

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4236

Appeal MA20-00476

City of Peterborough

August 15, 2022

Summary: The City of Peterborough (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a specified file, which related to a certain complaint made about a specified address. The city granted partial access to the responsive three-page record, and withheld portions of the record under the mandatory exemption at section 14(1) (personal privacy) of the *Act*. On appeal, the adjudicator determined that the appropriate personal privacy exemption to consider is the discretionary exemption at section 38(b) of the *Act*. She upholds the city's decision to withhold the information at issue, and dismisses the appeal.

Statute 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)(f), 14(2), 14(3)(b), and 38(b).

Order Considered: Order M-352

OVERVIEW:

[1] The City of Peterborough (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records related to a certain file number. The file was in regards to the inspection and closure of a complaint made about a certain issue at a specified address.

[2] In response to the request, the city issued a decision granting partial access to a

three-page record. The city withheld access to portions of the record under the mandatory exemption at section 14(1) (personal privacy) of the *Act*.

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

[4] The IPC appointed a mediator to explore resolution. Through the course of mediation, a number of developments occurred:

- the city issued a revised decision, granting the appellant access to additional information;
- a third party whose interests might be affected by disclosure was notified by the city about the request, and advised that it had no concerns about disclosure, so the city disclosed the information related to that party to the appellant;
- the city clarified that it continued to deny access to other parts of the records, under section 14(1) of the *Act*; and
- the appellant requested that the mediator notify another affected party and attempt to gain their consent to disclose the information in the record relating to them, but the mediator was unable to obtain the consent of that affected party.

[5] Further mediation was not possible and this matter moved to the adjudication stage of the appeal process, where an adjudicator may conduct a written inquiry.

[6] As the adjudicator of this appeal, I began an inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the city; in doing so, as a result of my review of the records at issue, I decided to ask the city for representations on whether the applicable personal privacy exemption is the mandatory one at section 14(1) of the *Act*, or the discretionary one at section 38(b) of the *Act*. I sought and received written representations from the city in response. I then invited the appellant to provide written representations in response to the Notice of Inquiry and the non-confidential portions of the city's representations.¹ The appellant provided representations in response, some of which he asked to remain confidential. Therefore, I will only be making general reference to them so that I can explain the basis of my decision.

[7] For the reasons that follow, I uphold the city's decision to withhold the information at issue and dismiss the appeal. Although the city decided that this information is exempt under section 14(1), I find that the information it is exempt under section 38(b) of the *Act*.

¹ Portions of the city's representations were withheld due to confidentiality concerns, under *Practice Direction 7* of the IPC's *Code of Procedure* (which deals with the sharing of representations).

RECORD:

[8] The remaining information at issue is found in the severed portion(s) on each page of a three-page report.

ISSUES:

- A. Does the record contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?
- B. Does the discretionary personal privacy exemption at section 38(b) apply to the information at issue?
- C. Did the institution exercise its discretion under section 38(b)? If so, should the IPC uphold the exercise of discretion?

DISCUSSION:

Issue A: Does the record contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[9] In order to decide which sections of the *Act* may apply to a specific case, the IPC must first decide whether the record contains "personal information," and if so, to whom the personal information relates. As I will explain below, I find that the record contains the personal information of the appellant and other identifiable individuals.

What is "personal information"?

[10] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual."

Recorded information

[11] "Recorded information" is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps.²

About

[12] Information is "about" the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official or business

² See the definition of "record" in section 2(1).

capacity is not considered to be "about" the individual.³ In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be "personal information" if it reveals something of a personal nature about the individual.⁴

Identifiable individual

[13] Information is about an "identifiable individual" if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.⁵

What are some examples of "personal information"?

[14] Section 2(1) of the *Act* gives a list of examples of personal information:

"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,

. . .

(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]

. . .

(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 Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225. See also sections 2(2.1) and (2.2), which 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.

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.).

[15] The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be "personal information."⁶

Whose personal information is in the record?

