



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER MO-2331**

**Appeal MA07-203**

**Township of Russell**



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## **NATURE OF THE APPEAL:**

The Township of Russell (the Township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to records related to a complaint about an incident involving the requester's dog. The requester specifically sought access to:

[a]ll records, personal information, that are in the Township of Russell's possession, concerning, leading up to, and subsequent to the Township of Russell's letter, addressed to me and my wife ... dated [specified date] and signed by [named individual].

The Township located 18 responsive records and issued a decision letter denying access to them pursuant to sections 8(1) and (2) (law enforcement) of the *Act*.

The requester, now the appellant, appealed the decision.

During mediation, the Township advised that it was prepared to disclose Records 4, 5, 6, 8, 10, 11, 12, 14, and 18 to the appellant. The records were provided to him and were subsequently removed from the scope of the appeal.

The appellant advised that he continues to pursue access to Records 1, 2, 3, 7, 9, 13, 15, 16, and 17.

During the mediation stage of the appeal process, the mediator raised the possible application of section 38(a), as well as the possible application of section 38(b) because some of the records might contain personal information belonging to the appellant. Sections 38(a) and (b) were therefore, added to the scope of the appeal.

Also during mediation, the mediator contacted the complainant (the affected party) to determine whether she consented to the disclosure of any personal information related to her. The affected party did not provide consent.

As further mediation was not possible, the file was transferred to the adjudication stage.

On my review of the file, I noted that in the Township's index of records that it provided to this office during mediation, it claims that Records 13, 15, 16 and 17 are subject to solicitor-client privilege. As a result, I added section 12 to the scope of the appeal.

I began my inquiry into this appeal by sending a Notice of Inquiry to the Township. The Township responded with representations. I also sent a Notice of Inquiry to the affected party. The affected party did not respond to the Notice.

I then sent the Notice of Inquiry to the appellant, along with the non-confidential portions of the Township's representations. The appellant provided representations in response.

## **RECORDS:**

The following records remain at issue in this appeal:

Record 1 – Complainer/offender record

Record 2 – Invoice from veterinary hospital

Record 3 – Invoice from a veterinary hospital

Record 7 – Complainant statement

Record 9 – Email correspondence between Township staff

Record 13 – Email correspondence between outside legal counsel and Township staff

Record 15 – Email correspondence between outside legal counsel and Township staff

Record 16 – Email correspondence between outside legal counsel and Township staff

Record 17 – Email correspondence between outside legal counsel and Township staff

## **DISCUSSION:**

### **PERSONAL INFORMATION**

Under the *Act*, different exemptions may apply depending on whether or not a record contains the personal information of the requester [Order M-352]. Where records contain the requester's own information and the information of other individuals, access to the records is addressed under Part II of the *Act* and the exemptions at section 38 may apply. Where the records only contain the personal information of individuals other than the appellant, access to the records is addressed under Part I of the *Act* and the exemptions found at sections 6 to 15 may apply.

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. 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 Township submits that the records at issue contain the personal information of the appellant as well as that of other individuals, including the complainant and other witnesses to the specific incident. It submits that this information includes names, addresses, telephone numbers, age, sex and family status.

The appellant submits that he has “no doubt that all records, less perhaps [Records] #2 and 3, identify [him], and as the Township represents, could identify others.” He also submits:

Undoubtedly there is some personal information identifying the complainant(s). The identifying information would constitute the complainant's personal information. Any statement, opinion, or views made about us, constitutes OUR

personal information. The [Act] section 2(1) “personal information” (g) applies in this case.

In the event that the personal information of others and our personal information are included on the same record, then the personal information of the others should be severed to create a record with only our personal information.

I have carefully reviewed the records at issue and find that Records 1, 7, and 9 contain the personal information of the appellant, the complainant and several witnesses or other individuals who were connected in some way to the incident. The personal information includes addresses, telephone numbers and family status, as well as names, together with other personal information about them. I also find that Records 1 and 7 include correspondence, sent to the Township by the complainant, of an implicitly personal nature.

I find that Records 13, 15, 16 and 17 contain the personal information of the appellant, including his name and other personal information about him. However, none of these records contain the personal information of any other individual.

Finally, I find that Records 2 and 3 do not contain the personal information of the appellant but do contain the personal information of the complainant including her address and details about financial transactions in which she has been involved, as well as her name together with other personal information about her.

As noted above, if a record does not contain the personal information of the appellant, but contains either the personal information of individuals other than the appellant or no personal information at all, a decision regarding access must be made in accordance with the exemptions in Part I of the *Act*. However, in circumstances where a record contains both the personal information of the appellant and another individual, the request falls under Part II of the *Act* and the decision regarding access must be made in accordance with the exemptions in that part.

Accordingly, access to the Records 1, 7, 9, 13, 15, 16 and 17, which contain the personal information of the appellant and other individuals, must be determined under Part II in accordance with the exemptions at sections 38(a) and (b).

