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

ORDER MO-2472

Appeal MA07-134

Town of Oakville

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NATURE OF THE APPEAL:

The Town of Oakville (the Town) received seven separate requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) in the name of the requester and her husband (request 2007-013 only) for information relating to the installation, operation and remediation of the heating, ventilation and cooling (HVAC) system in their new home.

The requests were as follows:

1. Request number 2007-0007: any record of exchanges between the Town of Oakville and eight companies and/or named individuals regarding the HVAC system installed in the requester's home. The request states that this should include exchanges regarding the remedial work as well as her name.

2. Request number 2007-0008: any record of exchanges between the Town and six companies and/or named individuals with respect to the requester's address and/or name.

3. Request number 2007-0009: any record of exchanges between the Town and [a third party] and/or [a third party] with respect to her address and/or name.

4. Request number 2007-0010: any record between January 1, 1999 and the date of the request containing the requester's property address. The requester also indicated the plan number of the property prior to it being assigned a municipal address.

5. Request number 2007-0011: any record of exchanges between the Town and a named builder with respect to the HVAC system installed in the requester's new home.

6. Request number 2007-0012: any record between January 1, 2000 and the date of the request containing the requester's name.

7. Request number 2007-0013 (in the name of the requester's husband): Any record between January 1, 2000 and the date of the request containing his name.

The Town identified records responsive to the requests and issued two preliminary decision letters. One pertained to the requests which the Town assigned the designations 2007-0007 to 2007-0012. The other decision letter pertained to the request by the husband which the Town designated as request numbered 2007-0013. The letters advised that, after a preliminary review, the Town had decided to grant partial access to the responsive records, upon payment of a fee. The Town relied on sections 7(1) (advice or recommendations), 10(1) (third party information) and 12 (solicitor-client privilege) of the *Act* to deny access to the information it withheld. The Town also provided a fee estimate of $1,980.00 for access to information responsive to requests 2007-0007 to 2007-0012 and a fee estimate of $330.00 for access to information responsive to request 2007-0013. The fee estimates did not include photocopying charges. In an effort to reduce the costs, the requesters narrowed the scope of all the requests. This is described in more

detail below. The Town then issued two supplementary decision letters reflecting revised fee estimates. The Town estimated a revised fee of $390.00 for access to information responsive to the requester's narrowed requests and a revised fee of $75.00 for access to information responsive to her husband's narrowed request. Again, the fee estimates did not include photocopying charges.

The requester paid a portion of the revised fees and the Town issued a final decision letter for all seven requests, granting partial access to thirty pages of responsive records. The Town relied on the mandatory exemption at section 14(1) of the *Act* (personal privacy) to sever any personal information from the pages it disclosed. The Town relied on section 12 of the *Act* to deny access to the balance of the records it withheld. In this supplementary decision letter, the Town made no mention of relying on sections 7(1) and 10(1) of the *Act* to deny access to any responsive records. The Town ultimately made no submissions with respect to the application of section 10(1) nor in my view is that exemption applicable to the records that are at issue in this appeal. I will, therefore, not be addressing the application of section 10(1) as an issue in this appeal. Notwithstanding the letter's silence on section 7(1) the Town ultimately provided representations on the application of this discretionary exemption. This is also addressed in more detail below.

The requesters (now the appellants) appealed the Town's decision. The requester's husband provided this office with written consent for his wife to act on his behalf as an agent in this appeal.

At mediation, the following occurred:

- The Town issued a further supplementary decision letter providing access to an additional 11 records.

- The appellants advised that they would not be seeking access to the portions of the responsive records that the City withheld under section 14(1) of the *Act*. As a result, that information and the application of section 14(1) are no longer at issue in the appeal.

- The appellants noted that they were already in receipt of some records that the Town sought to withhold. As a result, those records were removed from the scope of the appeal.

- The appellants agreed with the Town that some records that it had originally identified were, in fact, not responsive to the request. Accordingly, those records are also no longer at issue in the appeal.

- It was confirmed that the appellants only sought access to the records that the City withheld under section 12 of the *Act*.

- The appellants took the position that other responsive records should exist. As a result, the reasonableness of the Town's search for responsive records was added as an issue in the appeal.

