

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-4477

Appeal MA22-00582

City of Mississauga

December 22, 2023

**Summary:** The appellant made a request under the *Act* to the city for access to records relating to a specific Committee of Adjustment application for an identified address. The city issued a decision granting the appellant partial access to the responsive records, which include email correspondence. The city withheld portions of the email correspondence under the personal privacy exemption in section 38(b). The appellant appealed the city's decision. In this order, the adjudicator upholds the city's decision and dismisses the appeal.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 14(2)(h), 14(3)(b), and 38(b).

### OVERVIEW:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Mississauga (the city) for the notice(s) of objection received regarding a specific Committee of Adjustment application for an identified address. In addition, the appellant advised she sought access to any notes, documents or other communication with the building department including enforcement and building inspections since January 2022.

[2] The city issued a decision granting the appellant partial access to the responsive records. It withheld portions of the records under the discretionary exemption in section 38(a), read with section 8(1)(d) (discretion to refuse requester's own

information/confidential source of information), and the discretionary personal privacy exemption in section 38(b) of the *Act*. To support its personal privacy claim, the city cited the presumption in section 14(3)(b) (investigation into possible violation of law).

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

[4] During mediation, the appellant confirmed her interest in the information the city withheld. The city maintained its decision to withhold some of the records.

[5] Further mediation was not possible and the appeal was transferred to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. The adjudicator originally assigned to the appeal began the inquiry by inviting the city to submit representations. The city submitted representations. The adjudicator then sought and received representations from the appellant in response to the city's representations, which were shared in accordance with *Practice Direction Number 7* of the IPC's *Code of Procedure*. In her representations, the appellant confirmed she only pursues access to pages 8 to 14 of the records.

[6] The appeal was then transferred to me to complete the inquiry. Following my review of the appeal file, I sought and received reply representations from the city in response to the appellant's representations. I also notified an individual whose interests may be affected by the disclosure of the records (the affected party) and they submitted representations in response to a Supplementary Notice of Inquiry.

[7] In the discussion that follows, I uphold the city's decision to withhold portions of the records under section 38(b) of the *Act* and its exercise of discretion. I dismiss the appeal.

## **RECORDS:**

[8] There are seven pages of records at issue. The records and pages at issue are:

- Record 6: email correspondence (page 8)
- Record 7: email correspondence (pages 9-11)
- Record 8: email correspondence (pages 12-14)

I note the city identified the pages of records at issue as *records* in its representations, which resulted in some confusion during the inquiry. Therefore, I have provided the above description to ensure clarity with all parties.

## ISSUES:

- A. Do the records contain “personal information” as defined in section 2(1) of the *Act* and, if so, to whom does it relate?
- B. Does the discretionary personal privacy exemption in section 38(b) of the *Act* apply to the information at issue?

## DISCUSSION:

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

[9] The city relies on the discretionary personal privacy exemption at section 38(b)<sup>1</sup> of the *Act* to withhold portions of the email correspondence at issue. Given this exemption claim, it is necessary to decide whether the emails contain personal information and, if so, to whom it relates. The term *personal information* is defined in section 2(1) of the *Act* as “recorded information about an identifiable individual.” The definition in section 2(1) includes a non-inclusive list of examples of the types of information that would qualify as personal information.

[10] To qualify as personal information, the information must be about the individual in a personal capacity and it must be reasonable to expect an individual may be identified if the information is disclosed.<sup>2</sup>

[11] The city submits the records contain personal information relating to the appellant and other identifiable individuals. Specifically, the city submits the affected party provides their opinion of the events surrounding a complaint, an issuance of an Order to Comply and the subsequent Committee of Adjustment Hearing, which is the subject of the appellant’s request. The city also submits the records contain the name, address, telephone number and personal views or opinions of the affected party. The city submits the information relates to the affected party in their personal capacity and that the information was submitted in confidence.

[12] The affected party submits the records contain their name, address, telephone number, and personal opinions. The affected party submits the information at issue would, if disclosed, serve to identify them even if their name and contact information was severed from the records.

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<sup>1</sup> The city also claimed the law enforcement exemption at section 38(a), read with section 8(1)(d), applies to the records. It is not necessary for me to consider this exemption claim given my findings regarding section 38(b).

<sup>2</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[13] In her representations, the appellant did not address whether the records contain her personal information or that of any other individual.

