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

ORDER MO-2415

Appeal MA08-123

City of Windsor

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NATURE OF THE APPEAL:

The requester submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Windsor (the City) for "all personal information and records held by City of Windsor & Parks & Recreation" relating to him.

The City identified 21 records as responsive to the request. The City issued a decision in which it granted access to eight of the records in their entirety, but denied access to the remainder, relying on section 38(b) (discretion to refuse requester's personal information), together with section 14(1) (personal privacy), and section 38(a), in conjunction with sections 7(1) (advice or recommendations) and 8 (law enforcement).

The requester, now the appellant, appealed the City's decision to this office, and a mediator was appointed to try to resolve the issues. As it was not possible to achieve a mediated resolution of the appeal, the file was transferred to the adjudication stage of the appeals process, where it was assigned to me to conduct an inquiry.

I sent a Notice of Inquiry outlining the facts and issues to the City, initially, to seek representations**,** which I received. With its representations, the City provided a copy of a revised decision letter, in which it disclosed several additional records to the appellant. The records disclosed as a result of this supplementary decision were the only ones for which section 8 was claimed. As a result, that section is no longer at issue in this appeal.

In view of the City's revised decision, I decided to provide the appellant with an opportunity to review the records that were newly disclosed to him and make a decision about pursuing this appeal as regards the information still being withheld. After a period of time, the appellant advised a staff member from this office that he wished to continue to seek access to the records remaining at issue.

Next, I sent a modified Notice of Inquiry to the appellant, along with a complete copy of the City's representations, to invite submissions from him, which I received.

Upon review of the appellant's representations, I noted that he appeared to be seeking additional information not contemplated by – or available at the time of – the February 4, 2008 request that led to this appeal. Specifically, the appellant stated that he was requesting information "for the period from May 2007 till March 13, 2008." The second attachment to the appellant's representations was a document prepared by the City and dated March 11, 2008, which was after the request leading to this appeal was submitted to the City. Accordingly, I asked staff from this office to contact the appellant to advise him that it would be necessary to submit a new request to the City if he wished to seek access to records related to the second attachment.

RECORDS:

Record Number [City's numbering]	Description of Record	Access Decision	Exemption(s) Cited
9	Staff email and attachment – 2 pages	*Denied in full*	Sections 38(a)/7(1) & 38(b)/14(1)
14	Incident reports, November & December, 2007 – 4 pages	*Denied in full*	Section 38(b)/14(1)
15	Staff email – 1 page	*Denied in full*	Sections 38(a)/7(1) & 38(b)/14(1)
17	Staff email - 1 page	*Denied in full*	Sections 38(a)/7(1) & 38(b)/14(1)
18	Incident reports, July 2007 and attachment – 6 pages	*Denied in full*	Section 38(b)/14(1)
19	Incident reports, June & July 2007 – 4 pages	*Denied in full*	Section 38(b)/14(1)
20	Staff email and draft correspondence – 3 pages	*Denied in full*	Sections 38(a)/7(1) & 38(b)/14(1)
21	Incident reports, May & June 2007 – 6 pages	*Denied in full*	Section 38(b)/14(1)

DISCUSSION:

PRELIMINARY ISSUE: LIMITS OF THIS INQUIRY

It is evident from reading the submissions of the parties, particularly the appellant, as well as the records themselves that the circumstances surrounding this appeal are difficult for those involved. In my view, therefore, it is important to emphasize the limits of this inquiry. Under the *Act*, my authority is limited to reviewing the decision made by the City as regards access to the information requested by the appellant. It is not my function, nor do I have the jurisdiction, to review any decisions made or actions taken by the City in relation to the appellant and his use of parks and recreation facilities, and I will not be reviewing or commenting upon them.

PERSONAL INFORMATION

For the purpose of deciding which sections of the *Act* may apply, it is necessary to determine whether the record contains *personal* information and, if so, to whom it belongs. 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. Information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. 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, R-980015, MO-1550-F, PO-2225]. However, 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].

Representations

In the City's brief submissions on this issue, the records are said to contain personal information about the appellant, and personal information related to other individuals who have made complaints about the appellant.

The appellant's representations do not address the issue of whether the records contain personal information for the purposes of the definition contained in section 2(1) of the *Act*.