[16] It is important to know whose *personal information* is in the record. If the record contains the requester's own *personal information*, their access rights are greater than if it does not.⁷ Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.⁸

[17] The city submits that the record contains the *personal information* of a specified affected party. It also recognizes that the record also refers to the appellant. The city submits that the information about these individuals can identify them. The city submits that the information pertains to these individuals in their personal capacity.

[18] The appellant states that he assumes that the city severed portions of the record that it deemed to contain *personal information*; however, he states that the record has been severed such that he cannot determine if it does.

[19] Nevertheless, the appellant states that he presumes that the information at issue does not contain *personal information* because, in his view, the redacted information should be about a specified issue related to a property and compliance with the city's bylaw and building code. He also makes submissions about what he thinks should or should not be the type of information withheld, referring to the listed examples of *personal information* at section 2(1) of the *Act*. For the purpose of this order, it is only necessary for me to discuss his submissions about names appearing with address information. He states that he knows the names and address of the parties involved. He submits that the address is about the property and not an individual. He notes that the address was severed under the heading "People" and that it was not severed in other areas of the record. In addition, the appellant states that the affected parties are identifiable without the redacted information. He agrees that the information would be in their personal capacities.

[20] Based on my review of the record, I find that it contains the inextricably mixed *personal information* of the appellant and affected parties whose interests may be affected by disclosure (affected parties).

[21] In a disclosed portion of the record, it indicates that the record relates to a public

⁶ Order 11. However, Sections 2(2), (2.1) and (2.2) of the *Act* exclude some information from the definition of personal information. Sections 2(2.1) and (2.2) are set out, above, in Note 3. Section 2(2) states that personal information does not include information about an individual who has been dead for more than thirty years.

⁷ Under sections 36(1) and 38 of the *Act*, a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.

⁸ See sections 14(1) and 38(b).

health complaint. The fact of the affected parties' involvement with the city's public health department as a result of such a complaint is itself the *personal information* of the affected parties, under the introductory wording of the definition of that term in section 2(1) of the *Act* ("recorded information about an identifiable individual"). Similarly, reference to the appellant, even if not by name, in such a record is also the appellant's *personal information* under the introductory wording of the definition of that term in section 2(1) of the *Act*.

[22] In addition, I find that the record contains information that qualifies as *personal information* belonging to one or more affected parties, under paragraphs (a), (d), and (h) of the definition of *personal information* at section 2(1) of the *Act*.

[23] Since the record contains the *personal information* of the appellant and other identifiable individuals, the relevant personal privacy exemption to consider is the discretionary personal privacy exemption at section 38(b) of the *Act*. Order M-352 establishes that I need to determine whether the record as a whole contains the appellant's *personal information*, using a "record-by-record approach," where "the unit of analysis is the record, rather than individual paragraphs, sentences or words contained in a record." Therefore, I must consider any right of access that the appellant may have to the withheld information under the discretionary personal privacy exemption at section 38(b) of the *Act*, and not the mandatory personal privacy exemption at section 14(1) of the *Act* (which the city relies on to withhold the information).

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

[24] For the reasons that follow, I find that the withheld information is exempt under section 38(b) of the *Act*.

[25] 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 some exemptions from this right.

[26] Under the section 38(b) exemption, if a record contains the *personal information* of both the requester and another individual, the institution may refuse to disclose the other individual's *personal information* to the requester if disclosing that information would be an "unjustified invasion" of the other individual's personal privacy.

[27] The section 38(b) exemption is discretionary. This means that the institution can decide to disclose another individual's *personal information* to a requester even if doing so would result in an unjustified invasion of the other individual's personal privacy.⁹

[28] If disclosing another individual's *personal information* would not be an unjustified

⁹ See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's exercise of discretion under section 38(b).

invasion of personal privacy, then the information is not exempt under section 38(b).

[29] Also, the requester's own *personal information*, standing alone, cannot be exempt under section 38(b) as its disclosure could not, by definition, be an unjustified invasion of another individual's personal privacy.¹⁰

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

[30] Sections 14(1) to (4) provide guidance in deciding whether disclosure would be an unjustified invasion of the other individual's personal privacy.