- The appellants asserted that the requests were for their own personal information and, under section 6.1 of the Regulations to the *Act*, no manual search fees should have been charged. As a result, the appropriateness of the fee was added as an issue in the appeal.

Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. Prior to my preparing a Notice of Inquiry in the appeal, the Town forwarded correspondence to this office indicating that the appellants had paid the outstanding amount owing on the fee estimate. Accompanying the letter were copies of the severed records that the Town released to the appellants.

I began my inquiry by sending the Town a Notice of Inquiry setting out the facts and issues in the appeal. The Town provided representations in response to the Notice. In its representations, the Town advised that it had decided to release the records described as D38 and D41 in its index of records, severing the names and addresses of other individuals. As a result, those records are no longer at issue in the appeal. The Town also submitted that although it was listed in its index of records, closer examination of the email exchange identified as record D44 revealed that it related to a different property and, as a result, was actually not responsive to the request. In addition, the Town indicates in its representations that certain other information in the remaining records is similarly non-responsive. Accordingly, I added responsiveness as an issue in the appeal. Finally, although the application of section 7(1) was not raised as an issue in the Notice of Inquiry, the Town provided representations on the application of this discretionary exemption to a portion of Record D42. This is addressed in more detail below. I then sent a Notice of Inquiry to the appellants accompanied by the non-confidential representations of the Town. The appellants provided representations in response to the Notice.

I determined that the appellants' representations raised certain issues to which the Town should be given an opportunity to reply. Accordingly, I summarized a portion of the appellants' representations in a letter to the Town and asked for its representations in reply; which I received. In its reply representations the Town advised that after a further review of the records that remained at issue, it had decided to release Records D35, D36 and D43. Accordingly, those records are also no longer at issue in the appeal.

To summarize, the following matters were not resolved at mediation, or through subsequent disclosure, and still remain at issue:

a) The scope of the access request;

b) Whether Record D44 and certain other information in the records remaining at issue is responsive to the request;

c) The adequacy of the Town's search for responsive records;

d) Whether the request is for personal information or for information about a property, and whether the fee charged by the Town should be upheld;

e) Whether the discretionary exemption at section 12 of the *Act* applies to Records D40 and D42;

f) Whether the Town should be permitted to rely on section 7(1) of the *Act* and, if so, whether it applies to a portion of Record D42.

RECORDS:

Remaining at issue in this appeal are Records D40 and D42.

DISCUSSION:

THE SCOPE OF THE ACCESS REQUEST

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;
>
> . . .
>
> (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).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134 and P-880].

To be considered responsive to the request, records must "reasonably relate" to the request [Orders P-880 and PO-2661].

The representations of the appellants

The appellants submit that the temporal scope of the original request was only narrowed because of "the unreasonable fee estimate". The appellants ask that I "take into consideration our original request, and the prejudicial manner in which that request was constrained" and "take into consideration our continued desire to have all records if a reasonable fee or no fee is deemed justifiable." The appellants also question why only 170 pages of records were listed on the index of records the Town provided at mediation when they had previously been advised that the Town had located 2200 pages of responsive records. Furthermore, they ask why the Town ultimately only made 30 pages available for disclosure.

Finally, the appellants point out that they resubmitted their original requests and that, in response the Town advised that "these requests are currently the subject of [the present appeal] with the IPC. It is reasonable therefore to complete the appeal process to determine the status of your original requests."

The representations of the Town

The Town submits that the 2200 pages of documents referenced by the appellants was, in fact, the 2230 pages of responsive records that related to the original requests before they were narrowed in scope. The Town submits that the original fee estimate was based on those 2230 pages of records.

It explains that:

> It is under these "narrowed search criteria" that the final 126 records were identified prior to any exemptions being applied. Of the 126 pages of responsive records, 30 pages were then prepared for release. The 170 pages referred to by the appellant in the Index of Records include 44 pages of correspondence generated as a result of the FOI Requests.

With respect to the re-submission of the original request, the Town submits that this:

> … was a re-submission of the very same requests that are the subject of this appeal which would have constituted a complete duplication in effort and the processing of the request fee would have been unfair to the requester.

Analysis and Finding

The agreement to narrow the scope of the requests

The purpose of a fee estimate is to give a requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access [Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699].