Analysis and Findings

I have reviewed the records to determine whether they contain personal information and, if so, to whom it relates.

Records 14, 18, 19 and 21 are comprised of incident reports that relate to complaints about the appellant. These records include the name, address and telephone number of the appellant, an identification of the date of each incident, a description of the incident, and in some cases, information related to the intended follow-up action. I note that the records also contain information about the appellant consisting of other individuals' views or opinions about him, as well as descriptions of actions reportedly taken by him.

Records 9, 15, 17 and 20 are staff e-mails and attachments relating to the incidents and actions taken by parks and recreation staff in response to the incidents.

The records remaining at issue in this appeal all relate to the investigation of the complaints about the appellant. I find that all of them contain information pertaining to the appellant that qualifies as his personal information, within the meaning of paragraphs (a), (d), (e), (g) and (h) of the definition in section 2(1) of the *Act*.

With respect to the incident reports (Records 14, 18, 19 and 21), I find that portions of these records also contain the personal information of other identifiable individuals, including complainants, witnesses and other individuals. This information consists of names, ages, addresses, e-mail addresses, telephone numbers, medical information, and other personal information about those individuals that satisfies the definition of personal information under paragraphs (a), (b), (d), (e), (g) & (h) of section 2(1).

Regarding Records 9, 15, 17 and 20 (staff e-mails and attachments), I find that portions of Records 15 and 17, as well as portions of the first page of Record 9, also contain the personal information of other individuals, including parks and recreation staff, who were involved directly or indirectly in the incidents. The personal information about these individuals includes their identity, in conjunction with information that connects them to the incidents. In some instances, I find that the information about parks and recreation staff does not relate to them in their professional capacities. In the circumstances of this appeal, I find that the records contain

personal information about staff as witnesses to the incidents, and certain other incidental information such as personal e-mail addresses, that qualifies as their personal information.

However, certain portions of the records do contain information relating to several identifiable individuals in their professional capacity as employees with the City's parks and recreation department. In the specific circumstances of this appeal, I find that disclosure of the names of these particular individuals would not reveal anything of a personal nature about them and that, accordingly, this specific information does not constitute personal information for the purposes of the definition in section 2(1) of the *Act*.

As regards Record 20 and the attachment to Record 9, I find that these records do not contain the personal information of any identifiable individuals other than the appellant.

In summary, I find that all of the records contain the personal information of the appellant, and that portions of Records 9 (page 1), 14, 15, 17, 18, 19 and 21 contain the personal information of identifiable individuals other than the appellant.

However, once the names and other identifying information of other individuals is removed from Records 9, 14, 15, 17, 18, 19 and 21 (including details about the incidents which may identify individuals), I find that the remaining portions of these records do not contain the personal information of any identifiable individuals other than the appellant. Although the City asserts that the records at issue cannot be severed without divulging the particulars of the incidents and therefore identifying the other individuals, I reject this argument. In my view, the "particulars of the incidents" are comprised, for the most part, of the appellant's own personal information, as they describe other individuals' view and opinions about him, as well as his name and the actions he is reported to have taken against other users of the pool facility.

Having founds that portions of Records 9, 14, 15, 17, 18, 19, 21 and Record 20 in its entirety do not contain the personal information of identifiable individuals other than the appellant, it is not necessary for me to review the possible application of section 38(b) to that information since the disclosure of the appellant's own personal information to him cannot be an unjustified invasion of another individual's personal privacy, as that section requires. As section 38(b) is the only exemption claimed for Records 14, 18, 19 and 21, I will order that those portions of the records that do not contain the personal information of identifiable individuals other than the appellant be disclosed to him.

I will now review the possible application of section 38(b) to the portions of Records 9, 14, 15, 17, 18, 19 and 21 that contain the personal information of identifiable individuals other than the appellant.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/PERSONAL PRIVACY OF ANOTHER INDIVIDUAL OR ADVICE OR RECOMMENDATIONS

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.

SECTION 38(b) - PERSONAL PRIVACY OF ANOTHER INDIVIDUAL

Under this section, an institution may refuse to disclose information to a requester where it appears in a record containing 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. However, the institution may choose to disclose this information upon 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.

With respect to the remaining portions of the records at issue, sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 38(b) is met. In determining whether the exemption in section 38(b) applies, sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates.

