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

ORDER MO-2223

Appeal MA-060063-2

Township of Edwardsburgh/Cardinal

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NATURE OF THE APPEAL:

The Township of Edwardsburgh/Cardinal (the Township) received a multi-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to the construction of a building and a dock.

The Township did not make a full decision on access, initially. Instead, the Township identified records responsive to the multi-part request and provided the requester with a fee for obtaining access. The Township also advised that based on its preliminary review, the exemptions at sections 7(1) (advice or recommendations), 12 (solicitor-client privilege), 14(1) (personal privacy) and 14(5) (refuse to confirm or deny existence of a record) of the *Act* might apply.

The requesters (now the appellants) appealed the Township's interim decision and file MA-060063-1 was opened. That file was closed when the Township issued its initial decision letter. The Township enclosed with the decision letter an itemized list setting out the type of record requested and its position on any responsive records that pertained to the item.

The decision letter set out that the fee for access was $95.00 and that certain assessment information relating to Item 7 was held by the Municipal Property Assessment Corporation. The itemized list set out that there were no available records that were responsive to Items 4, 12, 13, 14 and 17 but that certain records responsive to Items 6, 8, 10, 15 and 16 would be released after the severing of any personal information and that certain records responsive to Items 1, 2, 3 and 8 would be released in full. In addition, the Township advised that it would have to obtain permission from the owner's of the drawings identified under Items 3 and 5 before they were released. Finally, the Township relied on the discretionary exemptions at sections 7(1) and 12 of the *Act* to deny access to an email exchange with a solicitor involving the seeking and giving of legal advice (Item 11) and the mandatory exemption at section 14(1) (personal privacy), in conjunction with the presumption in section 14(3)(b) (compiled as part of an investigation into a possible violation of law) to deny access to records responsive to Items 9 and 18 on the list.

The appellants appealed the decision and the amount of the fee. The appellants also alleged that the Township did not make reasonable efforts to locate all the records that were responsive to the request. This raised the adequacy of the Township's search for records as an issue in the appeal.

During mediation, the following took place:

- The appellants confirmed that they were satisfied with the Township's efforts to locate records responsive to Items 7, 12, 13, 14 and 16 on the list. As a result, the reasonableness of the Township's search for those particular records is no longer an issue in the appeal.

- The Township agreed to release two responsive records from its by-law enforcement unit and to conduct a further search for records responsive to Items 4, 8 and 17 on the list.

- The Township issued two supplementary decision letters. The first supplementary decision letter granted access in full to a note to a file and to a copy of a By-law Enforcement Occurrence Report. Its final supplementary decision letter granted the

appellants access to the remaining portion of a record it identified as being responsive to Item number 8 of the request after removing any non-responsive information. The last letter also advised that a supplementary search did not locate records responsive to Items 4 or 17 on the list. It was the Township's position that no such records exist.

- After receiving the last supplementary decision letter, the appellants indicated they were satisfied with the Township's efforts to locate records responsive to Items 4 and 17 on the list. The appellants also confirmed that access was no longer being sought to the withheld records pertaining to Items 3 and 5 on the list and to the information withheld from the records the Township identified as responsive to Items 6, 8, 9 and 10. Accordingly, although the appellants maintained their position that other records responsive to Item 8, being notes of a By-law Enforcement Officer regarding the investigation of a by-law complaint, ought to exist, the reasonableness of the Township's search for records responsive to Items 4 and 17 and access to the responsive information or records the Township withheld relating to Items 3, 5, 6, 8, 9 and 10 are no longer at issue in the appeal.

- The Township advised that it would be relying on the exemptions at sections 38(a) and (b) of the *Act* to deny access to any personal information of the appellants found in the records responsive to Items 11 and 18 on the list. The Township also advised that it was no longer relying on the application of section 14(5) of the *Act*. As a result, the application of that exemption is no longer at issue in the appeal.

- The mediator contacted four persons whose interests may be affected by the release of the records, for their position on disclosure. One of the affected persons consented to the disclosure of her personal information. Three others objected to the disclosure of any of their personal information.

Mediation did not resolve the appeal and the matter moved to the adjudication stage of the appeal process.

