

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3969

Appeal MA18-552

The Corporation of the Town of Niagara-on-the-Lake

October 28, 2020

Summary: The Town of Niagara-on-the-Lake (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a specified property. The town notified an affected party and issued a decision granting partial access to the responsive records, withholding information under the discretionary personal privacy exemption in section 38(b) of the *Act*. The requester did not appeal the decision. However, the affected party, now the appellant, appealed the town's decision to this office. In this order, the adjudicator finds that the mandatory personal privacy exemption at section 14(1) or the discretionary personal privacy exemption at section 38(b) of the *Act* apply to portions of the records the town has decided to disclose to the requester and she upholds the town's decision in part.

Statutes Considered: The *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) and 38(b).

OVERVIEW:

[1] This order addresses the issue of access to records related to a by-law complaint in the Town of Niagara-on-the-Lake (the town). The town received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to a specified property.

[2] Following the notification of an affected party, the town issued a decision granting the requester partial access to the responsive records, relying on section 38(a) (discretion to refuse requester's own information), in conjunction with section 8(2)(a)

(law enforcement report), and section 38(b) (personal privacy), with reference to section 14(3)(b) (possible violation of law), of the *Act* to deny access to portions of the six responsive records.

[3] The affected party, now the appellant, appealed the town's decision to this office.

[4] During mediation, the town issued a revised decision granting the requester full access to records 1, 2, 4 and 6, and additional information in records 3 and 5. The town withdrew its reliance on section 38(a) in conjunction with section 8(2)(a). However, the town continued to deny access to the severed portions of records 3 and 5 pursuant to section 38(b) of the *Act*. The town noted that no records could be disclosed to the requester pending the outcome of the appeal.

[5] The requester did not file his own appeal to seek access to the information the town withheld from records 3 and 5, but he continues to pursue access to the information to which the town decided to grant access.

[6] The appellant objects to the disclosure of all six responsive records in their entirety to the requester and raised concerns relating to his personal privacy.

[7] As a mediated resolution was not possible, the appeal proceeded to the adjudication stage, where an adjudicator conducts an inquiry under the *Act*. I decided to commence the inquiry by inviting representations from the appellant, initially.

[8] The appellant responded with representations that I accepted met the confidentiality criteria in this office's *Practice Direction 7: Sharing of Representations*. A summary of the appellant's representations was provided to the town and the requester. Representations were sought and received from the town and the requester.

[9] In this order, I find that the mandatory personal privacy exemption at section 14(1) or the discretionary personal privacy exemption in section 38(b) of the *Act* applies to some portions of records 3 to 6, but that records 1 and 2 are not exempt by reason of the personal privacy exemptions. I uphold the town's access decision, in part, and order it to disclose the non-exempt records, or portions of records, to the requester.

RECORDS:

[10] The records at issue in this appeal consists of service request forms, zoning information, inspector notes and other records relating to the specified property. Records 1, 2, 4, and 6 are at issue in this appeal, in their entirety, because the town decided to release these records in full. Since the requester did not appeal the town's decision to withhold information in records 3 and 5, only the portions of records 3 and 5 to which the town has decided to grant access remain at issue in this appeal.

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 mandatory personal privacy exemption at section 14(1) or the discretionary personal privacy exemption at section 38(b) apply to the information at issue?

DISCUSSION:

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

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

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

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and

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

[12] Sections (2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[13] 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

[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.²

[15] 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

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

[17] The representations of the appellant and the requester do not address whether the records at issue contain personal information. The town's representations acknowledge that the records at issue contain personal information but do not provide any further details.

Analysis and findings

[18] After reviewing the representations of the parties and the records at issue, I find

¹ Order 11.

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

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

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

that records 1 and 3 contain the personal information of the requester, and records 3-6 contain the personal information of the appellant. I further find that record 2 does not contain any personal information as that term is defined under section 2(1) of the *Act*.

[19] Record 1 is a "Service Request Form" filled out by the requester and I find that it contains the personal information of the requester only. It contains his name, his email address, his address, and his phone number. I find that all this information fits within paragraphs (c), (d), and (h) of the definition of "personal information" under section 2(1) of the *Act*.

