

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3864

Appeal MA17-690-2

City of St. Catharines

November 21, 2019

Summary: The City of St. Catharines (the city) received a request for access to information under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester sought access to records pertaining to a complaint made against him by a property management company about a shed on his property that provides shelter to feral cats and the number of cats on his property. The city issued a decision granting partial access to responsive records, but withheld three sentences from a series of emails contained in one of the records, claiming that they are exempt under section 7(1) of the *Act* because they contain advice or recommendations of city staff. The appellant sought access to the redacted information, and challenged the reasonableness of the city's search for responsive records. In this order, the adjudicator partially upholds the city's decision. She finds that section 38(a) (discretion to refuse requester's own information) in conjunction with section 7(1) does not apply to some of the withheld information and orders the city to disclose it. She finds that the city properly exercised its discretion in withholding the remainder of the information on that basis. She also finds that the city's search for responsive records was reasonable.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c.M.56, as amended, sections 7(1), 17(1) and 38(a).

Case Considered: *John Doe v. Ontario (Finance)*, 2014 SCC 36.

OVERVIEW:

[1] The City of St. Catharines (the city) received a request for access to information under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester sought access to "all investigative records pertaining to" an August 31, 2017 complaint made against him by a specific property management company's

“property owners” about a “cat house”¹ that he was building on his property and about the number of feral cats that he rescues. The requester also sought access to all related documentation that the city received from the local humane society, local police, and the property management company about him after a city inspector investigated his property as a result of the complaint.

[2] The city issued a decision in which it granted partial access to responsive records. The city denied access to other records, claiming they contained advice or recommendations and were therefore exempt under sections 7(1) (advice or recommendations) and 14(1) (personal privacy) of the *Act*. The city also withheld some information as non-responsive to the request.

[3] The requester, now the appellant, appealed the city’s decision and the parties engaged in mediation to seek a resolution. During mediation, the appellant raised issues regarding the conduct of city employees and other third party agencies. Although the appellant was informed that the conduct of municipal employees, other agencies, or city processes and procedures was outside the jurisdiction of this office and could not be addressed as part of this appeal, the mediator did obtain consent from the third party agencies to disclose additional information to the appellant. As a result, the city issued a revised decision, in which it wrote that it was disclosing additional information to the appellant based on the consent of the third parties.

[4] In its revised decision, the city relied only on section 7(1) to withhold some information in the records. The personal privacy exemption is therefore not an issue in this appeal.²

[5] Although it disclosed further information to the appellant through the revised decision, based on consent, the city maintained its claim that some of the information that it initially withheld is exempt under section 7(1) and it did not disclose this information to him.

[6] The appellant continues to seek access to all of the information the city withheld. The appellant also advised during mediation that he believes more records exist that the city did not disclose. Specifically, the appellant claimed that, before the city sent an inspector to his property, the city would have received a completed property standards complaint form and that the records disclosed to him by the city did not contain such a form.

¹ The appellant described the “cat house” as a shed on his property that provides shelter to feral cats.

² Where a requester seeks access to the personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions applies. Because I have found that the record at issue contains the appellant’s own personal information, the relevant personal privacy exemption would be the discretionary one in section 38(b); however, given the city’s revised decision, review of the personal privacy exemption is not necessary.

[7] The city conducted a further search for a property standards complaint form, did not locate such a form or any further records relating to the request, and took the position that no further responsive records exist. The reasonableness of the city's search was added as an issue to this appeal.

[8] A mediated resolution was not reached and the file was transferred to the adjudication stage of the appeal process during which the parties participated in a written inquiry.

[9] In this order, I partially uphold the city's application of the section 38(a) exemption, read in conjunction with the advice or recommendations exemption in section 7(1) of the *Act*. I order disclosure of information that I find not to fall within the meaning of advice or recommendations as contemplated by section 7(1). I also find that the city properly exercised its discretion in withholding the exempt information, and that its search for responsive records was reasonable.

[10] Because the records contain the appellant's personal information, and for the reasons discussed below, I have considered section 7(1) under section 38(a) of the *Act*.

RECORDS:

[11] The records consist of emails exchanged among city staff, the city solicitor, and the appellant, as well as correspondence and handwritten notes made by city staff. These records are marked collectively as "Record E" in a series of records that the city previously disclosed to the appellant. The information at issue is contained in two severances: the first severance consists of two sentences in an email on page 2, while the second is a sentence severed from an email on page 9.

ISSUES:

- A. Do the records contain "personal information" and if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(a), in conjunction with section 7(1), apply to the information at issue?
- C. Did the city exercise its discretion under section 38(a), and, if so, should this office uphold the exercise of discretion?
- D. Did the city conduct a reasonable search for responsive records?

