

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3857

Appeal MA18-488

Town of East Gwillimbury

November 1, 2019

Summary: The Town of East Gwillimbury (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all copies of by-law complaints made against the appellant's address. The town located by-law complaints and issued a decision, granting partial access to the records; it withheld portions of the records pursuant to section 14(1) (personal privacy) of the *Act*. The appellant appealed that decision, and through mediation, additional searches were conducted and supplementary access decisions were issued. The town continued to rely on section 14(1) to withhold portions of the additional records located. At adjudication, the adjudicator raised the possible application of the discretionary personal privacy exemption at section 38(b). In this order, she finds that the information withheld is exempt under section 38(b), and upholds the town'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"), 2(2.1), 14(2)(b), 14(2)(d), 14(3)(b), 38(b), and 51.

Orders Considered: Orders P-1014 and MO-2171.

OVERVIEW:

[1] The Town of East Gwillimbury (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all copies of by-law complaints made against the requester's address.

[2] The town located responsive records, and issued an access decision. It granted partial access to the records and withheld portions of the records under section 14(1)

(personal privacy) of the *Act*.

[3] The requester (now the appellant) appealed the town's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office).

[4] Mediation at the IPC led to the town conducting two additional searches for responsive records, the location of additional records, and the issuance of two supplemental access decisions. The town granted partial access to these records, and relied on the personal privacy exemption at section 14(1) to withhold portions of them. In addition, two of the three affected parties who were asked for consent to disclosure of the information relating to them in the records declined to provide their consent. The appellant decided he would not need to pursue the information that was of interest to the third affected party.

[5] As no further mediation was possible on the issue of section 14(1), the appeal proceeded to the adjudication stage, where a written inquiry is conducted by an adjudicator. The sole issue proceeding to adjudication was the town's withholding of certain information under section 14(1).

[6] I began an inquiry under the *Act* by sending a Notice of inquiry, setting out the facts and issues on appeal, to the town, and then to the appellant. Representations were shared between the parties, on consent. Since the records appeared to contain the personal information of the appellant, I raised the possible application of the discretionary personal privacy exemption at section 38(b) of the *Act* to the scope of the appeal. I also later determined that an affected party should be given an opportunity to provide representations regarding the disclosure of their personal information in a specified record at issue. That affected party's representations were not shared with the town or the appellant, due to confidentiality concerns. However, I advised the appellant of that affected party's opposition to disclosure, and invited him to provide additional representations in light of that opposition, and he did. In deciding the outcome of this appeal, I have only taken into account the representations of the appellant and the town, and the affected party's lack of consent to the disclosure of their personal information. While I considered all of the appellant's representations, only those relevant to the town's access decision will be addressed in this order.¹

[7] For the reasons that follow, I uphold the town's access decision and dismiss this appeal.

¹ Therefore, records not identified as being at issue in the Mediator's Report, and the issue of reasonable search, will not be discussed.

RECORDS:

[8] The withheld portions of seven records are at issue in this appeal. Records 1, 2, 3, 4, 6, and 7 are emails of specified dates, and Record 5 is a complaint form of a specified date.

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 town exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[9] The town withheld information on the basis of a personal privacy exemption, so I must first decide whether each record contains "personal information" as defined in section 2(1) of the *Act*, and to whom it relates. For the reasons that follow, I find that all of the records at issue contain the appellant's personal information as defined in section 2(1) of the *Act*, as well as that of other identifiable individuals.

[10] The term "personal information" in section 2(1) of the *Act* is defined, in part, as follows:

"personal information" means recorded information about an identifiable individual, including,

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

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[11] 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.²

[12] Section 2(2.1) of the *Act* specifically excludes name and contact information from the definition of "personal information" if that type of information appears in a business, professional, or official capacity. 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 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

[13] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁵

[14] The town describes the withheld information in the records as belonging to the by-law complainants. While this is true of most of the withheld information, based on my review of the records, I find that Records 2 and 3 contain by-law complaints against multiple properties, not only the one named in the request. To be considered responsive to the request, records must "reasonably relate" to the request.⁶ Therefore, I find that the by-law complaints against properties other than the one specified in the request are not responsive to the request and, as a result, information that may identify the owners of those properties is outside the scope of this appeal.

Personal information of the by-law complainants, and other identifiable individuals

[15] The *responsive* information that has been withheld consists of the names and contact information of the individuals who made by-law complaints against the address

² Order 11.

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.

⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

⁶ Orders P-880 and PO-2661.

named in the request. Disclosure of this information would reveal that these individuals made complaints, which is their "personal information" under the introductory wording of the definition of that term. The withheld information is also the "personal information" of these individuals under paragraphs (h) (name with other information) and (d) (address, telephone number, and email address) of section 2(1) of the *Act*. Although one or more work email addresses may appear to be information about an individual in a business capacity, there is no evidence before me to suggest that any record(s) containing work email addresses had any relation to the employment of the sender(s). Rather, each complaint was made in a personal capacity, and would reveal something of a personal nature about the individual involved (that they made a by-law complainant against someone). As discussed, this is their "personal information" under the introductory wording of that term in section 2(1). Accordingly, I find that any work email addresses are equally the "personal information" of an affected party as the personal email addresses withheld.

The appellant's personal information

[16] Based on my review of the records, I find that each one contains the appellant's personal information, including his address, the views and opinions of others relating to his residential property, and the fact that that a by-law complaint was made against his property. This information qualifies as his "personal information" under the introductory wording of the definition of that term and paragraphs (d) and (g) of section 2(1) of the *Act*. In the circumstances, I am satisfied that this is information about the appellant and not solely about a property.

[17] Since the records all contain the appellant's personal information, I must consider whether he has a right of access to the information withheld under the discretionary personal privacy exemption at section 38(b) of the *Act*.

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

[18] 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.

[19] Under section 38(b), if 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.⁷

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

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

[21] 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). The parties do not argue that any of these exceptions apply, and on my review of the evidence before me, I find that they do not. Notably, neither of the affected parties whose personal information is of interest to the appellant consented to the disclosure of their personal information, so section 14(1)(a) does not apply.

[22] Section 14(4) lists situations that would not be an unjustified invasion of personal privacy. The parties have not argued that any of these situations apply, and on my review of the evidence before me, I find that they do not.

[23] 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.⁸

Section 14(3)(b) applies

[24] If any of paragraphs (a) to (h) of section 14(3) apply, that is a factor that weighs towards a finding that disclosure of the information is an unjustified invasion of personal privacy under section 38(b).

[25] The town submits that section 14(3)(b) (possible violation of law) applies.

[26] Section 14(3)(b) says:

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 [.]

⁷ See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).

⁸ Order MO-2954.

[27] Section 14(3)(b) can apply to a variety of investigations, including those relating to by-law enforcement,⁹ which is the case here. 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.¹⁰ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.¹¹

[28] The town submits, and I find, that section 14(3)(b) applies because the personal information at issue is that of the by-law complaints, which was compiled and is identifiable as part of law enforcement investigations into possible violations of the town's by-laws.

[29] No other paragraphs under section 14(3) were claimed, and based on my review of the evidence, no others apply.

No factors favouring disclosure apply

[30] 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 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).¹³

[31] The appellant argues that the factors at sections 14(2)(b) and 14(2)(d) apply. I also raised the possible application of the unlisted factor of inherent fairness in the inquiry. The town argues that none of these factors apply. I will consider each one, below.

[32] The considerations in sections 14(2)(b) and (d) are typically factors that favour disclosure. These sections say:

14 (2) 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,

(b) access to the personal information may promote public health and safety;

⁹ Order MO-2147.

¹⁰ Orders P-242 and MO-2235.

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

¹² Order P-239.

¹³ Order P-99.

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

Section 14(2)(b) – public health and safety

[33] In this case, the appellant raises concerns about a particular individual that he views as being a risk to his and his family's safety in relation to Record 1. As this does not relate to promoting broader issues of health or safety in any real and demonstrable way, as contemplated by section 14(2)(b), I find that section 14(2)(b) does not apply to Record 1, as argued by the appellant.

Section 14(2)(d) – fair determination of rights

[34] The appellant argues that section 14(2)(d) applies, but I find that it does not, for the reasons set out below.

[35] In the Notice of Inquiry sent to the appellant, he was advised that for section 14(2)(d) to apply, he must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
- (2) the right is related to a proceeding which is either existing or *contemplated*, not one which has already been completed; and
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
- (4) the personal information *is required* in order to *prepare for the proceeding or to ensure an impartial hearing*.¹⁴ [Emphasis added.]

[36] All four parts of this test must be met in order to accept that section 14(2)(d) is relevant to a record at issue. Therefore, if one part of the test is not met, the remaining three parts do not need to be considered.

[37] The appellant argues that section 14(2)(d) applies because the by-law complainants waived their right of anonymity when they filed the by-law complaints, but I find that this argument is not substantiated by the evidence, and does not

¹⁴ 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.).

establish that the four-part test above applies.

[38] He also provided record-specific representations discussed below.