[20] Record 2 contains what appears to be a screenshot of a "Service Request Form" form in an electronic file management program, which displays dates, time stamps, file numbers and the status of an investigation. From my review of the record, it contains no information about an identifiable individual except for the name of a town employee who created the file. However, this employee's name appears in the context of their employment with the town and does not reveal anything of a personal nature. Therefore, I find that record 2 does not contain any personal information as that term is defined under section 2(1) of the *Act*.

[21] Record 3 is a chart of "Inspector Notes" and contains the name of the inspector, the name and address of the requester, the appellant's name and address, and notes made by the inspector with respect to his by-law investigation. The notes of the inspector outline the opinions of an individual about the appellant. The name of the inspector appears in a business capacity and does not reveal anything of a personal nature about him. Therefore, I find that record 3 contains the personal information of the requester and the appellant that fits within paragraphs (d), (g), and (h) of the definition of "personal information" under section 2(1) of the *Act*.

[22] Record 4 is a "MLE Note to File", which lists the appellant's address and roll number, and outlines the applicable zoning by-law. I find that this record contains only the personal information of the appellant that fits within paragraph (d) of the definition of "personal information" under section 2(1) of the *Act*.

[23] Record 5 is a by-law "Zoning Notice" and it contains the appellant's name, address, and the name and business contact information of the "Supervisor of Enforcement" of the town. Since the name and business contact information of the supervisor appear in a business capacity and do not reveal anything of a personal nature about him, the exception in section 2(2.1) applies. I find that this record contains only the personal information of the appellant according to paragraphs (d) and (h) of the definition.

[24] Record 6 is a chart of "Inspector Notes." It contains the appellant's address, the name of the inspector, and notes made by the inspector with respect to his by-law investigation, and this information fits into paragraph (d) of the definition. The name of the inspector appears in a business capacity and does not reveal anything of a personal nature about him. Therefore, I find that record 6 contains only the personal information of the appellant.

[25] As noted above, I found that record 3 contains both the requester's and the appellant's personal information. For this record, I must review the application of the discretionary personal privacy exemption in section 38(b) of the *Act*. However, the only personal information in records 4-6 belongs to the appellant and, therefore, the relevant personal privacy exemption is the mandatory one in section 14(1).

[26] Regarding the requester's own personal information in records 1 and 3, however, since its disclosure to him would not be an unjustified invasion of another individual's personal privacy under the exemption in section 38(b), I will order it disclosed.

[27] Additionally, as the personal privacy exemption can only apply to personal information, and I have found that record 2 does not contain any personal information, the personal privacy exemption cannot apply to it. As no other mandatory exemption is claimed (or would apply) to record 2, there is no basis for withholding it under the *Act*, and I will order it disclosed.

Issue B: Does the mandatory personal privacy exemption at section 14(1) or the discretionary personal privacy exemption at section 38(b) apply to the information at issue?

[28] As noted previously, record 3 will be reviewed under the discretionary personal privacy exemption at section 38(b), and records 4-6 will be reviewed under the mandatory personal privacy exemption at section 14(1).

[29] 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.

[30] 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.

[31] In contrast, under section 14(1), where a record contains personal information of another individual but *not* the requester, the institution is prohibited from disclosing that information unless one of the exceptions in paragraphs (a) to (e) applies, or unless the section 14(1)(f) exception applies.

[32] If any of paragraphs (a) to (e) of section 14(1) apply, neither the section 14(1) exemption nor the section 38(b) exemption applies. The section 14(1)(a) to (e) exceptions are relatively straightforward.

[33] In applying either the section 38(b) exemption or the section 14(1)(f) exception to the section 14(1) exemption, sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy. Also,

section 14(4) lists situations that would not be an unjustified invasion of personal privacy.

[34] 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.