DISCUSSION:

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

[12] 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, whose. This is because under the *Act*, different exemptions could apply depending on whether or not the record contains the requester’s personal information.

[13] “Personal information” is defined in section 2(1) as “recorded information about an identifiable individual.” Section 2(1) sets out a non-exhaustive list of examples of “personal information.” These include:

- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (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.³

[14] 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.⁴ To qualify as personal information, it must also be reasonable to expect that an individual may be identified if the information is disclosed.⁵

[15] I have reviewed the records and find that they contain the appellant’s email address,⁶ his home address, others’ views about him and the nature of his communications with the city, which collectively fall under paragraphs (c), (d), (g) and

³ As noted, section 2(1) contains a non-exhaustive list of examples of personal information. Only those reproduced above are relevant to this appeal.

⁴ Orders P-257, P-427, P-1412, R-980015, MO-1550-F and PO-2225.

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

⁶ Previous orders of this office have found that email addresses constitute an “identifying number, symbol or other particular” of an individual within the meaning of paragraph (c) of section 2(1), or to fall within the definition of “address” in paragraph (d) of section 2(1). See, for example, Orders PO-3153, PO-3193, PO-3396 and PO-3997.

(h) of the definition of “personal information” in section 2(1) of the *Act*.

[16] I have also reviewed the records to determine whether they contain the personal information of any individuals other than the appellant. I find that they do not.

[17] Because I have found that the records contain the appellant’s personal information, I must consider whether the discretionary personal privacy exemption at section 38(a), read with section 7(1) of the *Act*, applies to the withheld, severed portions of the records that are at issue.

ISSUE B: Does the discretionary exemption at section 38(a), read in conjunction with section 7(1), apply to the record?

[18] Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38(a) of the *Act*, which provides for some exemptions from this general right, recognizes the special nature of requests for one’s own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.⁷

[19] In this case, the city relies on section 38(a) in conjunction with section 7(1) to deny access to the severances on page 2 and page 9.

[20] Section 38(a) allows the city to withhold those portions of pages 2 and 9 if the information would be exempt under section 7(1) of the *Act*.⁸ Section 7(1) is also discretionary and allows an institution to refuse to disclose a record “where the disclosure would reveal advice or recommendations of an officer or employee of an institution.”⁹

[21] The purpose of section 7 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.¹⁰

[22] “Advice” and “recommendations” have distinct meanings. “Recommendations” refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

⁷ Order M-352.

⁸ Section 38(a) states that an institution may refuse to disclose to the individual to whom the information relates personal information if sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to disclosure of that personal information. Only section 7 is relevant in this appeal.

⁹ Section 7(1) states, in its entirety, that: “A head may effuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution”.

¹⁰ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

[23] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.¹¹ "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[24] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.¹²

[25] The application of section 7(1) is assessed as of the time the public servant prepared the advice or recommendations. Information such as factual or background information has been found not to qualify as advice or recommendations.¹³

Representations

[26] The city submits that the severances on page 2 and page 9 constitute the advice and recommendations of the city solicitor who is both a municipal employee and an officer of the corporation.¹⁴

[27] The city says that the page 2 severance is expressly a recommendation communicated by the city solicitor to the mayor's administrative assistant, to the city clerk, and to the chief building official responsible for by-law enforcement matters, all of whom had received correspondence or telephone calls from the appellant. The city submits that the page 2 severance is a clear statement of a suggested course of action in response to what the city says were the appellant's vexatious communications.

[28] With respect to the page 9 severance, the city submits that, although the severance itself contains the appellant's personal information (in the form of the city solicitor's views or opinions about the appellant), the city has refused to disclose the appellant's personal information to him because it also constitutes the city solicitor's advice and recommendations and is therefore exempt under section 38(a) read with

¹¹ See above at paras. 26 and 47.

¹² Order P-1054.

¹³ Order PO-2677.

¹⁴ The city did not claim the solicitor-client privilege exemption at section 12. Since this is a discretionary exemption and it is open to the city not to claim it, I will not consider it further.

section 7(1). The city says that the page 9 severance is an evaluative analysis of information and is advice communicated directly to the mayor's administrative assistant, who would have received the evaluation as advice. Although less explicit than the page 2 severance, the city says that the page 9 severance suggests a course of action that would have been understood by city staff.

[29] The appellant's representations do not specifically address whether the records contain information that would be exempt from disclosure under section 38(a), read with section 7(1), of the *Act*.

Analysis and findings

[30] The city argues that the severed information on page 2 contains no personal information and is therefore exempt under section 7(1) standing alone, as opposed to section 38(a) read in conjunction with section 7(1). The city says that although the severance on page 9 does contain the appellant's personal information, it is exempt from disclosure under section 38(a) because the section 7(1) discretionary advice and recommendations exemption also applies.

