Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

INTERIM ORDER MO-2133-I

Appeal MA06-262

County of Brant

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NATURE OF THE APPEAL:

The requester submitted a two-part request to the County of Brant (the County) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for:

> Each, any, all and every mention of myself in any files, minutes of Council meetings, recorded bilaw specific, including up to date pic's as of 2000 foreward. property [identified address].
>
> and
>
> Each, any, all and every item's of personal info, as of 2000 foreward.

The County identified five records or record groups, each comprising multiple documents, as being responsive to the request. The County then granted access to two records and applied the exemptions found in sections 8(1)(a), 8(1)(b) (law enforcement) and 12 (solicitor-client privilege) of the *Act* to deny access to the remaining three record groups (hereinafter referred to as the records), in their entirety.

The requester (now the appellant) appealed the County's decision.

During mediation, the appellant confirmed that he is appealing the County's denial of access to the three outstanding records. It should be noted that some of the documents pre-date the parameters set out in the appellant's request. However, the County indicated that the matter to which the records relate is on-going, and the pre-2000 documents are relevant to the overall issue. It was agreed between the parties that these documents would be included in the records at issue.

The County issued a supplementary decision in which it added the exemptions found in sections 38(a) (discretion to refuse requester's own information in conjunction with sections 8 and 12) and 38(b) (invasion of privacy) to deny access to Records 1 and 2.

No issues were resolved during mediation and the file was referred to me for adjudication. I sought representations from the County, initially. The County submitted representations in response and they were shared, in their entirety, with the appellant, who was also asked to make submissions. The appellant did not submit representations. However, in a telephone call to the Adjudication Review Officer (ARO) assigned by this office, the appellant stated that he was not interested in obtaining the personal information of anyone other than himself.

RECORDS:

The three records remaining at issue are:

1. By-law Inspection Report [access denied under section 38(a) of the *Act*, in conjunction with sections 8(1)(a) and 8(1)(b), and section 38(b) of the *Act*];

2. By-law Inspection Background Notes to File (undated) together with photographs [access denied under section 38(a) of the *Act*, in conjunction with sections 8(1)(a) and 8(1)(b), and section 38(b) of the *Act*];

3. Correspondence from the Legal and Enforcement Services Office to the County of Brant Solicitor together with a response from the County of Brant Solicitor dated April 27, 2006 [access denied under sections 12 and 38(a) of the *Act*].

DISCUSSION:

PERSONAL INFORMATION

General principles

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "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 where 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;

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 [Order 11].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The County does not address this issue in its representations. I have, therefore, reviewed the records to determine whether they contain personal information and, if so, to whom the personal information relates.

Record 1 contains the appellant's first name and address as well as the name of a numbered company owned by him. It also contains the name and address of a complainant as well as information about the complaint and the manner in which it was dealt. The complaint relates to the use of his land by the appellant, as opposed to being information strictly about the property. Although the record relates to a corporate entity, it is apparent that the appellant is the sole owner and that he is personally responsible for the activity undertaken on the property. Accordingly, I find that this record contains the personal information of the appellant and another identifiable individual, the complainant.

Record 2 comprises a number of different documents, which contain the appellant's full name and address, as well as information about his numbered company, and the name and address of another person who is connected to another numbered company. It also contains information about the appellant's business, including photographs taken at the site of his business and communications from the County relating to the use to which the property was being put. Although the information appears to be related to the appellant's business, I find in the circumstances that it pertains to allegations of illegal activity for which the appellant would be liable. I, therefore, find that the information in Record 2 qualifies as his personal information. In the circumstances, I find that the record also contains the personal information of the other identifiable individual, as similar issues arise relating to that person's use of the subject property.

Record 3 also comprises a number of documents of which only one page refers to the appellant by name. However, the circumstances surrounding this matter that have brought him and his company to the attention of the Country are discussed in the record as a whole. I find that Record 3, in its entirety, contains the appellant's personal information, as he is identifiable by context. The record also refers to the use to which the property was put by the previous corporate owner. Because the matter relates to an investigation into illegal use of the property, I find that Record 3 also contains the personal information of the previous owner of the numbered company.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

As noted above, I have found that all three records contain the appellant's personal information. 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. Under section 38(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information.