[35] For records claimed to be exempt under section 14(1) (i.e., records that do not contain the requester's personal information), a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if a section 14(4) exception or the "public interest override" at section 16 applies.⁵

[36] If the records are not covered by a presumption in section 14(3), section 14(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy, and the information will be exempt unless the circumstances favour disclosure.⁶

[37] For records claimed to be exempt under section 38(b) (i.e., records that contain the requester's personal information), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.⁷ 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

[38] As noted above, the appellant submitted confidential representations in this appeal, which I have reviewed in full, but will not set out below, since I accepted that they met the confidentiality criteria in Practice Direction 7.

[39] The appellant submits that he is aware of the identity of the requester, who owns a property connected to his, and that he has had negative interactions with the requester for several years. The appellant also submits that the requester has made false allegations and by-law complaints against him and his family.

[40] The appellant relies on section 14(2)(e) (unfair exposure to pecuniary or other harm) of the *Act* in requesting that no information about him, his family or his property be released to the requester. The appellant submits that releasing this information would cause the requester's unwanted behaviour to escalate, resulting in further harm and a loss of privacy and safety for him and his family.

⁵ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

⁶ Order P-239.

⁷ Order MO-2954.

⁸ Order P-99.

[41] The town submits that the section 14(3)(b) presumption applies and disclosure of the withheld information (in records 3 and 5) would be a presumed invasion of personal privacy, because the personal information was compiled as part of an investigation related to enforcement of the town's zoning by-law. The town does not make representations on section 14(3)(b) with respect to the rest of the records, but, as noted, decided to grant the requester full access to them.

[42] A large portion of the requester's representations outline his concerns with respect to the town's enforcement of by-laws, short-term rentals in his area, and confidentiality relating to a different request for records made by the appellant to the town. While it is evident that these issues are all important to the requester, I have set out only the parts that are relevant to the personal privacy exemption at issue in this appeal.

[43] The requester submits that the appellant's business operations have caused problems between them that have resulted in many negative interactions. The requester submits that he has no desire to interfere with the appellant's business operations or livelihood, but he submits that all residents of the town must abide by the town's by-laws without the need for persistent enforcement. The requester submits that his request for the records at issue was made solely to seek closure on the by-law matter.

Analysis and findings

[44] As noted above, I must review the application of the discretionary personal privacy exemption in section 38(b) to record 3 and the mandatory personal privacy exemption in section 14(1) to records 4-6.

[45] The parties did not argue that any of the exceptions at sections (a) to (e) of 14(1) apply, and I find that none of the exceptions apply in this appeal.

[46] The town argues that the presumption in section 14(3)(b) applies in this appeal. Section 14(3)(b) states:

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[.]

[47] The appellant also argues that the factor weighing against disclosure in section 14(2)(e) applies in this appeal. Section 14(2)(e) states:

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,

the individual to whom the information relates will be exposed unfairly to pecuniary or other harm[.]

[48] Based on my review of the records, I find that section 14(3)(b) applies to all the appellant's personal information at issue in this appeal. I am satisfied that the appellant's personal information was compiled and is identifiable as part of an investigation into a possible violation of law. 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.⁹ The presumption can apply to a variety of investigations, including those relating to by-law enforcement.¹⁰

Record 3

[49] Since record 3 contains the requester's personal information, the relevant personal privacy exemption is the discretionary one in section 38(b). After reviewing the representations of the parties and the records at issue, I find that some portions of record 3, which the town decided to disclose, contain personal information about the appellant to which the discretionary personal privacy exemption at section 38(b) applies.

[50] Under section 38(b), the presumption in section 14(3)(b) must be weighed and balanced with any factors in section 14(2) that are relevant. I have found that the section 14(3)(b) presumption applies to the appellant's personal information in record 3. I also find that the "unfair exposure to pecuniary or other harm" factor at section 14(2)(e) applies. For section 14(2)(e) to apply, the evidence must demonstrate that the damage or harm envisioned by the clause is present or foreseeable, and that this damage or harm would be "unfair" to the appellant. The appellant argues that disclosure of the information would cause the requester's unwanted behaviour to escalate, resulting in further harm, and a loss of privacy and safety for him and his family. I accept his submission in this regard.