Access to Records 2 and 3, which contain no personal information belonging to the appellant, must be determined under Part I in accordance with the exemptions at sections 8(1) and 14(1).

#### **RIGHT OF ACCESS TO ONE’S OWN PERSONAL INFORMATION**

Section 36(1) 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 his or her 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.

Even if the information at issue falls under one of the listed exemptions, the institution must still exercise its discretion in deciding whether or not to disclose the information to the requester.

In this case, the Township relies on section 38(a), read in conjunction with section 12 (solicitor-client privilege), to exempt Records 13, 15, 16 and 17 from disclosure.

The Township also relies on section 38(a), in conjunction with sections 8(1)(a), (b), (d) and (e) and 8(2)(a) and (c) (law enforcement) with regard to Records 1, 7, and 9. As Records 2 and 3 must be examined under Part I of the *Act*, the Township relies on sections 8(1)(a), (b), (d) and (e) and 8(2)(a) and (c) on their own to exempt those records from disclosure. However, as a result of my findings below with respect to the application of section 38(b) to Records 1, 7 and 9 and of section 14(1) to Records 2 and 3, it is not necessary for me to determine whether either of sections 38(a) or 8(1) or (2) applies to these records.

### **Solicitor-client privilege**

Section 12 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 privilege and statutory privilege. The institution must establish that one or the other (or both) branches apply. In this case, the Township takes the position that the common law privilege branch of the solicitor-client exemption applies to exempt Records 13, 15, 16 and 17 from disclosure.

The common law branch 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 the common law branch 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. (4<sup>th</sup>) 457 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

I will first address whether the first head of privilege under the common law branch, solicitor-client communication privilege, applies.

### ***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.)].

### ***Representations***

The Township submits that Records 13, 15, 16 and 17 are subject to solicitor-client privilege exemption at section 12 of the *Act*. It submits that these records consist of correspondence, both emails and letters, between the Township and outside legal counsel rendering or requesting legal advice. The Township also submits that this advice was provided in contemplation of litigation.

The appellant submits that any records prepared prior to a specific date not subject to solicitor-client privilege or 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. He states that prior to the specified date:

[t]here were no solicitors involved and the litigation at hand, namely judicial review, was not even contemplated at that time. Even if these records were eventually attached to, or used to prepare another record that is subject to common law or statutory solicitor-client communication privilege, or to common law or statutory litigation privilege, the original records are not privileged.

### ***Analysis and finding***

Based on my review of the records and the parties’ representations, I find that Records 13, 15, 16 and 17 contain the details of direct communications of a confidential nature between outside counsel hired by the Township and Township staff, created for the purpose of obtaining or providing professional legal advice. The letters and emails consist of advice sought and given with respect to a number of potential legal issues faced by the Township as a result of the incident involving the appellant’s dog. Accordingly, I find that Records 13, 15, 16 and 17 qualify as confidential solicitor-client privileged communications as they represent direct communications between a solicitor and his client for the purpose of obtaining or giving professional legal advice.

Whether or not the records at issue were prepared before or after any litigation was contemplated is relevant to determine whether common law litigation privilege applies. However, it is not relevant in determining whether the solicitor-client communication privilege applies. The solicitor-client communication privilege exists even in the absence of litigation. As I have found that the solicitor-client communication privilege applies, it is not necessary for me to determine whether or not common law litigation privilege applies to the records.

Accordingly, I find that the common law solicitor-client communication privilege component of section 12 applies to the records for which it was claimed. Subject to my review of the Township's exercise of discretion, I conclude that Records 13, 15, 16 and 17 are exempt from disclosure under section 38(a), read in conjunction with section 12 of the *Act*.

### **PERSONAL PRIVACY**

Section 38(b) is the relevant personal privacy exemption under Part II of the *Act*. It provides:

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.

The personal privacy exemptions under the *Act* are *mandatory* at section 14(1) under Part I and *discretionary* at section 38(b) under Part II. Put another way, where a record contains the personal information of both the appellant and another individual, section 38 (b) in Part II of the *Act* permits an institution to disclose information that it could not disclose if the exemptions at section 14(1) in Part I were applied [Order MO-1757].

Section 38(b) introduces a balancing principle, which involves weighing the requester's right of access to his own personal information against the other individual's right to protection of their privacy. The institution retains the discretion to deny the appellant access to information if it determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure of the information *would* constitute an unjustified invasion of another individual's personal privacy [Order M-1146].

In order for disclosure to "constitute an unjustified invasion of another individual's personal privacy" under either the discretionary exemption at section 38(b) or the mandatory exemption at section 14(1), the information in question must contain the personal information of an individual or individuals other than the person requesting it.

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 institution 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 [Order PO-1764].

As Records 1, 7, and 9 contain the personal information of the appellant as well as that of other individuals I will determine whether those records qualify for exemption under the discretionary exemption at section 38(b). Records 2 and 3 contain the personal information of individuals other than the appellant; therefore, I will review whether those records qualify for exemption under the mandatory exemption at section 14(1).

