

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4538

Appeal MA22-00114

The Corporation of the City of Oshawa

June 28, 2024

Summary: The city denied access to records relating to a trespass notice issued by it to the appellant. Responsive records were withheld pursuant to section 38(a) (discretion to refuse requester's own information) read with law enforcement exemptions at section 8(1) of the *Act*. In this order, the adjudicator upholds the city's decision to deny access to responsive records pursuant to section 38(a) read with section 8(1)(e) (endanger life or safety).

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, sections 2(1) (definition of "personal information"), 8(1)(e) and 38(a).

OVERVIEW:

[1] This appeal concerns a trespass notice that was issued by the Corporation of the City of Oshawa (the city) to the appellant prohibiting him from entering most of the city's property for two years.

[2] The appellant filed a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to the trespass notice. The city issued a decision denying access to the responsive records pursuant to section 38(a) read with various law enforcement exemptions in section 8(1) of the *Act*.

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

[4] An IPC adjudicator sought, received and shared the parties' representations in accordance with the IPC's *Practice Direction 7*. The appeal was then transferred to me to continue the inquiry. I reviewed the records at issue and the materials exchanged in the inquiry and decided that I did not require further representations before making my decision.

[5] For the reasons that follow, I uphold the city's decision to withhold the records at issue under section 38(a) read with section 8(1)(e) of the *Act*. Given my finding, I do not need to determine the application of other exemptions.

RECORDS:

[6] There are two records at issue: notes and an incident report.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?
- B. Does the discretionary exemption at section 38(a), allowing the city to refuse access to appellant's own personal information, read with the section 8(1) law enforcement exemption, apply to the records?
- C. Did the city exercise its discretion under section 38(a)? If so, should the IPC uphold the exercise of discretion?

DISCUSSION:

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

[7] 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 general right of access to one's own personal information.

[8] Because the request relates to information about the appellant, it is therefore necessary to first consider whether the records contain "personal information," and if so, to whom the personal information relates.

[9] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual." Information is "about" an individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Section 2(1) of the *Act* gives a list of examples of personal

information, but the list is not exhaustive. This means that other kinds of information could also be "personal information."¹

Analysis and finding

[10] The city submits, and I accept, that the records contain information that qualifies as the appellant's personal information. The appellant did not provide representations on this issue. The records contain the appellant's address and phone number, communication of a personal nature from the city to the appellant and between the city and the appellant, description of the appellant's conduct, his personal opinions, and his name in the context of the preceding information.

[11] Given that the records contain the appellant's personal information, the law enforcement exemption must be considered in conjunction with section 38(a).

Issue B: Does the discretionary exemption at section 38(a), allowing the city to refuse access to appellant's own personal information, read with the section 8(1) law enforcement exemption, apply to the records?

[12] The discretionary nature of section 38(a) 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 own personal information.²

[13] In this case, the institution relies on section 38(a) read with sections 8(1)(a), (c), (e) and 8(2)(a). Given my finding that exemption at section 38(a) read with section 8(1)(e) applies, I do not need to consider the application of other exemptions. For this reason, the following discussion focuses on my reasons for upholding exemption at section 38(a) read with section 8(1)(e).

[14] The law enforcement exemption must be approached in a sensitive manner because it is hard to predict future events in the law enforcement context, and so care must be taken not to harm ongoing law enforcement investigations.³

[15] However, parties resisting disclosure of a record cannot simply assert that the harms under section 8 are obvious based on the record. They must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 8 are self-evident and can be proven simply by repeating the description of harms in the *Act*.⁴ Parties resisting disclosure must show that the risk of harm is real and not just a possibility.⁵ However, they do not have

¹ Order 11.

² Order M-352.

³ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

⁴ Orders MO-2363 and PO-2435.

⁵ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

to prove that disclosure will in fact result in harm.

Section 8(1)(e)

[16] Section 8(1)(e) states:

(1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

(e) endanger the life or physical safety of a law enforcement officer or any other person.