Section 14(1) – do any of the exceptions in sections 14(1)(a) to (e) apply?

[31] If any of the section 14(1)(a) to (e) exceptions apply, disclosure would not be an unjustified invasion of personal privacy and the information is not exempt from disclosure under section 38(b).

[32] The city submits that none of these exceptions apply. The appellant states that he does not have enough information to determine if they do.

[33] Based on my review of the evidence before me, I find that I have no basis for concluding that any of the exceptions at section 14(1)(a) to (e) are relevant in this appeal.

Sections 14(2), (3) and (4)

[34] Sections 14(2), (3) and (4) also help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b). Section 14(4) lists situations where disclosure would *not* be an unjustified invasion of personal privacy, in which case it is not necessary to decide if any of the factors or presumptions in sections 14(2) or (3) apply. In the circumstances, I find that section 14(4) does not apply to the withheld personal information.

[35] Otherwise, in deciding whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), the decision-maker¹¹ must consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.¹²

Section 14(3) - is disclosure presumed to be an unjustified invasion of personal privacy?

[36] Sections 14(3)(a) to (h) list several situations in which disclosing *personal information* is presumed to be an unjustified invasion of personal privacy under section

¹⁰ Order PO-2560.

¹¹ The institution or, on appeal, the IPC.

¹² Order MO-2954.

38(b).

14(3)(b): investigation into a possible violation of law

[37] This presumption requires only that there be an investigation into a *possible* violation of law.¹³

[38] The presumption can apply to different types of investigations, including those relating to by-law enforcement.¹⁴

[39] The city did not provide representations about the possible application of this presumption, or any other section 14(3) presumption. The appellant states that he has no information to support the application of any of the presumptions.

[40] However, based on my review of the record, I find that the presumption at section 14(3) applies to all of the information withheld. I note that the city disclosed most of the record to the appellant, including information that indicates that the record relates to building complaints without permits, and that the city took steps to engage with a complaint made, including an investigation. Since section 14(3)(b) can apply to investigations related to by-law enforcement, I find that the *personal information* at issue was compiled and is it identifiable as part of an investigation into a possible violation of law. This weighs significantly against disclosure.

Section 14(2): Do any factors in section 14(2) help in deciding if disclosure would be an unjustified invasion of personal privacy?

[41] Section 14(2) lists several factors that may be relevant to determining whether disclosure of personal information would be an unjustified invasion of personal privacy.¹⁵ Some of the factors weigh in favour of disclosure, while others weigh against disclosure.

[42] The list of factors under section 14(2) is not a complete list. The institution must also consider any other circumstances that are relevant, even if these circumstances are not listed under section 14(2).¹⁶

[43] Each of the first four factors, found in sections 14(2)(a) to (d), if established, would tend to support disclosure of the personal information in question, while the remaining five factors found in sections 14(2)(e) to (i), if established, would tend to support non-disclosure of that information.

[44] The city did not provide representations about any of the section 14(2) factors. The appellant provided confidential representations about certain section 14(2) factors,

¹³ Orders P-242 and MO-2235. However, the presumption does not apply if the records were created after the completion of an investigation into a possible violation of law (see Orders M-734, M-841, M-1086, PO-1819 and MO-2019).

¹⁴ Order MO-2147.

¹⁵ Order P-239.

¹⁶ Order P-99.

which he submits favour disclosure.

[45] I have reviewed the appellant's confidential representations, and I am not persuaded that there is sufficient evidence before me to conclude that any of the factors he mentions apply. For the benefit of the appellant, below, I will address each of the listed section 14(2) factors that would tend to favour disclosure and provide my assessment about each one of them in the circumstances of this appeal, in general terms.