Section 14(3) lists the types of information whose disclosure is *presumed* to constitute an unjustified invasion of the personal privacy of another individual. Section 14(2) lists factors to consider in determining whether disclosure would constitute an unjustified invasion of another individual's personal privacy. 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, 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], 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). The application of sections 14(4) or 16 has not been raised and, in my view, neither are available in the circumstances of this appeal.

If none of the presumptions in section 14(3) applies, the institution must consider the application of the factors listed in section 14(2), as well as all other considerations that are relevant in the circumstances of the appeal.

The parts of section 14 that may be relevant in this appeal state:

> (2) 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; …
> >
> > (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; ...
> >
> > (h) the personal information has been supplied by the individual to whom the information relates in confidence; …
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation; …

Representations

The City submits that section 38(b) applies to exempt the personal information in all of the records because none of the considerations listed in section 14(2) which favour disclosure are applicable in the circumstances of the present appeal. According to the City, the factor in section 14(2)(e) supports the decision not to release the information as its disclosure would expose the individuals to whom the information relates unfairly to (other) harm in the form of retaliation from the appellant. More specifically, the City submits that:

> Given the nature of the allegations and the description of the appellant's behaviour, there is ample evidence to support that the appellant will target the individuals for further ill-tempered treatment. These individuals should not be exposed to that harm or the possibility of that harm. The goal of protecting an individual from harm should prevail when freedom of information is balanced against the protection of individual privacy in order to shield someone from harm. That goal applies in this instance.

Regarding Record 17, the City asserts that it contains personal information about another individual's medical condition that should not be released to the appellant because its disclosure is presumed to constitute an unjustified invasion of that individual's privacy under section 14(3)(a) of the *Act*.

Finally, the City asserts that the records at issue cannot be severed without divulging the particulars of the incidents and therefore identifying the other individuals.

The appellant's submissions do not specifically respond to the City's representations on the personal privacy exemption in section 38(b), nor do they address the principles and interpretation of the exemption in previous orders of this office. Instead, the appellant expresses concern about what he perceives to be the City's unfair treatment of him as regards access to its recreational facilities, and he suggests that he is entitled to know more about the basis for the City's decisions.

Analysis and Findings

First, I agree with the City's submission that the presumption against disclosure in section 14(3)(a) applies to the personal medical information of an individual identified in Record 17, and I find that this portion of the record is exempt.

As previously noted, the factors in section 14(2) offer some guidance to an institution in considering whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. The only specific reference to these factors by either of the parties is the City's reliance on section 14(2)(e). However, in my view, several others are raised implicitly by the circumstances of the appeal and by the representations of the appellant, and these factors have been set out above.

Factors favouring disclosure

The factors listed at paragraphs (a) through (d) of section 14(2) of the *Act* are those which may be relied upon to support the disclosure of information at issue in an appeal. The appellant's representations suggest that the factors at paragraphs (a) and (d) of section 14(2) may justify disclosure of the information. However, for the reasons set out below, I find that neither factor is applicable in the circumstances of this appeal.

Section 14(2)(a) – public scrutiny

In order to support a finding that section 14(2)(a) applies to the disclosure of the personal information at issue, it must be shown that the activities of the City have been called into question *publicly* and that the information sought will contribute materially to the scrutiny of those specific activities. In the present appeal, however, the personal information sought by the appellant relates to his own involvement in incidents occurring at a City recreational facility. In my view, this is a private interest. Moreover, although the appellant has expressed concern about

the foundation for the decision by City parks and recreation staff as regards his access to that facility, there is no evidence before me to support a finding that disclosure of the personal information of other individuals in the records at issue would serve to promote the objective of scrutiny of the City's activities by the public at large (see Order P-1014). I therefore find that the factor at section 14(2)(a) is not applicable.

Section 14(2)(d) – fair determination of rights

The appellant's desire to review the basis of the decision affecting his use of the City's recreational facility might suggest the application of the factor at section 14(2)(d), which relates to a fair determination of rights. In my view, however, this section does not apply in the circumstances. Previous orders of this office have established a four-part test for reliance upon this factor. For section 14(2)(d) to apply, the appellant must establish that:

(1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and

(2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and

(3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

(4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing

(Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)).