[14] I find the records contain the personal information of the appellant and the affected party. Specifically, I find the records contain their names, contact information, personal views or opinions, and opinions or views of another individual about them, which is considered personal information under paragraphs (d), (e), (g) and (h) of the definition of *personal information* in section 2(1) of the *Act*. I also find some of the information at issue is correspondence the affected party sent the city that is implicitly or explicitly of a private or confidential nature, which is considered personal information under paragraph (f) of the definition of *personal information*. Finally, I find the information to fit under the introductory wording of the definition of *personal information* in section 2(1) as "recorded information about an identifiable individual."

[15] I confirm the city only severed the personal information of the affected party from the email correspondence at issue. The city disclosed the remainder of the email correspondence to the appellant. I find most of the affected party's correspondence relates to them entirely. In the case of the affected party's statements or opinions, I find these portions contain the mixed personal information of the appellant and the affected party. I make this finding because some portions of the affected party's correspondence contain the personal views and opinions of the affected party and these personal views and opinions relate to the appellant (paragraphs (e) and (g) of the section 2(1) definition of personal information). Based on my review, I find the appellant and affected party's personal information is inextricably linked and cannot be severed in a way that only the appellant's personal information could be disclosed to her.

[16] In conclusion, I find the records at issue contain the personal information of the appellant and other identifiable individuals. Given this finding, I must determine whether the personal information at issue is exempt from disclosure under section 38(b) of the *Act*.

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

[17] 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.

[18] 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 another 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.

[19] Under section 38(b), if any of the exceptions in sections 14(1)(a) to (e) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). None of the section 14(1)(a) to (e) exceptions are applicable here.

[20] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), sections 14(2) to (4) offer guidance. If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). None of the circumstances in section 14(4) are present here.

[21] If, as in this case, section 14(4) does not apply, in deciding whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), I must consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.<sup>3</sup>

[22] If any of sections 14(3)(a) to (h) apply, disclosure of the personal information is presumed to be an unjustified invasion of personal privacy under section 38(b). 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.<sup>4</sup> 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).<sup>5</sup>

[23] The city submits the presumption in section 14(3)(b) applies to the information at issue because 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. The city submits the information and correspondence at issue relates to the complaint filed under the *Building Code Act, 1992*.<sup>6</sup>

[24] The affected party submits the presumption in section 14(3)(b) applies to the records as well. The affected party submits the records relate to a complaint made to the city regarding a law enforcement matter under the *Planning Act*.<sup>7</sup> The complaint related to non-compliance with a zoning by-law and the *Building Code Act, 1992* resulting from construction without a building permit. The affected party submits the correspondence at issue, between the affected party and an employee of the Building Inspection Services section of the city, relates to a possible violation of law.

[25] The appellant did not address the application of the personal privacy exemption

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<sup>3</sup> Order MO-2954.

<sup>4</sup> Order P-239.

<sup>5</sup> Order P-99.

<sup>6</sup> S.O. 1992, c. 23.

<sup>7</sup> R.S.O. 1990, c. P. 13

to the information she requested. However, she provided copies of materials that were sent to the Committee of Adjustment by the individual she believes to be the affected party. The appellant claims these submissions were sent to a public hearing and this individual identified their name, address, and confirmed they filed the complaint. The appellant submits that, given these circumstances, there is no invasion of personal privacy because the complainant already agreed to the disclosure of their information to the public.

[26] I cannot confirm the identity of the affected party. In any case, I find that even though an individual may have consented to the disclosure of their personal information in one forum, it does not mean they consented to the disclosure of their personal information generally. The affected party did not consent to the disclosure of any information relating to them in the records; in fact, the affected party provided submissions claiming that the information they submitted to the city is their personal information and exempt from disclosure. Therefore, I find the appellant's arguments do not weigh in favour of the disclosure of the information at issue.

[27] Based on my review of the records, I am satisfied the presumption in section 14(3)(b) applies to the information at issue. I agree with the city and the affected party that the presumption in section 14(3)(b) applies as the personal information was compiled and is identifiable as part of investigations into possible violations of city by-law. This presumption has been found to apply to a variety of investigations, including those related to by-law enforcement.<sup>8</sup> From a review of the records, it is unclear whether charges were laid after this investigation. In any case, even if no charges were filed against an individual in relation to the incident or they were later withdrawn, section 14(3)(b) may still apply. The presumption only requires there be an investigation into a *possible* violation of law.<sup>9</sup> Upon review of the email correspondence before me, I find section 14(3)(b) applies to the personal information at issue and its disclosure is presumed to be an unjustified invasion of the affected party and other identifiable individuals' personal privacy.