### ***Representations***

The Township submits that disclosure of Records 1, 2, 3, 7 and 9 would amount to an unjustified invasion of privacy because those records were compiled as part of a report that forms part of the Township's law enforcement investigation into an alleged violation of By-Law 69-90, entitled "A By-law to Provide for the Licensing of Dogs and the Regulating of the Keeping of Dogs".

The presumption at section 14(3)(b) reads:

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.

Although the appellant agrees that the only presumption that might apply in the circumstances of this appeal is section 14(3)(b), he submits that "the simple identification of another individual does not constitute a presumed 'unjustified invasion' of privacy". He also submits that "the information must be compiled as part of an investigation into a violation of law and not subsequent to the completion of any such investigation." [emphasis in original]

### ***Analysis and Findings***

Previous orders of the Commissioner have determined that a municipality's by-law enforcement process qualifies as a "law enforcement" matter for the purposes of section 2(1) of the *Act* [Orders M-16, M-582, MO-1295 and MO-1626]. I agree with the reasoning in those orders and adopt it for the purposes of this appeal.

Based on a careful review of Records 1, 2, 3, 7, and 9, I find that the nature and content of these records demonstrate that they were compiled and are identifiable as part of an investigation conducted by the Township into a possible violation of a municipal by-law. Specifically, the records relate to alleged infractions of the Township's By-law 69-90, entitled "A By-law to Provide for the Licensing of Dogs and the Regulating of the Keeping of Dogs", and to the Township's investigation into the alleged infractions.

Consistent with previous orders, I find that an investigation into municipal by-law infractions constitutes an investigation into a possible violation of law. Accordingly, I find that the records were compiled by the Township and are identifiable as part of its investigation. As a result, I find that the presumption at section 14(3)(b) applies to Records 1, 2, 3, 7, and 9. Therefore, the disclosure of the information contained in those records is presumed to constitute an unjustified invasion of the personal privacy of the individuals other than the appellant whose personal information is contained in them.

In my view, section 14(4) does not apply to any of the records. Additionally, the possible application of the public interest override at section 16 of the *Act* was not raised. Accordingly, I find that, subject to the possible application of the absurd result principle and my review of the Township's exercise of discretion, the discretionary exemption at section 38(b) applies to exempt Records 1, 7 and 9 from disclosure

As for Records 2 and 3, which do not contain the personal information of the appellant but only that of other individuals, I find that, subject to the possible application of the absurd result principle, the mandatory exemption at section 14(1) applies to exempt them from disclosure.

### **ABSURD RESULT**

Whether or not the factors or circumstances in section 14(2) or the presumptions in section 14(3) apply, where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under either section 38(b) or section 14(1), 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]

The appellant submits that, in the circumstances of this appeal, to refuse to disclose the information at issue would not be consistent with the purpose of the exemptions as no invasion

of privacy would occur. He submits that non-disclosure would amount to an 'absurd result'. The appellant explains that he already knows the name and address of the complainants and the other individuals involved in the incident as well as the facts and circumstances surrounding the incident. He submits that as he knows this information, to withhold it "would not be consistent with the objective of the [Act] and there would be an absurd result."

It is clear from the representations of the parties and the contents of the records that the information at issue relates to an incident involving both the appellant and his neighbours. I accept that the appellant knows the names of his neighbours as well as their address. I also accept that he is aware of the circumstances surrounding the incident. However, the Records 1, 2, 3, 7 and 9 contain more than mere names and addresses; as they include witness statements and other personal information belonging to individuals other than the appellant. As there is no evidence before me to indicate that the information that is contained in these records is within the appellant's knowledge, I find that the absurd result principle does not apply in the context of this appeal.

### **EXERCISE OF DISCRETION**

The exemptions at sections 38(a) and (b) 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.

I will now determine whether the Township appropriately exercised its discretion under section 38(a), read in conjunction with section 12, and section 38(b), read in conjunction with section 14(1), and if so, whether I should uphold the exercise of discretion.

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

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)].

In the circumstances of this appeal, I conclude that the exercise of discretion by the Township to withhold the information at issue from disclosure was appropriate, given the circumstances and nature of the information. Although the records contain personal information belonging to the appellant, Records 13, 15, 16 and 17 are clearly direct communications between a lawyer and his client that fall within the definition of solicitor-client privilege and Records 1, 7 and 9 clearly were compiled and are identifiable as part of an investigation into a possible violation of law. In my view, the sensitivity of this information and how it relates the purpose of those exemptions is

sufficiently significant to outweigh the access rights of the appellant under sections 38(a) and (b). In the circumstances, I find that the Township has properly exercised its discretion to withhold the personal information in the records.

Accordingly, I uphold the exercise of discretion by the Township and find that the records are exempt under sections 38(a) and (b) of the *Act*.

**ORDER:**

I uphold the Township's decision not to disclose the records.

Original Signed by: \_\_\_\_\_  
Catherine Corban  
Adjudicator

\_\_\_\_\_ July 23, 2008