[17] For section 8(1)(e) to apply, there must be a reasonable basis for concluding that *disclosure* of the information at issue could be expected to endanger someone's life or physical safety. A person's subjective fear, or their sincere belief that they could be harmed, is important, but is not enough on its own establish this exemption.⁶

[18] The term "person" is not necessarily limited to a specific individual. It can include the members of an identifiable group or organization.⁷

Parties' Representations

[19] The city relies on the trespass notice and criminal charges in submitting that its reasons for resisting the disclosure of the records are not frivolous or exaggerated. In confidential representations, the city describes its basis for having issued the trespass notice. The city says that the information provided by individuals who submit complaints to it, the city's process of responding to those complaints, and its process of issuing trespass notices is confidential. The city adds that the information provided by individuals who file complaints remains confidential to protect their identity. The city also submits that the police laid charges on the appellant as a result of his conduct. Finally, in confidential portions of its representations, the city explains whose lives or physical safety could be endangered by the disclosure of the records and the reasons for its position.

[20] The appellant submits that, on the day described in the incident report, he did not engage in conduct that could have triggered a concern. The appellant also disputes the grounds on which the city issued the trespass notice and the police laid charges against him. The appellant says that he has appealed the trespass notice.

Analysis and finding

[21] Considering the nature of the interests protected by the exemption and the difficulty of predicting events in a law enforcement context, I find that the city has established that its reasons for resisting disclosure of the records are not frivolous or

⁶ Order PO-2003.

⁷ Order PO-1817-R.

exaggerated. I acknowledge that there is no evidence before me that the appellant engaged in physical violence and the appellant's statement that he did not engage in conduct that could have raised a concern on the day captured by the incident report appears to be borne out by the information at issue. However, a danger to life or physical safety is not restricted to a physical attack⁸ and establishing the exemption does not require that the city prove with certainty that the harm will occur.

[22] Having reviewed the records and city's supporting documentation, I find that the disclosure of the records could reasonably be expected to trigger conduct that resulted in the trespass notice and ongoing criminal prosecution. The appellant's prior conduct was of sufficiently severe nature to have resulted in the city issuing a trespass notice and police laying criminal charges against him. In light of the information contained in the records, there is a reasonable basis to conclude that the release of the information in the records could create the context that would result in the appellant exhibiting the same pattern of behaviour.

[23] I acknowledge that the appellant appealed the trespass notice because he disagrees with the city's decision to issue it and that he disputes that there were grounds to lay criminal charges against him. However, it is for the city and the court, respectively, to address the appellant's concerns about the trespass notice and charges. The issue before me is whether the city had reasonable basis to withhold the records based on the harms set out at section 8(1)(e). As explained above, I find that the city had such a reasonable basis.

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

[24] Under section 38(a), the institution must exercise its discretion about whether to grant an individual access to their own personal information.

[25] On appeal, the IPC may determine whether the institution failed to do so. In addition, the IPC may find that the institution erred in exercising its discretion where, for example,

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

[26] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.⁹ The IPC cannot, however, substitute its

⁸ Order PO-1940, PO-3740 at para 80.

⁹ Order MO-1573.

own discretion for that of the institution.¹⁰

Parties' representations, analysis and finding

[27] The city submits that it took all relevant considerations into account when it decided not to disclose the records to the appellant. The city says that it considered the following:

- the purpose and principles of the *Act*;
- the wording of law enforcement exemptions that it relied on and the interests that they seek to protect;
- whether the appellant is seeking his own personal information;
- the reason for the appellant's access request;
- the relationship between the appellant, the city and affected parties;
- the nature of the information, the context of its creation and the extent to which it is sensitive/significant to parties involved;
- city's historical practices with respect to the disclosure of similar records;
- its practices with respect to the procedures that it uses to investigate security incidents and to gather information to support the issuance of trespass notices;
- its legal obligations to protect the safety of its employees, members of council and visitors;
- the intent of the trespass by-law;
- ongoing legal matters related to the appellant; and
- discussions during the mediation.

[28] The appellant does not make direct representations on the issue of the city's exercise of discretion. However, I understand him to argue that the city unfairly withheld the records and I have taken this into account in reaching the following conclusion.

[29] I am persuaded by the city's representations that it took relevant considerations into account when it decided not to disclose the records to the appellant. I find that the city did not consider irrelevant matters or exercise its discretion in bad faith or for improper purpose.

¹⁰ Section 43(2).

ORDER:

I uphold the city's decision to withhold the records and dismiss the appeal.

Original Signed by: _____
Anna Kalinichenko
Adjudicator

_____ June 28, 2024