In the appeal before me, there is no evidence, either provided by the appellant or implicit in the circumstances of the appeal, to satisfy me that the first part of this test is met, namely that the right in question is a *legal* right drawn from the concepts of common law or statute law. Notwithstanding the appellant's perception of having been treated unfairly by City parks and recreation administration with respect to his use of City's facilities, the existence of an imperilled *legal* right has not been established and I find that section 14(2)(d) does not apply.

Factors favouring privacy protection

The factors listed at paragraphs (e) through (i), which stand for protecting the privacy of the individuals to whom the personal information at issue relates, must also be incorporated into the balancing of factors under section 14(2). In approaching the balancing of the considerations in

section 14(2), I have considered the City's representations regarding disclosure of the personal information in the records, and I have also considered the information itself. In these circumstances, I find that the factors at paragraphs (e), (f), and (h) of section 14(2) are relevant.

Section 14(2)(e) – unfair exposure to harm

Turning to the factor in section 14(2)(e), which was raised by the City, this office has held that although the disclosure of personal information may be uncomfortable for those involved in an acrimonious relationship, this does not mean that harm would result, or that any resulting harm would be unfair (Order PO-2230). However, it has also been held that the unfair harm contemplated by section 14(2)(e) is foreseeable where disclosure of personal information is likely to expose individuals to unwanted contact with the requester (see M-1147), or where such disclosure could expose the individuals concerned to repercussions as a result of their involvement in an investigation by the institution (see PO-1659). Based on the information before me, it is reasonable to conclude that the appellant does not consider this matter resolved. In the circumstances, and with consideration of the City's representations, I am satisfied that disclosure of the personal information at issue could lead to unfair exposure to some form of "pecuniary or other harm" to the other individuals whose personal information is contained in the records. Accordingly, I find that the factor at section 14(2)(e) is a relevant consideration.

Section 14(2)(f) – highly sensitive

For personal information to be considered highly sensitive in the manner contemplated by section 14(2)(f), I must be satisfied that disclosure of the information could reasonably be expected to cause significant personal distress to the subject individual (Order PO-2518). Based on the nature of the personal information and the surrounding circumstances of this matter, I am persuaded that disclosure of the personal information remaining at issue could cause significant personal distress to the other identifiable individuals. I find that the factor at section 14(2)(f) is also a relevant consideration.

Section 14(2)(h) – supplied in confidence

The relevance of the factor found at section 14(2)(h) is determined by an evaluation of whether the personal information was supplied by the individual to whom the information relates in confidence. Any assurances of confidentiality given to the individual providing the information must also be considered. In filling out incident reports with the parks and recreation administration, the individuals identified in these records supplied the City with personal information relating to themselves and to other individuals, including the appellant. Although I have no specific evidence before me on this point, it would have been, in my view, reasonable to conclude from the circumstances that these individuals expected some level of confidentiality or discretion regarding the use or disclosure of their own information. I find that the factor in section 14(2)(h) is a relevant consideration in the circumstances of this appeal.

In summary, I find that the factors favouring privacy protection in section 14(2)(e), (f) and (h) apply to the personal information of other identifiable individuals that is contained in the records, and that these factors weigh against the appellant's right of access. Having concluded the balancing of the factors favouring privacy protection against those weighing in favour of access, I conclude that the disclosure of the personal information of the individuals identified in the records would constitute an unjustified invasion of their personal privacy. Accordingly, subject to my discussion of the absurd result principle and the City's exercise of discretion below, I find that this information qualifies for exemption under section 38(b) of the *Act*.

Absurd Result

Where the requester originally supplied the information, or is otherwise aware of it, the information may be found not to be 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 in appeals where, for example, the requester was seeking 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); or the information was clearly within the requester's knowledge (Orders MO-1196, PO-1679, MO-1755). However, the absurd result principle may not apply even if the information was supplied by the requester or is clearly within the requester's knowledge if disclosure would be inconsistent with the purpose of the 38(b) exemption.

Only the City addressed the absurd result principle in its representations, and it did so simply by stating that it "can think of no argument that would support that it is absurd to withhold the information."

Analysis and Findings

I accept that the appellant is likely already aware of at least some of the information in the records, relating to him and to other identifiable individuals. Since the appellant will receive his own personal information as a result of my findings above, however, I need only consider the application of the absurd result principle in relation to the personal information of other individuals contained in the records.