Records 1, 2, and 7

[39] As set out below, although he speculates that the “false claims” made in the by-law complaints “may fall” under section 140(1) (public mischief) of the *Criminal Code of Canada*,¹⁵ and repeatedly mentions harassment in his representations, I find that the appellant has not established that part 4 has been met for Records 1, 2, and 7.

[40] In addition to making references to the *Criminal Code*, the appellant states that he intends to sue both the town and complainant(s) named in Records 1, 2, and 7. He argues that the anonymity provided to the by-law complainants by the town has prevented him from pursuing legal matters “that range from harassment and violations of sovereign rights to the most likely violation of criminal law.” The adjudicator in Order MO-2171 considered similar arguments¹⁶ and noted the following:

. . . many of the rights asserted by the appellant, if they were found to apply in the context of this bylaw infraction process, would apply to the process used by the City rather than against the complainant. In complaint-driven processes such as the one resulting in the records in this appeal, a complainant makes a complaint, and then it is up to the City’s bylaw enforcement unit to determine whether the complaint has validity, to pursue compliance with the bylaw, and to determine what actions must be taken to comply with the bylaw. Other than filing the complaint, the complainant is no longer involved in the process. Accordingly, the rights asserted by the appellant, and the concerns expressed by her about the process, relate to the actions of the City, rather than those of the complainant.

[41] The above reasoning is relevant to this case, and I adopt it here. Even if the appellant has legal rights drawn from statute or common law (under part 1 of the test) that could be pursued at a proceeding, I find that those rights relate to a dispute with the town. There is no evidence before me that the withheld names and contact information of the by-law complainants in Records 1, 2, and 7 are “required in order to prepare for” such a proceeding against the town, “or to ensure an impartial hearing” against it, under part 4 of the test.

[42] Moreover, to the extent that the appellant may wish to pursue legal claims against the by-law complainants, I am not satisfied that part 4 of the test would be met

¹⁵ R.S.C., 1985, c. C-46.

¹⁶ Order MO-2171 was ultimately decided on the basis of the presumption at section 14(3)(b) of the *Act*.

either. Since the appellant states that he intends to pursue legal rights against the town, the information he is seeking in this appeal may be sought through proceedings made against the town. The *Rules of Civil Procedure* that govern a lawsuit over which a court presides are not affected by the *Act* that governs this appeal. That is clear from the wording of section 51 of the *Act*:

1. This Act does not impose any limitation on the information otherwise available by law to a party to litigation.
2. This Act does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document.

[43] Therefore, section 14(2)(d) does not apply to Records 1, 2, and 7.

Records 3, 4, 5, and 6

[44] On the basis of the appellant's representations and the records themselves, I find that part 2 of the four-part test has clearly not been met in relation to Records 3, 4, 5, and 6.

[45] To meet part 2, there must be a proceeding that is "either existing or contemplated." There is no suggestion that there is any existing proceeding, which means that if there is no contemplated proceeding either, part 2 is not met, and the factor at section 14(2)(d) does not apply.

[46] Here, the appellant specifically states that he is not intending to pursue litigation in relation to Record 4, and does not make any submissions about contemplated proceedings regarding Record 5, so part 2 is not met for these records.

[47] Regarding Record 3, the appellant states that litigation is only intended if the withheld information would reveal something damaging about him.¹⁷ But that is impossible since the responsive information withheld is the name and contact information of the by-law complainant. Therefore, using the appellant's stated criteria for contemplating litigation for Record 3, and the nature of the responsive information withheld within it, I find that no proceeding is contemplated for Record 3. Accordingly, it does not meet part 2 of the four-part test.

[48] With respect to Record 6, the appellant states that litigation is not intended

¹⁷ This position appears to arise from the town's characterization of the information withheld in Record 3. As mentioned, some of the personal information withheld in Record 3 relates to the by-law complaint that is the subject matter of the request, and some does not. Without this distinction being made by the town, the appellant submits that the amount of information withheld in Record 3 could not possibly amount to the combined name, address, phone number, and other personal information of the complainant.

unless the by-law complainant involved "continue[s] to make complaints that are unfounded." I find that this falls short of being a "contemplated" proceeding, so Record 6 does not meet part 2 of the four-part test either.

[49] For these reasons, I find that section 14(2)(d) does not apply to any of the records at issue. Even if it did, I would consider it a factor worth minimal weight because the appellant would have had an alternate means of obtaining information withheld through the civil litigation process. There is certainly no evidence before me that that is not the case.