Still remaining at issue in this appeal is the reasonableness of the fee the Township is charging for access, the adequacy of the Township's search for records responsive to Item 8 on the itemized list and the application of the exemptions in sections 14(1) and 38(a) (in conjunction with sections 7 and 12) and 38(b) (with particular reference to the presumption in section 14(3)(b)) to the records responsive to Items 11, 15 and 18.

To commence the adjudication stage of the appeal process, I sent a Notice of Inquiry setting out the facts and issues in the appeal to the Township and four persons whose interests may be affected by disclosure (the affected parties), initially. The Township and the affected parties provided representations in response to the appeal. All the affected parties asked that their representations remain confidential. In my view, because all of the relevant arguments made by the affected parties are also advanced by the Township, it was not necessary to share their

representations with the appellants. A Notice of Inquiry, along with the representations of the Township, was then sent to the appellants, who provided representations in response. The appellants asked that a portion of their representations be withheld due to confidentiality concerns. I determined that the appellants' representations raised issues to which the Township should be given an opportunity to reply. Accordingly, I sent a severed copy of the appellants' representations to the Township, along with a letter inviting their representations in reply. The Township chose not to file any reply representations.

RECORDS:

The records remaining at issue consist of all, or portions of, the following records:

- An email exchange between the Township's Chief Administrative Officer/Clerk and outside counsel (Item 11 on the itemized list)
  [Exemption claimed: section 38(a) in conjunction with sections 7 and 12]

- An affected party's name severed from a note to file dated July 28, 2005 (Item 15 on the itemized list)
  [Exemption claimed: section 14(1) in conjunction with the presumption in section 14(3)(b)]

- Two letters of Complaint (Item 18 on the itemized list)
  [Exemption claimed: section 38(b) with particular reference to the presumption in section 14(3)(b)]

DISCUSSION:

ADEQUACY OF THE SEARCH FOR RECORDS

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer

> assistance in reformulating the request so as to comply with subsection (1).

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act* [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request [Order M-909].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

The appellants allege that other records responsive to Item 8, being notes of a By-law Enforcement Officer regarding the investigation of a by-law complaint, ought to exist.

The Township explains in its representations that in response to the request it searched four relevant property files, as well as property files that had similar assessment roll numbers, just in case a document had been misfiled. The Township also conducted a search of the "confidential" files maintained in the Chief Administrative Officer's office and reviewed a specific file folder that the Township identified. As part of the search process, the former Chief Administrative Officer/Clerk, the Chief Building Official (CBO), elected officials and the by-law enforcement officer were asked to search their files for responsive records.

As set out above, during mediation the Township provided the appellants with a letter detailing the further additional steps it took to locate responsive records.

Analysis and Finding

Upon receipt of the request, the Township conducted a search for responsive records. Another search was conducted during the mediation stage of this appeal. Although the appellants allege that further responsive records exist pertaining to Item 8 of the itemized list, as set out above, the *Act* does not require the Township to prove with absolute certainty that further records do not exist, but rather provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624]. In my view, the Township has provided

sufficient evidence to establish that it has conducted a reasonable search for records within its custody or control pertaining to Item 8 of the itemized list. Therefore, I dismiss this part of the appellants' appeal.

FEES

General principles

Section 45(1) of the *Act* provides that:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> (a) the costs of every hour of manual search required to locate a record;
>
> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
>
> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.

More specific provisions regarding fees are found in section 6 of Regulation 823 (as amended by O. Reg 22/96). This provision states:

> The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> 2. For floppy disks, $10 for each disk.
>
> 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.
>
> 4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.

5. For developing a computer program or other method of producing a record from a machine readable record, $15 for each 15 minutes spent by any person.

6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

Where the fee exceeds $25.00, the institution must provide the requester with a fee estimate. Where the fee is $100.00 or more, the institution may require the requester to pay a deposit equal to 50% of the fee estimate before the institution takes any further steps to process the request. A fee estimate of $100 or more must be based on either:

- The actual work done by the institution to respond to the request, or
- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records.