The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees [Order MO-1520-I].

I find that there is no evidence before me to support an allegation that the quoting of the initial fee by the Town amounted to "coercion" which left the appellants with no option but to limit the time frame to be covered by the requests.

As acknowledged by the appellants, the requests were narrowed by agreement. In my view, this was a conscious decision by the appellants to narrow the scope of the request in order to reduce the fee. Although the appellants suggest that the narrowing was as a result of "the unreasonable fee estimate", they had options available to them. They could have, as they have done here, appealed the amount of the fee estimate at that time. Alternatively, they could have requested a fee waiver. They chose not to do so and pursued, as is their right, narrowed requests. In my view, in the circumstances of this appeal, no grounds exist to revisit their decision to narrow the requests. That said, the appellants remain at liberty to file a request for records that might fall outside the scope of the requests that I have determined, below.

The Scope of the Requests

For a number of reasons the scope of the requests became an issue in the appeal. I have considered the materials provided to this office as well as the representations of the parties on this issue. I find that the scope of the requests are defined by their initial terms as modified by the following parameters:

- The appellants agreed not to seek any personal information of other identifiable individuals that may be found in any records remaining at issue. Accordingly, this information is removed from the scope of this appeal.

- Requests 2007-0012 and 2007-0013 are for records relating to the installation, operation and remediation of the HVAC system in the appellants' home only, and not for any records of any nature that simply contain the names of the appellants;

- the temporal scope of all the requests except 2007-0010, is for records from January 1, 2005 to the date of the requests;

- the scope of request 2007-0010 was also narrowed by the appellants to be only for "Building Inspector record(s) prior, during and after construction and a copy of the various permits issued, including the occupancy permit";

- as set out in the Town's final decision letter and confirmed in the affidavit of its Records and Freedom of Information Officer, the appellants agreed not to seek access to any records already in their possession, which would include any correspondence (electronic or otherwise) which had been sent to or received by them or upon which they had been "copied".

The adjudication of this appeal will proceed on the basis of the scope of the appeal that I have determined above.

RESPONSIVENESS OF RECORDS D40, D42, D43 and D44

The Town submits that a closer examination of the email exchange in Record D44 revealed that it related to a different property and, as a result, was actually not responsive to the request. The Town also submitted that the email exchange in Record D42 includes a duplicate of the email it identified as Record D41 which it had previously agreed to disclose. The Town takes the position that this portion of Record D42 is therefore outside the scope of the request. The Town also submits that the second email in the email thread in Record D40, which is dated August 28, 2006, can be disclosed to the appellants.

The Town also raised the responsiveness of a portion of Record D43; however, that record was ultimately disclosed to the appellant and need not be further addressed in this appeal.

The appellants submit that they provided the Town with signed authorizations from every homeowner on their road which authorized one of the appellants to speak on their behalf, as well as receive information from the Town regarding their HVAC systems. They submit that these authorizations ought to have facilitated complete access to the requested information.

Analysis and Finding

To be considered responsive to the request, records must "reasonably relate" to the request [Orders P-880 and PO-2661].

I have reviewed Record D44 and agree with the Town that it relates to a different property. Accordingly, I find that Record D44 is not responsive to the request. I also accept the Town's position that the email exchange in Record D42 that duplicates Record D41 is also no longer at issue in the appeal, because it has already been disclosed to the appellants. In light of the Town's position, I will order the Town to disclose to the appellants the second email in the email thread in Record D40, which is dated August 28, 2006.

Finally, for a consent to qualify under the *Act*, it must satisfy the requirements of section 14(1)(a) which requires that it be a consent to the disclosure of personal information in the context of an access request [see generally Order MO-2461]. On the evidence before me, I am not satisfied that authorizations from every homeowner on the appellants' road to allow the appellants to speak on their behalf to the Town, in the context of a dispute over their HVAC systems, satisfy those requirements.

REASONABLENESS OF THE SEARCH FOR RESPONSIVE RECORDS

The appellants take the position that the Town failed to conduct a reasonable search for responsive records.

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 [Orders P-85, P-221 and 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 [Orders P-624 and PO-2559]. To be responsive, a record must be "reasonably related" to the request [Order PO-2554].