[51] In Order MO-2318, former Commissioner Brian Beamish provided guidance on the "unfair harm" as contemplated by section 14(2)(e). He states:

Turning to the factor at section 14(2)(e), this office has held that although the disclosure of personal information may be uncomfortable for those involved in an already acrimonious matter, this does not mean that harm would result within the meaning of this section, or that any resulting harm would be unfair [Order PO-2230]. However, it has also been held that the unfair harm contemplated by section 14(2)(e) is foreseeable where

⁹ Orders P-242 and MO-2235.

¹⁰ Order MO-2147.

disclosure of personal information is likely to expose individuals to unwanted contact with the requester [Order M-1147], or where such disclosure could expose the individuals concerned to repercussions as a result of their involvement in an investigation by the institution [Order PO-1659]. [Emphasis added].

[52] I adopt the analysis set out by former Commissioner Beamish in this appeal. Based on the appellant's confidential representations, I find that the unfair harm contemplated by section 14(2)(e) is foreseeable and that the factor at section 14(2)(e) applies to weigh against disclosure of the appellant's personal information in record 3.

[53] Apart from the listed factors in section 14(2), I also considered whether any unlisted factors favouring disclosure, such as inherent fairness issues, apply and I find that none of them do.

[54] The factor at section 14(2)(e) weighs against disclosure, and there are no factors favouring disclosure of the appellant's personal information in record 3. Since I have found that the section 14(3)(b) presumption applies, balancing the interests of the parties, the facts of this appeal weigh against disclosure of the appellant's personal information in record 3. Therefore, I find that the appellant's personal information is exempt from disclosure pursuant to the discretionary exemption at section 38(b) of the *Act*.

[55] Since the section 38(b) exemption is discretionary, and would permit the town to disclose information, despite the fact that it could withhold it, I considered the town's exercise of discretion. Based on the circumstances of this appeal, I am satisfied that the town considered relevant factors and properly exercised its discretion to withhold the appellant's personal information in record 3 from the requester under section 38(b) of the *Act*.

Records 4-6

[56] Since records 4-6 contain only the personal information of the appellant, and not the requester, the relevant personal privacy exemption is the mandatory one in section 14(1). After reviewing the representations of the parties and the records at issue, I find that the portions of records 4-6 that contain the personal information of the appellant are exempt under the mandatory personal privacy exemption at section 14(1).

[57] As noted above, in reviewing the mandatory exemption in section 14(1), once a section 14(3) presumption has been established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies. I have found that the section 14(3)(b) presumption applies to the appellant's personal information in records 4-6. The parties did not argue that any of the exceptions in section 14(4) apply, and I find that none of them apply in the circumstances of this appeal. The parties also did not argue that the "public interest override" at section 16 applies to the information at issue, and I am satisfied that it does not.

Conclusion

[58] As a result, I find that the disclosure of the appellant's personal information in records 3-6 to the requester would constitute an unjustified invasion of the personal privacy of the appellant. Therefore, I find that the discretionary personal privacy exemption in section 38(b) applies to record 3 and the mandatory personal privacy exemption at section 14(1) applies to records 4-6, in part. In conclusion, I partially uphold the town's decision.

ORDER:

1. I partly uphold the town's access decision. I order the town to not disclose to the requester the portions of records 3-6 that I find exempt under the section 38(b) or section 14(1) exemptions. For the sake of clarity, I have highlighted the portions of the records to be withheld in the copy of the records that accompanies the town's copy of this order.
2. The rest of the information, which is not highlighted are to be disclosed, along with records 1 and 2, to the requester by **December 7, 2020**, but not before **November 30, 2020**.
3. To verify compliance with order provision 2, I reserve the right to require the town to provide me with a copy of the records disclosed to the requester.
4. The timeline noted in order provision 1 may be extended if the town is unable to comply in light of the current COVID-19 situation. I remain seized of the appeal to address any requests for extension.

Original signed by: _____
Anna Truong
Adjudicator

_____ October 28, 2020