[46] The factor at section 14(2)(a) supports disclosure when disclosure would subject the activities of the *government* (as opposed to the views or actions of private individuals) to public scrutiny.¹⁷ It promotes transparency of government actions. An institution should consider the broader interests of public accountability when considering whether disclosure is "desirable" or appropriate to allow for public scrutiny of its activities.¹⁸ Section 14(2)(a) does *not* apply when an appellant only seeks to have access to the records himself and is not arguing that the public should be able to scrutinize the records that are at issue.¹⁹ Considering these principles, and based on the evidence before me, I find that section 14(2)(a) does not apply in the circumstances.

[47] Similarly, I find that there is insufficient evidence before me that disclosure of the small portions of *personal information* at issue would promote public health and safety, within the meaning of section 14(2)(b).

[48] Likewise, I am unpersuaded by the evidence before me that disclosure of the *personal information* at issue would promote informed choices in the purchase of goods and services, within the meaning of section 14(2)(c).

[49] With respect to the factor at section 14(2)(d), this factor supports disclosure of someone else's *personal information* if the information is needed to allow a requester to participate in a court or tribunal process. The IPC uses a four-part test to decide whether this factor applies. For the factor to apply, all four parts of the test must be met:

1. Is the right in question a right existing in the law, as opposed to a non-legal right based solely on moral or ethical grounds?
2. Is the right related to a legal proceeding that is ongoing or might be brought, as opposed to one that has already been completed?
3. Is the personal information significant to the determination of the right in question?

¹⁷ Order P-1134.

¹⁸ Order P-256.

¹⁹ Order P-1014.

4. Is the personal information required in order to prepare for the proceeding or to ensure an impartial hearing?²⁰

[50] I find that the evidence before me does not establish that each part of this four-part test is met in the circumstances, such that I can conclude that the *personal information* is significant to the determination of rights affecting the appellant, within the meaning of section 14(2)(d) of the *Act*.

Other factors or relevant circumstances

[51] Other considerations (besides the ones listed in sections 14(2)(a) to (i)) must be considered under section 14(2) if they are relevant. These may include inherent fairness issues,²¹ and ensuring public confidence in an institution.

[52] In confidential representations, the appellant submits that there are other specified factors or other relevant circumstances that should be considered. Having reviewed these representations, I am satisfied that they carry some weight in favour of disclosure.

[53] Without city representations about section 14(2) factors against disclosure, and given my finding that a section 14(3) presumption applies, I will not consider whether any section 14(2) factors against disclosure apply.

Balancing the factors for and against disclosure

[54] In determining whether disclosure of the affected parties' *personal information* would constitute an unjustified invasion of personal privacy, I have considered the factors and presumptions at sections 14(2) and 14(3) of the *Act* in the circumstances of this appeal.

[55] I found that the presumption at section 14(3)(b) applies, and that an unlisted section 14(2) factor (of other factors or relevant circumstances), as set out in the appellant's confidential representations, has some weight. However, the application of a section 14(3) presumption weighs significantly against disclosure, and outweighs the limited weight I have given to the unlisted section 14(2) factor.

[56] Weighing the factors and presumptions, and taking into account the interests of the parties, I find that disclosure of the *personal information* at issue would be an unjustified invasion of personal privacy of the identifiable individuals whose *personal information* is contained in the records. Therefore, I find that the *personal information* withheld is exempt from disclosure under the personal privacy exemption at section 38(b), subject to my review of the absurd result principle and the city's exercise of

²⁰ See 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.).

²¹ Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014.

discretion.

Absurd result – the section 38(b) exemption may not apply

[57] An institution might not be able to rely on the section 38(b) exemption in cases where the requester originally supplied the information in the record, or is otherwise aware of the information contained in the record. In this situation, withholding the information might be absurd and inconsistent with the purpose of the exemption.²²

[58] For example, the “absurd result” principle has been applied when:

- the requester sought access to their own witness statement,²³
- the requester was present when the information was provided to the institution,²⁴ and
- the information was or is clearly within the requester’s knowledge.²⁵

[59] However, if disclosure is inconsistent with the *purpose* of the exemption, the absurd result principle may not apply.²⁶

[60] Having reviewed the *personal information* withheld in the record itself and the appellant’s confidential representations, I am not persuaded that the evidence before me establishes that the absurd result principle applies. More specifically, I am not persuaded by the evidence that most of the *personal information* withheld is within the appellant’s knowledge. To the extent that a small portion of it may be, I am satisfied that disclosure would be inconsistent with the purpose of the personal privacy exemption at section 38(b).