A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request [Orders M-909, PO-2469, PO-2592].

A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control [Order MO-2185].

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 [Order MO-2246].

A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable [Order MO-2213].

In its initial representations, the Town submitted that it conducted a thorough search for responsive records. The Town included two affidavits in its representations to demonstrate the extent of its search. The first affidavit from the Town's Records and Freedom of Information Officer recounted the steps taken to address the requests and indicated that the searches were conducted by the Town's Director of Building Services, Chief Building Official; Manager of Inspection Services; Supervisor of Mechanical Inspectors; and Administrative Assistant, Building Services. The second affidavit was from the Town's Director of Building Services, Chief Building Official deposing that in response to a request from the Town's Freedom of Information Officer, all Town building files were searched for responsive records. The Town also advised that it has placed a halt on disposals of all records until its Records Retention by-law is updated. It states, therefore, that all records are currently maintained on a permanent basis.

The appellants submit:

> The Town stated in their representations that they asked the following individuals to conduct searches of their emails and paper records: (a) the Director of Building Services, (b) the Manager of Inspection Service, and, (c) the Supervisor of Mechanical Inspections. This is not a comprehensive list of all of the Town representatives.
>
> …
>
> We do not believe that a reasonable search for the records was conducted. We inquired with [named individual], Records and Freedom of Information Officer as to how the information was being collected. He offered that members of the Building Department were searching their computers. [One of the appellants] stated that she did not think that process was reasonable. [Named individual] responded that he was not "allowed to stand over their heads" and that if we did not like the outcome we "would have to submit an appeal".
>
> It is our experience that institutions are able to rely upon their I.T. (Information Technology) Department staff to conduct database searches. We do not believe the Town searched for the documents with any I.T. assistance; instead, those responsible for the emails were permitted to search (unaccompanied) through their own computers. We do not think this is reasonable or fair to the requester.
>
> In addition to reducing search time we believe that it would be reasonable to involve the I.T. Department to avoid human error. For example, what if the employee performing the search does not have adequate knowledge to do so? Perhaps the computer or the hard drive that the employee was using had been replaced or reorganized by back-up systems, such that completeness of the search could not be verified. This brings into question the validity of the search process as well as the search results.
>
> In their representations the Town admitted that they only consulted with 3 members of the Building Department. We do not feel that this was a reasonable search. It would have been appropriate to broaden the search to include records from [four named individuals] as they were all involved in creating personal records about us. [Two of the named individuals] are no longer employed by the Town, but their records should still be accessible.
>
> Also, other Town employees were consulted during construction of our home with regards to [an agreement], while yet more employees conducted permit inspections. Mayor Mulvale and Mayor Burton were also involved in the HVAC issues, including correspondence and formal meetings with both, but they too were excluded from the search conducted.

There are many records that are missing from the Index of Records and so we do not believe that a thorough or comprehensive search was conducted. For example:

> (a) Between November 1, 2005 when [named individual] issued his sign-off letters, and March 28, 2006 when [a third party] issued their Decision Letters to the residents on [identified Road], we were made aware that there was continual correspondence between The Town, [named individual] and [a third party].
>
> (b) Personal information about the [appellants], provided by [a third party] and the builder to the Town ought to have been included within the documents indexed.
>
> (c) On July 14, 2006 [one of the appellants] sent an email to [a third party] who then forwarded it to [named individual], the Town even though it was marked "confidential". This was not included in the Index of Records.
>
> (c) In August 2006, [a third party] brought a Motion to include the Town of Oakville as a party to our Appeal at the Licence Appeal Tribunal. This correspondence is not listed in the Index of Records.
>
> (d) On November 20, 2006 we wrote to [name individual] about [named individual], but again this correspondence does not appear in the Index of Records.