Unlisted factor: inherent fairness

[50] The appellant argues that the confidential nature of the by-law complaint process has led to unfair harassment to him and his family, and an unfairly diminished reputation within the town. He also raised concerns relating to the safety of his family. As a result, I sought representations in the inquiry on the possible application of the unlisted factor of inherent fairness.¹⁸

[51] What I must consider under inherent fairness is whether withholding the names and contact information of the by-law complainants would be inherently unfair to the appellant.

[52] I find that it would not be. Rather, I agree with the town that inherent fairness to the appellant required that he know the number and nature of the by-law complaints made against him, not that he know the identity of the by-law complainants. Since the town disclosed both the number and nature of the complaints made against him, I am satisfied that the unlisted factor of inherent fairness is not applicable in this appeal. I also note that it is not the function of this office to comment on the substantive basis, or lack of basis, for any of the by-law complaints made against the appellant.

[53] In addition, I find that the unlisted factor of inherent fairness is inapplicable to the safety concerns raised by the appellant. Having considering the representations before me, and the content of the records themselves (including the information withheld), I am not satisfied that disclosure of the information withheld would assist the appellant or his family in the manner suggested.

[54] The appellant has not established that any other factors favouring disclosure apply, and based on my review of the evidence before me, I find that no such factors exist in the circumstances of this case.

¹⁸ Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014.

Weighing the presumption and factors

[55] As discussed, since the records contain the personal information of the appellant and other identifiable individuals, the factors and presumptions at sections 14(2) and 14(3) must be considered and weighed. The purpose of that exercise is to determine whether disclosing that information would be an unjustified invasion of the personal privacy of the identifiable individuals (other than the appellant) to whom the records relate. Because section 14(3)(b) applies (weighing against disclosure of the withheld personal information), and no factors favouring disclosure apply, and weighing the interests of the parties, I find that the personal information at issue is exempt under section 38(b). That is, disclosing the names and contact information of the by-law complainants would be an unjustified invasion of their personal privacy.

Absurd result principle

[56] The appellant claims that he knows who the by-law complainants are and that the information withheld can be found in “the phone-book, address-book, the town registry, [a specified] [F]acebook, and other online media outlets.” These submissions raise the possible application of the absurd result principle. If a requester is aware of the personal information at issue, the information may not be exempt under section 38(b), because to withhold it would be absurd and inconsistent with the purpose of the exemption.¹⁹ The absurd result principle has been applied where, for example, the information is clearly within the requester’s knowledge.²⁰ In this case, without confirming or denying the accuracy of his representations on this issue, I find insufficient evidence to accept that the information withheld is clearly within the appellant’s knowledge. Therefore, the absurd result principle does not apply.

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

[57] On the basis of the following, I accept the town’s submissions that it properly exercised its discretion in deciding to withhold the affected parties’ personal information.²¹

General principles

[58] 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

¹⁹ Orders M-444 and MO-1323.

²⁰ Orders MO-1196, PO-1679 and MO-1755.

²¹ Despite relying on the mandatory personal privacy exemption at section 14(1) instead of the discretionary one at section 38(b), the town provided submissions on the exercise of its discretion under section 38(b).

exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[59] 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.

[60] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²² This office may not, however, substitute its own discretion for that of the institution.²³

Relevant considerations

[61] Relevant considerations may include those listed below:²⁴

- 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
- 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.

[62] In exercising its discretion under section 38(b) to deny access to the names and contact information in the records, the town submits that it balanced the interests of the appellant with those of the by-law complainants. Specifically, the town's position is that the complaints themselves are not personal in nature, but do constitute "personal

²² Order MO-1573.

²³ Section 43(2).

²⁴ Orders P-344 and MO-1573.

information" under the *Act* when connected to the names and contact information of the by-law complainants. Since the identity of the by-law complainants could not be determined by the complaints alone, the town thought it was fair to the appellant to release the complaints against his property while protecting the personal privacy of the by-law complainants.

[63] I find that these are relevant factors for the town to have considered in exercising its discretion. In fully disclosing the complaints and only withholding the names and contact information in the records, the town has withheld the personal information of affected parties that could not be further severed without unjustifiably invading their personal privacy.

[64] In addition, I find that the town has not failed to take into consideration other relevant factors.

[65] Although the appellant's representations refer to the safety of his family, and specifically with respect to use of an infrared camera, there is insufficient evidence on this point for me to conclude that the town exercised its discretion inappropriately.

[66] There is also no evidence before me that the town exercised its discretion in bad faith or for an improper purpose.

[67] For these reasons, I uphold the town's exercise of discretion under section 38(b).

ORDER:

I uphold the town's access decision and dismiss this appeal.

Original Signed by: _____
Marian Sami
Adjudicator

_____ November 1, 2019