result. However, even if the numbers were severed as the appellant proposes, they would still be the affected party's personal information because they would reveal the general area to which she was making her personal calls.

[28] Given my finding that the information at issue is personal information about the affected party, I will now consider the region's decision to withhold it under the mandatory personal privacy exemption in section 14(1).

Does the mandatory personal privacy exemption in section 14(1) apply to the cell phone invoice information withheld by the region?

[29] Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) in section 14(1) applies. The affected party clearly indicated that she does not consent to disclosure of her personal information under section 14(1)(a). Based on my review, I find that none of the exceptions in sections 14(1)(a) to (e) of the *Act* apply.

[30] In the circumstances of this appeal, the only exception that could apply is section 14(1)(f), which allows disclosure if it would not be an unjustified invasion of personal

⁶ For example, see Orders MO-3737, MO-3272 and MO-2771.

privacy. The factors and presumptions in sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 14(1)(f). Section 14(4) also lists situations that would not be an unjustified invasion of personal privacy. None of these situations is present here.

[31] 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 14(1). Neither the region nor the affected party argue that any of the presumptions in section 14(3)(a) to (h) apply to the personal information that remains at issue in the cell phone invoices and, based on my review of it, I find that none of them do.

[32] If no section 14(3) presumption applies and the exceptions in section 14(4) do not apply, as in the present appeal, section 14(2) lists various factors that may be relevant in determining whether disclosure of the personal information at issue would constitute an unjustified invasion of personal privacy.⁷ In order to find that disclosure does *not* constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure in section 14(2) must be present. In the absence of such a finding, the exception in section 14(1)(f) is not established and the mandatory section 14(1) exemption applies.⁸

[33] 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).⁹

[34] The region submits that disclosure would result in an unjustified invasion of the personal privacy of the affected party and the individuals to whom she placed the calls. The region mentions Order MO-2771, where Adjudicator Frank DeVries found that the factor favouring protection of privacy in section 14(2)(h) (information supplied in confidence) applied to the personal information of third parties communicating with someone in a similar position to the affected party in this appeal, because they held a reasonable expectation that their information would remain confidential. The region also states that the adjudicator in Order MO-2771 held that in the absence of evidence to the contrary, disclosure of the personal information would constitute an unjustified invasion of personal privacy under section 14(1). Regarding the possibility of severance, the region maintains that no parts of the cell phone invoices can be severed to disclose non-exempt information pursuant to section 4(2) of the *Act*.

[35] The affected party submits that section 14(1) applies to the personal information at issue. Expanding on her submission (on the personal information issue) that the "Call

⁷ Order P-239.

⁸ Orders PO-2267 and PO-2733.

⁹ Order P-99.

from" location would allow others to know where she was at certain points in time, the affected party states,

While I know that I am a public figure and accept the various realities that come with that, I am not sure that the public necessarily should have a right to know my whereabouts at various points in time, when I am simply going about my life as a private citizen.

[36] The affected party adds that the individuals with whom she communicates when making personal calls have a reasonable expectation that neither their personal phone number, nor even the existence of the phone call, would be disclosed to the public upon request.

[37] Although the appellant does not directly address section 14(1) in his submissions, he argues that "there is no possible way this would be an intrusion into someone's privacy" because, he maintains, no individuals could be identified if the records are severed to disclose only the area code and first three digits of the numbers called, as he suggests.

Analysis and findings

[38] For the purpose of this analysis, the personal information at issue consists of the telephone numbers the affected party called, as well as the locations to, and from, which she made the personal calls on her region-issued cell phone.

[39] As stated, where no section 14(3) presumption applies and the exception in section 14(4) does not apply, 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.¹⁰ In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring *disclosure* in section 14(2) must be present. In the absence of such a finding, the exception in section 14(1)(f) is not established and the mandatory section 14(1) exemption applies.¹¹

[40] The appellant's representations did not directly address the factors favouring disclosure in section 14(2)(a) to (d). Nonetheless, I have considered whether his representations might support the application of any of the section 14(2) factors that favour disclosure, such as paragraph (a), where disclosure of personal information is desirable for the purpose of subjecting the institution to public scrutiny, or paragraph (d), where disclosure is relevant to a fair determination of a requester's rights. In the circumstances, I find that none applies.

¹⁰ Order P-239.

¹¹ Orders PO-2267 and PO-2733.

[41] Specifically, I find that no connection is established between disclosure of the personal information at issue and the factor in section 14(2)(a); the appellant's interest in it appears to be for the purpose of scrutinizing the affected party's activities, not the region's. There is also no evidence to establish how the disclosure of the personal information related to the affected party's personal cell phone calls could be relevant to a fair determination of the appellant's legal rights in any other forum.¹² The factors in section 14(2)(b) (public health and safety) and section 14(2)(c) (purchase of goods and services) are also not applicable in this appeal. Finally, I am not satisfied that any unlisted factors in favour of disclosure, such as inherent fairness¹³ or ensuring public confidence in the region,¹⁴ apply to the personal information at issue.

[42] As I stated above, in order to find that disclosure does not constitute an unjustified invasion of personal privacy under section 14(1), one or more factors and/or circumstances favouring disclosure in section 14(2) must be present. Having found that none of the factors favouring disclosure in section 14(2) apply, I find that the exception in section 14(1)(f) is not established. Consequently, since section 14(1) is a mandatory exemption, I find that disclosure of the personal information at issue would constitute an unjustified invasion of privacy and that it is exempt from disclosure under section 14(1) of the *Act*.

ORDER:

I uphold the region's decision to deny access to the withheld portions of the cell phone invoices under section 14(1), and I dismiss the appeal.

Original Signed by: _____

Daphne Loukidelis
Adjudicator

June 27, 2019

¹² Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

¹³ See Order P-1014, for example.

¹⁴ Orders M-129, P-237, P-1014 and PO-2657.