The Town submits in reply that:

> All Freedom of Information (FOI) Requests for the Town of Oakville are received and coordinated by the Clerk's Department. When a FOI request is received, the Records and Freedom of Information Officer identifies the department(s) with responsibility for the responsive records and then communicates the scope of the request to the director or manager of each relevant department. Therefore, the entire department's records are included in the scope of the search, from a top-down approach, including the relevant Section Heads and Managers. …
>
> In this case, [identified individual], Director of Building Services, Chief Building Official was contacted to initiate the search. The Building Services Department is responsible for building permit issuance and related inspection matters. Building Services employees do not maintain personal records about members of the public or about properties. While the appellant submits that only three members of the Building Department were consulted, the affidavit signed by the Chief Building Official [identified attachment] indicates that a complete search of all Building Department files (electronic and paper form) was conducted. This search applied

> to all applicable email accounts of individuals who were known to be involved in this matter.
>
> The appellant submits that records of Mayors Mulvale and Burton were not searched. Correspondence to staff and meeting records at which the Mayors would have been present would be included in records maintained by staff. Further, in response to the allegation of missing records any records missing from the Index of Records would be missing as a result of the "narrowing criteria" which removed many of these records outside the scope of the request.

After the Town had filed its representations the appellants provided this office with a copy of certain redacted material that they received from another entity as a result of a separate access request. The appellants submitted that these records were not listed in the Town's last Index of Records and that "[t]he emails indicate that other named employees [indentified employees] were involved, yet the Town admitted that they consulted with 3 members of the building department to fulfill our request." The appellants submit that the existence of these records, which they say the Town failed to identify, demonstrates that its search was inadequate.

I sent a copy of this material, along with a covering letter summarizing the appellants' position to the Town, inviting its submissions in response. The Town addressed the appellants' submission in a responding letter advising as follows:

> In response to the appellants' submission that "the emails indicate that other employees [named employees] were involved yet the Town admitted that they only consulted 3 members of the building department to fulfill our request", please note that in accordance with the Town's submission to the Notice of Inquiry dated September 26, 2008, [named individual], Director of Building Services and Chief Building Official was the primary contact to initiate the search of the Building Department's records. An affidavit, sworn by [named individual] was submitted with the response to the Notice of Inquiry indicating that a complete search of all Building Department files, both electronic and paper form was conducted. Hard copy records in Building Services are stored in a central file room and individual employees do not maintain separate files at their workstations. Email records in all Town departments reside in each employee's password protected email account. [Named individual's] name was included in some of the correspondence for information purposes only and as a matter of practice he would have forwarded all pertinent files to [named individual] who would was [sic] dealing with this matter. [Named individual's] e-mail account was the focus of the electronic records search in accordance with due to [sic] reporting and records management practices. [Named individual], the Town's Insurance Adjuster, would only have been involved in a record search if an official claim had been filed. As an official claim was not filed against the Town, there was no reason to make a request for his records.

The Town then addressed each of the documents provided by the appellants in detail. The Town submits:

> Document E1 is a string of e-mails and the most recent is from [named individual] to [named individual]. A search of [named individual's] e-mail account at the time of the request did not locate this record using the established search criteria "[appellants' surname]" or [appellants' address]. Another search of [named individual's] e-mail account took place on September 21, 2009 using the same search criteria and an exact search for the time and date of the e-mail however, the records were not found. The Town therefore is not in possession of this record although a reasonable search of all applicable files was conducted.
>
> The second email within Document E1, is from [named individual] to [named individual]. A search of [named individual's] email records on September 21, 2009 produced an email that appears to be the same however, the time stamp differs by one minute [reference to attached appendix]. If this is the document in question, this document was narrowed out of the scope of the request by the appellant because there is no reference to her property address or to her name.
>
> Document E2 is a letter from [a third party] to the Licence Appeal Tribunal, with a copy faxed to [named individual] in the Building Department. A search of Building Services records at the time of the request did not locate this record in the subject file and another search of Building Services records on September 21, 2009 confirmed that the Town was not in possession of this record although a reasonable search was conducted. This letter was allegedly faxed to [named individual], and assuming that he received the fax, it is likely that the document was misfiled.
>
> Document E3 is a string of three emails that was originally identified on the Town's Index of Records submitted to the IPC in July 2007 as two separate documents, D38 and D39. Section 12 was originally applied to document D38 for exemption from disclosure to protect solicitor/client privilege and document D39 was released to the appellant with Section 14 applied to protect other individuals' personal information. However, document D38 was subsequently released to the appellant on October 1, 2008 as part of the mediation process. Therefore, not only were these records listed on the Town's Index of Records, the appellant has possession of these documents.
>
> Document E4 is a cover letter from [a third party] to [named individual]. A search of Building Services records at the time of the request did not locate this record in the subject file and another search of Building Services records on September 21, 2009 confirmed that the Town was not in possession of this record although in both instances, a reasonable search was conducted. However, this cover letter refers to an email that is contained in document D39 of the Town's original