[61] As a result, I find that it would not be absurd to withhold the *personal information* at issue, in the circumstances.

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

[62] The section 38(b) exemption is discretionary (the institution “may” refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC *may* determine whether the institution failed to do so.

[63] In addition, the IPC may find that the institution erred in exercising its discretion

²² Orders M-444 and MO-1323.

²³ Orders M-444 and M-451.

²⁴ Orders M-444 and P-1414.

²⁵ Orders MO-1196, PO-1679 and MO-1755.

²⁶ Orders M-757, MO-1323 and MO-1378.

where, for example,

- it does so in bad faith or for an improper purpose;
- it takes into account irrelevant considerations; or
- it fails to take into account relevant considerations.

[64] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁷ The IPC cannot, however, substitute its own discretion for that of the institution.²⁸

What considerations are relevant to the exercise of discretion?

[65] Some examples of relevant considerations are listed below. However, not all of these will necessarily be relevant, and additional considerations may be relevant:²⁹

- 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, and
 - the privacy of individuals should be protected,
- the wording of the exemption and the interests it seeks to protect,
- whether the requester is seeking their own personal information,
- whether the requester has a sympathetic or compelling need to receive the information,
- whether the requester is an individual or an organization,
- the relationship between the requester and any affected persons,
- whether disclosure will increase public confidence in the operation of the institution,
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person,

²⁷ Order MO-1573.

²⁸ Section 43(2).

²⁹ Orders P-344 and MO-1573.

- the age of the information, and
- the historic practice of the institution with respect to similar information.

[66] Regarding the issue of the exercise of discretion under section 38(b) that was set out in the Notice of Inquiry, the city states:

We have concluded that section 14(1) does apply to the records. Therefore, section 38(b) does not apply to the information at issue.

[67] The appellant states that the city did not exercise its discretion, and that without access to the severed portions of the record, he cannot comment on why that is. He also states that the IPC would have to review the severed information to determine if the city should have exercised its discretion under section 38(b).

[68] Despite city's response to the issue of exercise of discretion (as set out above), I find that the city has exercised its discretion because it disclosed to the appellant almost the entire record, except for a few lines (or parts of lines) on each page of the three-page record.

[69] Having seen the small portions of the record that the city withheld, I find that, at a minimum, it is plain on the face of the city's redactions, that the redactions are consistent with the city's consideration of the following factors:

- 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, and the privacy of individuals should be protected,
- the interests that a personal privacy exemption seeks to protect (though the city did not properly identify *which* personal privacy exemption applies),
- the relationship between the requester and any affected persons, and
- 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.

[70] I find that all of these factors are relevant considerations in deciding which portions of the record were disclosed to the appellant (most of the record), and which very limited portions were not.

[71] Furthermore, there is no evidence before me that the city decided to withhold the very limited portions of the record from the appellant in bad faith or for an improper purpose.

[72] In conclusion, I find that the city cannot reasonably be seen to have not exercised its discretion, having chosen to disclose most of the record to the appellant and to

withhold only very limited portions of it. (The city's position on the exercise of discretion appears to flow from its misunderstanding about which part of the *Act* applies when a record contains the *personal information* of the appellant as well as that of other identifiable individuals.) Based on the nature of the limited portions of *personal information* withheld, I am satisfied that the city took the above-noted relevant factors into consideration, when deciding to disclose the rest of the record and make the limited redactions that it did.

[73] Given my findings in this order, I uphold the city's decision to withhold the *personal information* at issue, and dismiss the appeal.

ORDER:

I uphold the city's decision to withhold the personal information at issue, but under the discretionary exemption at section 38(b), not the mandatory exemption at section 14(1), and I dismiss the appeal.

Original Signed by: _____
Marian Sami
Adjudicator

_____ August 15, 2022