[31] This office has held that the correct approach to determining whether a record contains a requester's information is to review the entire record, not only the portions remaining at issue.¹⁵ This record-by-record analysis is significant because, as noted above, it determines under which part of the *Act* the information at issue will be reviewed. I have therefore considered the section 7(1) exemption under section 38(a) because I concluded above that both email records at pages 2 and 9 contain the appellant's personal information.

[32] Based on my review of the records, and having considered the city's submissions, I find that only the severed content of page 2 falls within the exemption at section 38(a), read with section 7(1), because it contains a recommendation by the city solicitor directed at the mayor. Conversely, I find that the page 9 severance does not contain advice or recommendations and therefore does not fall within the scope of the exemption claimed by the city.

[33] I am guided in my findings by the Supreme Court of Canada's 2014 decision in *John Doe v Ontario (Finance)*,¹⁶ in which the court determined how the advice or recommendations exemption should be interpreted and applied.¹⁷ The Supreme Court confirmed that the purpose of the exemption was identified in the Williams Commission

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¹⁶ *John Doe v. Ontario (Finance)*, 2014 SCC 36.

¹⁷ In *Finance*, the Supreme Court of Canada considered the advice and recommendations exemption in section 13(1) of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c.F.31, as amended, which is the provincial equivalent of section 7(1) of the *Act*.

Report¹⁸ as being to “preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice.” The Williams Commission Report canvassed the rationale for the advice or recommendations exemption, stating that:

First, it is accepted that some exemption must be made for documents or portions of documents containing advice or recommendations prepared for the purpose of participation in decision-making processes. Second, there is a general agreement that documents or parts of documents containing essentially factual material should be made available to the public. If a freedom of information law is to have the effect of increasing the accountability of public institutions to the electorate, it is essential that the information underlying decisions taken as well as the information about the operation of government programs must be accessible to the public.

[34] In *Finance*, the Supreme Court accepted that material relating to a suggested course of action that will ultimately be accepted or rejected by the person being advised falls into the category of “recommendations,” while “advice” would include a public servant’s view of policy options to be considered by a decision-maker. The court also found that the exemption applies to a public servant’s identification of various options to be considered by a decision-maker as well as a list of the considerations of advantages and disadvantages of alternative courses of action.

The page 2 severance

[35] The records, which were almost entirely disclosed to the appellant, document some of the appellant’s interactions with the city regarding his shed. The page 2 severance consists of two sentences that are contained in an email sent by the city solicitor to city staff, including the mayor’s administrative assistant and the city clerk.

[36] I am satisfied that the page 2 severance contains recommendations from a city employee (the city solicitor) to other staff about responding to the appellant. It sets out a suggested course of action for the mayor’s office to consider when contacted by the appellant and following the appellant’s initial email to the city and his subsequent interactions with city staff. It is immaterial whether the city solicitor’s recommendation was accepted or followed by the mayor and/or his staff. What matters is that the page 2 severance consists of a clearly stated recommendation for a course of action for the mayor’s office to consider in responding to the appellant, and I find that it is therefore exempt under section 38(a) read with section 7(1) of the *Act*.

¹⁸ *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy*, 1980, vol. 2 (Toronto: Queen’s Printer, 1980).

The page 9 severance

[37] The page 9 severance consists of a single sentence withheld from an email that is part of the same email chain as the page 2 severance. I find that it neither relates to a discussion of a suggested course of action nor to a city employee's view of policy options to be considered by a decision-maker.

[38] The city submits that the page 9 severance is an evaluative analysis of information and constitutes advice communicated directly to the mayor's administrative assistant. The city says that although it is less explicit than the recommendation contained in the page 2 severance, other city employees would have understood that the statement was advisory.

[39] I disagree. The page 9 severance is a statement (phrased as a question) that follows an email from the appellant and other communication regarding the city's interactions with him. I find that the sentence simply contains a statement that sets out the opinion or views of the city solicitor about the appellant. It does not contain or reveal any "advice or recommendations" for the purpose of section 7(1). While the city suggests that the comment would have been recognized as advice or recommendations by its recipient, it does not appear in any context that would disclose that it was part of any evaluative process. The page 9 severance appears independent from any discussion of policy or other city processes that the city might consider in its dealings with, or considerations when dealing with, the appellant. The statement's context makes no reference or mention to policy considerations or advice when dealing with the appellant.

[40] In the circumstances, I find that the page 9 severance should be disclosed to the appellant. The city has conceded that the statement is the appellant's personal information. Because the sentence is his personal information, and because it is neither advice nor a recommendation, it is not exempt under section 38(a), in conjunction with section 7(1) of the *Act*, and I will order it disclosed to the appellant.

[41] I now turn to considering the city's exercise of discretion in withholding the severance on page 2.