SOLICITOR-CLIENT PRIVILEGE

The County has claimed that solicitor-client privilege, the discretionary exemption found at section 12 of the *Act*, applies to exempt Record 3.

Section 12 of the *Act* reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 12 contains two branches: common law and statutory. The County does not indicate on which branch it relies. The burden of proof rests on the County to establish that one or the other (or both) branches apply.

Common law solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice (*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)).

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation (Order P-1551).

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach (*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)).

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice (*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27). Confidentiality is an essential component of the privilege. Therefore, the

institution must demonstrate that the communication was made in confidence, either expressly or by implication (*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)).

Statutory solicitor-client communication privilege

The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies. Statutory solicitor-client communication privilege applies to a record that was "prepared by or for counsel employed or retained by an institution for use in giving legal advice."

Representations and Analysis

The County's representations are extremely sparse with respect to this exemption claim. It states simply that, "[t]he record…shows that the information was solicited for the purpose of obtaining input and advice from the County's solicitor". As I noted above, the appellant did not submit representations. The record itself, however, forms part of the evidence in this appeal.

I have reviewed this record and, on its face, it clearly identifies the request for a legal opinion made by an employee of the County and the legal opinion delivered by an external legal counsel retained by the County. The record also contains background documents that were attached to the request for the opinion and referred to in that request to assist legal counsel in providing her opinion. I find that Record 3, in its entirety, is a confidential solicitor-client communication made in relation to the giving or receiving of legal advice. I, therefore, find that this record qualifies for exemption under both branches of the section 12 exemption.

LAW ENFORCEMENT

The County has claimed the application of sections 8(1)(a) and (b) to the information in Records 1 and 2. The relevant sections read:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result …

The term "law enforcement" is defined in section 2(1) as follows:

> "law enforcement" means,

> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in clause (b)

In determining the application of the law enforcement exemption claimed by the County, several well-established principles must be considered. Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

Except in the case of section 8(1)(e), which is not at issue in this appeal, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

Furthermore, the section 8(1)(a) and (b) exemptions do not apply where the law enforcement matter or investigation is completed, or where the alleged interference is with "potential" law enforcement matters [Orders PO-2085, MO-1578].

Section 8(1)(a) and (b): Interference with Law Enforcement Matter or Investigation

The County indicates that the records were reviewed in consultation with the by-law enforcement officer conducting a by-law enforcement investigation. The County stated further that:

> It was determined that all records in the file were directly related to the ongoing investigation with the potential to be produced as evidence should the matter proceed to a formal charge. It is the [County's] policy to refuse access to information collected as part of an investigation and the [County] relies on section 8 of the [*Act*] for this refusal. Central to the investigation are the questions of whether the property use conforms with the County's zoning bylaw, whether the appellant is operating a business from the property and if the business use is to

> continue does this business use require a licence under the County's licensing bylaw…
>
> The [County's] position remains that the records contained in the bylaw investigation file were collected and used for the purposes of bylaw enforcement as contemplated in section 8 of the [*Act*] and therefore the [County] correctly applied the exemptions found in the statute when access was refused…[Y]our office was notified that subsequent to the decision issued by this office a charge has been laid as a result of the investigation.

For the section 8(1)(a) or (b) exemptions to apply, the County must demonstrate the following:

(i) the activity of the By-law Enforcement officer in investigating a by-law complaint constitutes "law enforcement";

(ii) there are "matters" or "investigations" in existence; and

(iii) the disclosure of the records at issue in this appeal could reasonably be expected to interfere with an ongoing law enforcement matter or investigation.

Many previous orders of this office have found the term "law enforcement" to apply in the context of a municipality's investigation into a possible violation of a municipal by-law [see: Orders M-16, MO-1245, for example]. I agree with the findings in these previous orders, and conclude that the records pertain to law enforcement.