[Order P-81]

The Township is entitled to charge $7.50 for each 15 minutes (or $30 per hour) of search and/or preparation time (including severances), and, generally this office has accepted that it takes two minutes to sever a page that requires multiple severances [see Orders MO-1169, PO-1721, PO-1834, PO-1990].

This office may review an institution's fee to determine whether it complies with the fee provisions of the *Act* and Regulation 823. In determining whether to uphold a fee, my responsibility under section 45(5) is to ensure that the amount is reasonable. The burden of establishing the reasonableness of the fee rests with the Township. To discharge this burden, the Township must provide me with detailed information as to how the fee has been calculated in accordance with the provisions of the *Act*, and produce sufficient evidence to support its claim.

The Representations of the Township

In seeking to justify its fee estimate, the Township explains that files relating to specific properties are maintained in the Township CBO's office and the actual search for responsive records "included accessing and perusing" a number of property files, as well as some files of "a more confidential nature" kept in the office of the CAO. The Township submits that the amount of the original fee estimate was to cover the cost of three hours of search time and the cost of copying any responsive records it located. At the time the fee estimate was provided, the Township believed that three hours of search time would be sufficient and that 25 copies would be required. The Township submits that 4 hours were actually spent locating the responsive

records and that 17 pages of responsive records were copied and forwarded to the appellant to date.

The Representations of the Appellants

The appellants do not address the amount of the fee directly, only submitting that the fee is not fair. The appellants further state that if they had not appealed the Township's access decision "we would have got nothing even after we paid the fee".

Analysis and Finding

As set out above, the Township is entitled to charge $7.50 for each 15 minutes of time spent searching for or preparing the records for disclosure and 20 cents per page for each photocopy. Based on the representations of the Township with respect to the time it spent actually locating the responsive records, I have no difficulty in upholding the search time component of the fee estimate. In accordance with the findings made above, I uphold the Township's fee estimate for search time of $90.00. The Township also states that 17 pages of responsive records were copied and forwarded to the appellant. As only 17 copies were made, I will allow photocopy charges in the sum of $3.40.

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates.

Section 2(1) of the *Act* defines "personal information", in part, 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 an 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 where 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.

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.)].

As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621], but even if information relates to an individual in a professional, official or business capacity, it may still qualify as "personal information" if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225, PO-2435].

In my view, the chain of emails (Item 11) and the two letters of complaint (Item 18) contain the personal information of one or both of the appellants. This information qualifies as their personal information because it contains their names along with other personal information relating to them (paragraph (h)). I also find that these records also contain the personal information of the affected parties. This information qualifies as the personal information of the affected parties because it includes their address (paragraph (d)), is correspondence that is implicitly or explicitly of a private or confidential nature (paragraph (f)), or contains their names along with other personal information about them (paragraph (h)). The note to file (Item 15) does not contain the personal information of the appellants. However, the note does contain the personal information of an affected party because it includes his name along with other personal information about him (paragraph (h)).

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38(a) provides a number of exemptions from this right. It reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 6, **7**, 8, 8.1, 8.2, 9, 10, 11, **12**, 13, or 15 would apply to the disclosure of that personal information. [emphasis added]

SOLICITOR-CLIENT PRIVILEGE

The Township has claimed that the e-mail exchange between the Chief Administrative Officer/Clerk and outside counsel (Item 11 on the itemized list), retained by the Township to provide legal advice on zoning matters, is exempt under section 38(a), in conjunction with the discretionary exemption in section 12 of the *Act*.

Section 12 states as follows:

> 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 as described below. The institution must establish that one or the other (or both) branches apply.

Branch 1 – Common Law Privilege

Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 457 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

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].

As well, in *Lavallee, Rackel & Heinz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, the Supreme Court of Canada stated (at para. 36 of the judgment) that solicitor-client privilege "must remain as close to absolute as possible if it is to retain relevance". I will bear this in mind in assessing the application of section 12 in this appeal.

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.)].

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank* (cited above)].

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.

> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
>
> . . . . .
>
> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

Branch 2: Statutory Privileges

Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Statutory solicitor-client communication privilege

Branch 2 applies to a record that was "prepared by or for counsel employed or retained by an institution for use in giving legal advice."