[28] Under section 38(b), any presumptions in section 14(3) that have been found to apply must be weighed with any factors in section 14(3) that are relevant. Those presumptions and factors must be balanced against the interests of the parties. No other presumptions in sections 14(3) have been claimed or are relevant to this appeal.

[29] The city submits the factor weighing against disclosure of the personal information at issue in section 14(2)(h) applies. The city submits the information was provided by the affected party in confidence for the purposes of conducting a by-law inspection regarding a possible violation of law. In order for section 14(2)(h) to apply, both the individual supplying the information (in this case, the affected party) and the recipient (the city) must have an expectation the information will be treated

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<sup>8</sup> See Orders MO-2147 and MO-3686.

<sup>9</sup> Orders P-242 and MO-2235.

confidentially, and that expectation must be reasonable in the circumstances. Section 14(2)(h) requires an objective assessment of the reasonableness of any expectation of confidentiality.<sup>10</sup> Based on my review, I am satisfied the affected party supplied the personal information in the record in confidence and the factor in section 14(2)(h) applies. Neither the appellant nor the affected party raised any other factors, listed or unlisted, and I find none apply. I have found the presumption against disclosure at section 14(3)(b) applies. I have also found the factor weighing against disclosure in section 14(2)(h) applies. I have found that none of the factors weighing in favour of disclosure apply. Balancing the interests of the parties against the relevant presumption and factor, the facts of this appeal weigh against the disclosure of the personal information at issue.

[30] Therefore, I find that disclosure of the personal information at issue would constitute an unjustified invasion of the personal privacy of identifiable individuals, specifically the affected party, within the meaning of the exemption in section 38(b).

### ***Exercise of Discretion***

[31] The exemption at section 38(b) is discretionary, meaning the institution can decide to disclose information even if it qualifies for exemption. The institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[32] In addition, the IPC may find the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose, it considers irrelevant considerations or fails to consider relevant considerations. In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>11</sup> The IPC cannot, however, substitute its own discretion for that of the institution.<sup>12</sup>

[33] The city submits it exercised its discretion to withhold the personal information at issue under section 38(b) properly. The city submits it considered the purposes of the *Act*, which include the protection of individual's personal privacy. The city states it consulted the affected party regarding the disclosure of their personal information and the affected party did not consent to the disclosure of their personal information. The city submits the records are correspondence records directly related to the investigation of a by-law infraction and disclosure of the information would reveal the identity of a confidential complainant. Finally, the city submits it considered its historic practice regarding by-law complaints, where it traditionally guarantees the confidentiality of complainants.

[34] The appellant takes the position the information should be disclosed to her

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<sup>10</sup> Order PO-1670.

<sup>11</sup> Order MO-1573.

<sup>12</sup> Section 43(2).

because the affected party disclosed their identity to the Committee of Adjustments and has effectively consented to the disclosure of the information at issue.

[35] I have considered the parties' representations, the information at issue and the circumstances of this appeal. I find the city exercised their discretion under section 38(b) properly in withholding the information. I am satisfied the city considered relevant factors when exercising their discretion. Specifically, the city considered the purposes of the *Act* and the personal privacy exemption at section 38(b), the nature of the information at issue, the city's historic practice regarding this type of correspondence, the affected party's privacy interests, and the appellant's right of access. I am satisfied the city considered the relevant factors and did not take irrelevant factors into account when it made its decision. Finally, there is no evidence to demonstrate the city exercised its discretion in bad faith or for an improper purpose.

[36] With regard to the appellant's position, as mentioned above, the fact the affected party may have identified themselves publicly in a separate proceeding does not constitute consent to the disclosure of all information they may have provided to the city in relation to this complaint. As such, I find this factor is not a relevant consideration to take into account in my review of the city's exercise of discretion.

[37] In conclusion, I find the city properly exercised its discretion under section 38(b) to not disclose the information at issue to the appellant and I uphold its decision.

**ORDER:**

I uphold the city's decision and dismiss the appeal.

Original signed by: \_\_\_\_\_  
Justine Wai  
Adjudicator

December 22, 2023 \_\_\_\_\_