In this appeal, the records contain the personal information of identifiable individuals other than the appellant relating to incidents that took place at a City recreational facility. In addition, although the appellant may be aware of some of the information contained in the records, it is not clear what specific information he may, in fact, be aware of. It is apparent from the appellant's representations that his relationship with the administration at the facility is a source of discontent for him. In my view, the uncertainty regarding what he is aware of, and the acrimony evidently still present in relation to this situation, are compelling reasons for not applying the "absurd result" principle [Order MO-2114]. I find that disclosure of the remaining personal information in the records, which belongs to other individuals, would be inconsistent with the

purpose of the exemption at section 38(b), namely to protect individuals from unjustified invasions of their personal privacy.

In the circumstances of this appeal, I find that the absurd result principle does not apply and that it would not be absurd to withhold the remaining information I have found to be exempt under section 38(b). Accordingly, the personal information in the records that is *not* the appellant's own personal information, but is about other identifiable individuals, is exempt from disclosure under section 38(b) of the *Act*, subject to my review of the City's exercise of discretion, below.

SECTION 38(a)—ADVICE OR RECOMMENDATIONS

In view of the fact that I have upheld the application of section 38(b) in relation to the personal information of other identifiable individuals contained in the records, only the City's claim of section 38(a), in conjunction with section 7(1), respecting portions of Records 9, 15 and 17 and all of Record 20 remains at issue. Section 7(1) states:

> A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

Previous orders have established that advice or recommendations for the purpose of section 7(1) must contain more than mere information [see Order PO-2681]. "Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

Sections 7(2) and 7(3) create a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 7. Based on the analysis and my findings on section 7(1), however, it will not be necessary to review the exceptions.

Representations

In its representations, the City submits that Records 9 and 15 are e-mails sent between City employees that relate to "advice and recommendations concerning a letter and a proposed letter that were to be prepared and sent to the Appellant."

With regard to Record 20, the City submits:

> Record #20 is a draft letter. It was created for discussion purposes between employees of the City of Windsor. It falls under s. 7(1) of *MFIPPA*. It should not be released. For policy reasons, employees should be able to pass draft documents between each other without concern that those drafts will be released to the public or the individual about whom the draft relates. If this type of document is subject to release the result will be a severe chilling effect on the employees who will no longer be able to communicate with each other candidly and it will be much more difficult to work in consultation with each other.

The City did not provide representations on the application of this exemption in relation to Record 17.

The appellant's representations do not address the exemption for advice or recommendations.

Analysis and Findings

For the reasons that follow, I find that section 38(a), together with section 7(1), does not apply to any of the records for which it is claimed by the City.

To begin with, I reject the City's argument that the draft nature of Records 9, 15 and 20 qualifies them for exemption under section 7(1) for "policy reasons," or otherwise. Past orders of this office have established that it is not the "type" of record, or it being in a draft or final state that determines its eligibility for exemption under the advice or recommendations exemption, but rather its content. In Order PO-1690, Adjudicator Holly Big Canoe considered whether a draft environmental report could be considered exempt under section 13(1), which is the provincial *Act*'s equivalent to section 7(1). She stated:

> A draft document is not, simply by its nature, advice or recommendations [Order P-434]. In order to qualify for exemption under section 13, the record must recommend a suggested course of action that will ultimately be accepted or rejected during the deliberative process of government policy-making and decision-making. Although I am satisfied that the final version of this report is intended to be used during the deliberative process, it simply does not contain advice or recommendations, nor does it reveal advice or recommendations by inference. Accordingly, I find that section 13(1) does not apply.

I agree with Adjudicator Big Canoe's reasoning, and I find it applicable in the circumstances of the present appeal.

Put simply, the City has failed to provide sufficient evidence to persuade me that section 38(a), in conjunction with section 7(1), of the *Act* applies to exempt the records in their entirety. On my review of the information in the records, I find that it mainly consists of background and factual material which does not relate to a suggested course of action in the sense contemplated by this exemption. Further, the records do not contain an element of advice or a recommendation that could be accepted or rejected as part of the deliberative process.