I am also satisfied that the information in the records at issue was prepared during a specific investigation. The investigation concerns whether the appellant is in compliance with the County's by-laws, has resulted in charges being laid, and thus constitutes a law enforcement "matter".

Based on the County's submissions, however, I am not persuaded that disclosure of the records could *reasonably* be expected to interfere with the law enforcement matter or investigation. It is clear from the County's submissions that it has taken a blanket approach to records that are subject to an investigation and enforcement. In doing so, the County suggests that simply linking a record in such a way is sufficient to engage the application of the exemption. It is equally clear from previous orders and case law noted above, that an institution must examine the information at issue and determine whether the harms contemplated by disclosure could reasonably be expected to occur.

In my view, the evidence tendered by the County in support of its contention that the information in the records is exempt from disclosure under sections 8(1)(a) and (b) falls short of being sufficiently "detailed and convincing". The County has failed to make a sufficient evidentiary link between the disclosure of the records and the harm addressed by either of these sections. In reviewing the content of Records 1 and 2, I cannot agree that any portion that might reasonably

be considered to contain investigative information, the disclosure of which could reasonably be expected to interfere with the law enforcement matter, and the County has not provided any specific information to support such a claim. The onus is on the County to provide detailed and convincing evidence, for example, specific examples of the types of harm envisioned. In the absence of such examples, a blanket assertion that the disclosure of this information will interfere with a law enforcement matter or investigation is insufficient to establish the application of either exemption.

Moreover, according to the County's submissions, the investigation resulted in charges being laid against the appellant. Previous orders have found that once a law enforcement matter has reached the prosecution stage, disclosure of the record could not reasonably be expected to interfere with an *ongoing* investigation (Orders P-1584 and PO-1833). As in these previous orders, the law enforcement matter in this case has progressed beyond the investigation stage, and is now in the prosecution phase. In the absence of any evidence to the contrary, I conclude that there is no current investigation of the matter, and, therefore, section 8(1)(b) cannot apply.

In view of the above, I find that the County has failed to establish the application of either section 8(1)(a) or (b) to the information contained in Records 1 and 2. These sections are, therefore, not applicable. Accordingly, it is not necessary for me to consider the County's exercise of discretion under section 38(a) with respect to the section 8 exemption claims.

EXERCISE OF DISCRETION

The section 12 and 38(a) exemptions are discretionary and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

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

In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations (Order MO-1573). This office may not, however, substitute its own discretion for that of the institution (section 43(2)).

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- 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
    - the privacy of individuals should be protected
    - the wording of the exemption and the interests it seeks to protect
    - whether the requester is seeking his or her 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
    - the age of the information
    - the historic practice of the institution with respect to similar information

The County did not provide submissions regarding its exercise of discretion with respect to the application of section 12 or 38(a) to Record 3. Because of the paucity of information contained in its representations, it is not possible to glean any explanation as to how or whether the County undertook this exercise before denying access to the requested information. Accordingly, I will remit this matter back to the County and require it to exercise its discretion in accordance with the principles set out above.

INVASION OF PRIVACY

General Principles

I have found that the records also contain the personal information of other identifiable individuals. As noted above, 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.

Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

Sections 14(1) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold under section 38(b) is met.

If the presumptions contained in paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to constitute an unjustified invasion of privacy, unless the information falls within the ambit of the exceptions in section 14(4), or if the "public interest override" in section 16 applies [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

In the circumstances, it appears that the presumption at section 14(3)(b) may apply. This section states that:

> 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;

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 [Order P-242].

The County did not specifically address this issue in its representations. However, in providing background to the appeal, the County stated that the records at issue consist of "an active by-law enforcement investigation file". The County stated further that at the time it made its decision, all of the documents contained in the records at issue were directly related to the on-going investigation with the potential to be produced as evidence should the matter proceed to a formal charge. During mediation and reiterated in its representations, the County has confirmed that a charge has been laid as a result of the investigation conducted by the County into the appellant's use of the property.

As I noted above, the appellant did not make submissions. However, he indicated verbally that he is not seeking the personal information of any other individual. I have, nevertheless, decided to consider the application of the exemptions in sections 14(1)/38(b) to the information contained in the records.