Statutory litigation privilege

Branch 2 applies to a record that was prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation."

Analysis and Finding

At issue is an email exchange between the Township's outside counsel and its Chief Administrative Officer/Clerk. Based on my review of the record at issue and the circumstances surrounding its creation, I find that it represents confidential communications between a client and their solicitor made for the purpose of obtaining or giving professional legal advice. As a result, I find that the email exchange falls within branch 1 of section 12 of the *Act*. As a result, subject to the discussion of the Township's exercise of discretion below, I find that the exemption in section 38(a) applies to it.

As I have found the email exchange to be exempt under section 38(a), in conjunction with section 12, it is not necessary for me to also consider whether the email exchange falls within section 7(1) of the *Act*.

INVASION OF PRIVACY

General principles

Where a record contains personal information only of an individual other than the appellant, section 14(1) of the *Act* prohibits the Township from releasing this information, unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies.

Section 14(1)(f) provides that:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates,
>
> > except if the disclosure does not constitute an unjustified invasion of personal privacy.

Because section 14(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 14(1)(f) applies, I must find that disclosure of any personal information does **not** constitute an unjustified invasion of another individual's personal privacy.

If a record contains the personal information of the appellant along with the personal information of another individual, section 38(b) of the *Act* applies.

Section 38(b) of the *Act* reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

In order for disclosure to "constitute an unjustified invasion of another individual's personal privacy" under section 38(b), the information in question must be the personal information of an individual or individuals other than the person requesting it.

If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the Township may exercise its discretion to disclose the information to the appellants. This involves a weighing of the appellants' right of access to their own personal information against the other individual's right to protection of their privacy. This is addressed in the section on "exercise of discretion", below.

Under both sections 14(1)(f) and 38(b) the factors and presumptions in sections 14(2) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold is met.

Section 14(2) provides some criteria for the Township to consider in making this determination; section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established under section 14(3), it cannot be rebutted by either one or a combination of the factors set out in 14(2) (*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767 (*John Doe*)) though it can be overcome if the personal information at issue falls under section 14(4) of the *Act*, or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the exemption. [See Order PO-1764]

Although in this appeal an affected party has consented to the disclosure of their personal information, because the two letters of complaint (Item 18) contain the personal information of the appellants *as well as other affected parties*, it is still necessary to determine whether releasing the information of the consenting affected party would "constitute an unjustified invasion of another individual's personal privacy" under section 38(b).

Section 14(3)(b)

The Township originally claimed that the disclosure of the personal information contained in the note to file (Item 15) and the two letters of complaint (Item 18) would constitute a presumed unjustified invasion of personal privacy under section 14(3)(b) of the *Act*, which states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where 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 Township provided no representations on the note to file (Item 15).

With respect to the two letters of complaint (Item 18), the Township does not specifically refer to any sections of the *Act*, but rather submits that the letters were addressed to the Township and clearly marked "confidential". Furthermore, the Township submits that the expectation of the

writers was that the letters would not be disclosed. In addition, in the section of its representations on the exercise of discretion, the Township submits that:

> … Residents need to feel confident that they may file a complaint and that the source of the complaint will not be revealed. The [Township] does not act on anonymous complaints and we must be able to assure ratepayers that matters brought to our attention will be investigated with discretion.

Analysis and Findings

The note to file does not contain any of the personal information of the appellants. Hence, I am not applying the discretionary exemption at section 38(b), rather, I must simply consider whether the mandatory exemption in section 14(1) applies. I have reviewed the content of the note and in the circumstances of this appeal, I am satisfied that the information in the note to file was compiled and is identifiable as part of an investigation into a possible violation of law, namely the *Navigable Waters Protection Act*. As a result, I find that the presumption in section 14(3)(b) applies to the individual's name that the Township withheld. Accordingly, disclosure of this information is presumed to constitute an unjustified invasion of this individual's personal privacy. Section 14(4) and 16 do not apply to this information. Accordingly, it is exempt under the mandatory exemption at section 14(1) of the *Act*.