Seemingly implicit in the City's decision to claim section 7(1) is that Records 9, 15, 17 and 20 formed part of a deliberative process. However, on my review, it is not clear that these records were ever used in the City's deliberative processes, or even deliberations undertaken by its parks and recreation staff. Indeed, the representations provided by the City are not sufficient to establish a connection between the records and any deliberations. Indeed, it is implicit in each of these records that the decision regarding the appellant's access to its recreational facility had already been made.

I note that the second page of Record 9 is, in fact, a copy of a letter written to City parks and recreation staff by the appellant after the decision had been conveyed to him. The course of action in this particular matter is well known to all of the parties. At most, it could be said that several of the records contain drafting suggestions made by one of the City's parks and recreation employees to another as to how to convey the intended message to the appellant. In the circumstances, I find that these suggestions do not qualify as "advice or recommendations" for the purposes of section 7(1).

Furthermore, taking a purposive approach to this exemption demands consideration of whether disclosure of the information at issue could *reasonably* be expected to hinder the provision of expert or professional assistance within the deliberative process (Orders PO-2028 and 94). Based on the City's brief representations, and the actual content of the records for which section 7(1) is claimed, I find that disclosing this information would not, as former Commissioner Linden established in Order 94, interfere with "the free flow of advice and recommendations within the deliberative process of government decision-making and policy-making", or inhibit the free and frank exchange of views. Implicit in this finding is the rejection of the City's submission that disclosure of the record could reasonably be expected to result in a "severe chilling effect on the employees who will no longer be able to communicate with each other candidly" or "work in consultation with each other" without difficulty.

For all of these reasons, I find that none of the information contained in Records 9, 15, 17 and 20 qualifies for exemption under section 7(1) of the *Act*. Furthermore, there being no suggestion that the City intended to withhold the appellant's own personal information from him under section 38(a) with section 7(1), nor any possibility that its disclosure to him could reveal the advice or recommendations of a public servant, I see no reason to exempt it under this section.

EXERCISE OF DISCRETION

As I have upheld the City's decision to deny access under section 38(b), I will now consider the City's exercise of discretion in doing so. Since section 38(b) is discretionary, an institution may choose to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion.

On appeal, the Commissioner or her delegate may determine whether the institution failed to do so. In addition, I may find that the institution erred in exercising its discretion where it does so in bad faith or for an improper purpose; where it takes into account irrelevant considerations; or where 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]. I may not, however, substitute my own discretion for that of the institution [section 43(2)].

Representations

Although requested to do so, neither the City nor the appellant specifically addressed the City's exercise of discretion in claiming section 38(b). As I understand the appellant's submissions, however, he appears to be arguing that the City's parks and recreation staff have an obligation to assist him in understanding their decision as regards access to the recreational facility in question. I also note that the City's representations allude to having considered the nature of the relationship between the appellant and the individuals identified in the records, and a resulting effort to protect the privacy of the affected individuals.

Analysis and Findings

In the circumstances of the present appeal, I am satisfied that the City exercised its discretion to deny access under section 38(b) appropriately and within generally accepted parameters.

In saying this, I note that the appellant was provided with additional information relating to this matter and, specifically, his access to the recreational facility in question by the City, in the form of a revised decision letter issued during the adjudication stage. The appellant will also receive more through the operation of this order. Although the information disclosed may not resolve all of the appellant's concerns about the decision of City parks and recreation staff regarding access to the facility in question, this is not determinative of the issue of exercise of discretion. In denying access to personal information of the other identifiable individuals, I find that the City exercised its discretion under section 38(b) in a proper manner, and I will not disturb it on appeal.

Consequently, I find that disclosure of the personal information of the other identifiable individuals in the records would constitute an unjustified invasion of their personal privacy and that the information is exempt under section 38(b) of the *Act*.

ORDER:

1. I uphold the decision of the City to withhold the personal information of the other identifiable individuals in the records under section 38(b). For greater certainty, I have highlighted the personal information of these individuals **in orange highlighter** in the copy of the records enclosed with this order. This information is **not** to be disclosed.

2. I order the City to disclose to the appellant all remaining portions of the records by sending him a copy of the records by **June 11, 2009** but not earlier than **June 4, 2009**.

3. In order to verify compliance, I reserve the right to require the City to provide me with a copy of the records as they were disclosed to the appellant as per the provisions of this order.

Original signed by: May 7, 2009
Daphne Loukidelis
Adjudicator