The records pertain to the County's investigation relating to enforcement of its zoning, land use and licensing by-laws. In my view, it is clear that the personal information in the records, which relates to individuals other than the appellant, was compiled and is identifiable as part of an investigation into a possible violation of the County's zoning and licensing by-laws. Therefore, I find that the presumption in section 14(3)(b) of the *Act* applies to the personal information pertaining to identifiable individuals other than the appellant.

Once 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. [*John Doe*, cited above]. I have considered the application of the exceptions contained in section 14(4) of the *Act* and find that the personal information at issue does not fall within the ambit of this section. As a result, I find that it qualifies for exemption under section 38(b).

Absurd result

Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 38(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451]

- the requester was present when the information was provided to the institution [Orders M-444, P-1414]

- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]

However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principal may not apply, even if the information was supplied by the requester or is within the requester's knowledge [Orders M-757, MO-1323, MO-1378].

In this case, several of the documents contained in Record 2 consist of public documents relating to the property that were compiled by the by-law enforcement officer during his investigation. Some of these documents contain the personal information of an individual other than the appellant. There is nothing on the face of these documents that would link them to an investigation and the individual is clearly known to the appellant as they were involved in a business transaction/arrangement. In these circumstances, I am not persuaded that disclosure of this information would be inconsistent with the purpose of the exemption.

Consequently, I find that the discretionary exemption in section 38(b) does not apply to these portions of Record 2.

Severance

Where a record contains exempt information, section 4(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information. A head will not be required to sever the record and disclose portions where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed [Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.)].

I find that none of the personal information of the other identifiable individual contained in Record 3 can be reasonably severed as it is intertwined with that of the appellant. However, I also conclude that the personal information of the other individual contained in Record 2 can be easily separated from that pertaining solely to the appellant and can, therefore, be severed out. Similarly, the personal information relating to the complainant is mostly self-contained in Record 1 and can, therefore, be separated. The written information in this record relating to the complaint can also, for the most part, be disclosed as to do so would not reveal the identity of the complainant. A small portion of the complaint may lead the appellant to be able to identify the complainant and this information should be withheld. The remaining portions, however, cannot be described as "disconnected snippets", or "worthless", "meaningless" or "misleading" information.

EXERCISE OF DISCRETION

The section 38(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

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

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

The County did not provide representations on its exercise of discretion with respect to section 38(b) of the *Act*. In the circumstances, I would be inclined not to send this matter back to the County, given the appellant's verbal indication to the ARO that he did not want to obtain another individual's personal information. However, because, I have found that Record 3 qualifies for exemption under section 12/38(a), which are also discretionary exemptions, I will require the County to exercise its discretion regarding disclosure of the personal information in the records under section 38(b), as well as the information that qualifies for exemption under sections 12 and 38(a).

I have attached to the copy of this order, highlighted copies of Records 1 and 2. The highlighted information should not be disclosed to the appellant as a determination has yet to be made regarding the application of section 38(b). However, as no exemptions apply to the remaining information in these two records, that information should be disclosed.

ORDER:

1. I order the County to provide the appellant with the information contained in Records 1 and 2 that has **not** been highlighted on the copies of these two records that I am attaching to the copy of this order that I am sending to the County. This information should be disclosed to the appellant by **January 22, 2007** but not before **January 17, 2007**.

2. I order the County to exercise its discretion under sections 12, 38(a) and 38(b) taking into account relevant considerations.

3. I order the County to provide me with representations on its exercise of discretion no later than **January 4, 2007**.

4. I will defer my final decision with respect to disclosure of Record 3 and the remaining personal information in Records 1 and 2 pending my review of the County's exercise of discretion as required by Provision 2.

5. In order to verify compliance with the terms of Order Provision 1, I reserve the right to require the County to provide me with copies of the records that are disclosed to the appellant.

6. I remain seized of this appeal in order to deal with the exercise of discretion issue, and any other issues that may be outstanding.

December 18, 2006

Laurel Cropley
Adjudicator