In my view the two letters of complaint do not fall within the scope of 14(3)(b). The Township indicated that the letters were compiled and are identifiable as part of an investigation into a possible violation of law, however, they do not specify what law that may be. I am not otherwise satisfied that the information in the letters was compiled and is identifiable as part of an investigation into a possible violation of law, as required by the presumption in section 14(3)(b). I am also satisfied that no other section 14(3) presumption applies to the information in the letters of complaint.

All the Relevant Circumstances in section 14(2)

As set out above, if a section 14(3) presumption does not apply, section 14(2) of the *Act* provides some criteria for the Township to consider in making a determination whether the "unjustified invasion of personal privacy" threshold is met.

Section 14(2) reads:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

(b) access to the personal information may promote public health and safety;

(c) access to the personal information will promote informed choice in the purchase of goods and services;

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(f) the personal information is highly sensitive;

(g) the personal information is unlikely to be accurate or reliable;

(h) the personal information has been supplied by the individual to whom the information relates in confidence; and

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

Neither the representations of the appellant nor the representations of the Township make reference to the application of any of the factors in section 14(2) to the two letters of complaint (Item 18). However, the appellants' submissions discuss various concerns about the conduct of the Township, particularly its by-law enforcement process. I interpret this as a submission that disclosure of the information would be desirable for the purpose of subjecting the activities of the Township to public scrutiny, a circumstance listed in section 14(2)(a). In addition to the circumstance listed in section 14(2)(a), the appellants' submissions also appear to raise another circumstance which is not listed in the section but is often considered in balancing access and privacy interests under section 14(2) in matters of this nature, i.e. that "the disclosure of the personal information could be desirable for ensuring public confidence in the integrity of the institution". However, I am not satisfied that releasing the information in the letters will accomplish either of those purposes. As a result I give these factors, which favour disclosure of the information, very minimal weight.

The two letters of complaint are clearly marked "confidential". Both the Township and the affected parties submitted that the letters were provided with the expectation that the information in them would be treated confidentially. It is evident from the content and the context in which they were sent that these records are of a confidential nature. This raises the application of the

consideration listed at section 14(2)(h), which I find to be a significant factor weighing in favour of the non-disclosure of the records.

I have carefully considered the matter and I find on balance that the factor favouring privacy protection at section 14(2)(h) clearly outweighs any factors favouring disclosure in this case, and disclosure of the letters would constitute an unjustified invasion of the personal privacy of certain affected parties. As a result, subject to my discussion on the exercise of discretion below, this information is exempt from disclosure under section 38(b).

SEVERANCES

Section 4(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. However, no useful purpose would be served by the severance of records where exempt information is so intertwined with non-exempt information that what is disclosed is substantially unintelligible. The key question raised by section 4(2) is one of reasonableness. 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.)]. With these principles in mind, and because the personal information of the appellants is so intertwined with the personal information of affected parties (including the affected party who provided her consent) I have concluded that it is not practicable to sever the two letters of complaint.

EXERCISE OF DISCRETION

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under the *Act*. Because sections 38(a) and (b) are discretionary exemptions, I must also review the Township's exercise of discretion in deciding to deny access to the withheld information. On appeal, this office may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.

I may find that the Township erred in exercising their discretion where, for example:

- it did so in bad faith or for an improper purpose
- it took into account irrelevant considerations
- it failed to take into account relevant considerations

In these cases, I may send the matter back to the Township for an exercise of discretion based on proper considerations [Order MO-1573].

The appellants submit that they are the subject of the letters of complaint and challenge the Township's exercise of discretion not to disclose the information in them. In the circumstances of this appeal, however, I conclude that the exercise of discretion by the Township to withhold the information that I have found to be exempt was appropriate, given the circumstances and nature of the information.

ORDER:

1. I find that the Township's search for responsive records is reasonable.

2. The fee that the Township may claim is $93.40.

3. I uphold the Township's decision to deny access to the email exchange between the Township's Chief Administrative Officer/Clerk and outside counsel (Item 11), the individual's name in the note to file (Item 15) and the two letters of complaint (Item 18).

Original signed by: September 5, 2007
Steven Faughnan
Adjudicator