Issue C: Did the city exercise its discretion under section 38(a), and if so, should this office uphold the exercise of discretion?

[42] The section 38(a) exemption is discretionary. It permits the city to disclose information despite the fact that it could withhold it. The city must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[43] 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.

[44] While this office may send the matter back to the institution for an exercise of discretion based on proper considerations,¹⁹ it may not substitute its own discretion for that of the institution.²⁰

[45] In this part, I consider the city's exercise of discretion only in relation to the part of page 2 that I found above to be exempt under section 38(a), in conjunction with section 7(1).

Relevant considerations

[46] Where access is denied under section 38(a), the city must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information. Other relevant considerations may include, but are not limited to, those listed below:²¹

- the purposes of the *Act*, including the principles that information should be available to the public
- exemptions from the right of access should be limited and specific
- the wording of the exemption and the interests it seeks to protect
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- 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

Representations

[47] The city submits that, in exercising its discretion to deny access to portions of the record, it took into account relevant considerations. Among them, the city says it

¹⁹ Order MO-1573.

²⁰ Section 43(2).

²¹ Orders P-344 and MO-1573.

considered that the appellant has no need to receive the withheld information, that no public interest is served by the disclosure of the information, and that the nature of the information is itself sensitive to both the appellant and the city.

[48] The appellant's representations do not address the issue of the city's exercise of discretion.

Analysis and findings

[49] As I have noted above, this office is entitled only to consider whether the city did, in fact, properly undertake an exercise of its discretion under section 38(a), but cannot substitute its own discretion for that of the city. Section 43(2) of the *Act* states:

(2) If the Commissioner upholds a decision of a head that the head may refuse to disclose a record or a part of a record, the Commissioner shall not order the head to disclose the record or part.

[50] In this case, I do not find that the city took into account improper considerations in the exercise of its discretion to withhold the page 2 severance. I have reviewed the record and am satisfied that, although the city did not initially consider that the entire record itself (rather than simply the severed portion at issue) contained the appellant's personal information, the city did consider that any exemption from the right of access should be limited and specific. I am also satisfied that the city, in disclosing remaining records that it did, considered the need to be transparent and the appellant's right to access information about himself.

[51] I therefore uphold the city's exercise of discretion to withhold the severed portion of page 2 under section 38(a), read in conjunction with section 7(1) of the *Act*.

Issue D: Did the city conduct a reasonable search for records?

[52] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.²² If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[53] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it made a reasonable effort to identify and locate responsive records.²³ To be

²² Orders P-85, P-221 and PO-1954-I.

²³ Orders P-624 and PO-2559.

responsive, a record must be "reasonably related" to the request.²⁴

[54] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.²⁵ A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.²⁶

[55] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.²⁷

[56] The appellant submits that no property standards complaint form was completed before the complaint against his property was investigated and that one must have been completed to launch an investigation. He says that information regarding property standards complaints that had previously been posted to the city's website but since removed, stated that under no circumstances would a by-law investigation take place without the complaint form first completed. He goes on to allege that the complaint against him was investigated far more expeditiously than the four-to-six weeks he says was prescribed on the city's website.

[57] In responding to the request, the city disclosed to the appellant a letter of complaint it received about the appellant's property from the complainant that the appellant identified in his request, as well as a series of emails and other related communications.²⁸ The letter, although not prepared on a specific form but rather, on the complainant's letterhead, appears to contain the information identified by the appellant in his request.

[58] I note from my review of the records that, as the city indicates, it has already disclosed the complaint itself to the appellant. At the appellant's request during mediation, the city conducted a further search for an actual complaint form, but did not locate one. I have also considered the disclosures made by the city, as well as the fact that the city disclosed the actual complaint, which suggests that no duplicate complaint exists in a separate form. Finally, I note that the appellant, in his request, provided a specific date for the complaint to which he sought access. In response, the city located a complaint made on another date, suggesting that its search was not limited only to the date identified by the appellant. Based on the evidence before me, I find that the

²⁴ Order PO-2554.

²⁵ Orders M-909, PO-2469 and PO-2592.

²⁶ Order MO-2185.

²⁷ Order MO-2246.

²⁸ The complaint letter was marked as "Record D" in the package of records disclosed to the appellant in response to the request that gives rise to this appeal.

city has completed a reasonable search for responsive records and I therefore find no reason to require the city to conduct a further search for records relating to a complaint made on the date identified by the appellant.

ORDER:

1. I order the city to disclose to the appellant the information that it severed from page 2 of record E, by **December 31, 2019**.
2. I uphold the city's decision to withhold the information at issue on page 9 of record E.
3. In order to verify compliance with order provision 1, I reserve the right to require the city to provide me with a copy of the records disclosed to the appellant.

Original signed by: _____
Jessica Kowalski
Adjudicator

November 21, 2019