submission which was released to the appellant. The "experts reports" it refers to is document D11, Report on Heating Systems for [named street] Residences. On June 25, 2007 IPC Mediator Brian Bisson, indicated that the appellant already had a copy of D11 as a result of legal processes. This record may have been misfiled or it may have been considered as a transitory record that has temporary usefulness and only required for the completion of a routine action such as receipt of the attached records and therefore may not have been filed in the subject file.

Document E5 is a string of seven emails between [named individual] and [named individual], with the most recent and final email also sent to [named individual]. A search of [named individual's] email account at the time of the request did not locate these emails and another search on September 21, 2009 confirmed that the Town is not in possession of these records although in both instances, a reasonable search was conducted. There is a possibility, depending on who the first e-mail is copied to, that these records were taken out of scope if the appellant is the recipient. However, as we do not have a clean copy of this record, we do not know who it was copied to in order to make that assertion.

Document E6 is a string of four emails. The most recent email of document E6 the sender, recipient and content fields are completely severed preventing the Town from determining whether the email is a responsive record.

The second email of document E6 is from [named individual] to [named individual]. A search of [named individual's] email account at the time of the request did not locate this email and another search on September 21, 2009 confirmed that the Town is not in possession of this record however a reasonable search was conducted in both instances. The Town responds that the email may have inadvertently been deleted.

The third email of document E6 from [named individual] to [named individual] was not identified as a responsive record because the content of this email only served as a cover page forwarding the fourth email that was narrowed out of scope of the request because it was addressed to the appellant and reasonably implied that she was already in possession of it.

Document E7 is a string of two emails between [named individual] and [named individual], with the most recent email, on page 1, also copied to [named individual]. A search of [named individual's] email account at the time of the request did not locate these emails and another search on September 21, 2009 confirmed that the Town is not in possession of these records however, a reasonable search was conducted in both instances. Portions of the 'copied to' fields and the entire bodies of the emails are severed preventing the Town from determining whether the appellant is listed as a copied recipient therefore removing the records from the scope of the request. Further, the message fields of

> the emails are extensively severed preventing the Town from determining whether the subject matter is responsive to the requests because even though the appellant's surname is in the subject field, the email may in fact deal exclusively with another homeowner who was also dealing with similar issues at that time. If that is the case, the Town may have removed the records from the scope of the request.
>
> Document E8 is a string of three emails between [named individual] and [named individual]. A search of [named individual's] email account at the time of the request did not locate these emails and another search on September 21, 2009 confirmed that the Town is not in possession of these records however, a reasonable search was conducted in both instances. The Town responds that the email may have inadvertently been deleted.
>
> Similar to Document E7, portions of the 'copied to' fields and the entire bodies of the emails are severed preventing the Town from determining whether the appellant is listed as a copied recipient therefore removing the records from the scope of the request. Further, the message fields of the emails are extensively severed preventing the Town from determining whether the subject matter is responsive to the requests because even though the appellant's surname is in the subject field, the email may in fact deal exclusively with another homeowner who was also dealing with similar issues at that time. If that is the case, the Town may have removed the records from the scope of the request.
>
> Documents E9-E16 are emails created after the original F.O.I requests were received. The Town identified the requests to include only records created up to and including the submission date was January 18, 2007. This range of documents is not within the scope of the request.

Analysis and Finding

In Order PO-2592 Adjudicator Laurel Cropley addressed an assertion in that appeal that a search conducted by the Ontario Secretariat for Aboriginal Affairs (OSAA) for responsive records should have been conducted differently, albeit in the context of an appeal of the amount of a fee. She wrote:

> Although the Co-ordinator may not have known where all of the records were located, she quite appropriately directed the requests to the various branches that might have records in order for those staff members most knowledgeable with respect to the types of records and their specific locations to conduct the actual searches. There is no requirement that these staff be experts in the Freedom of Information process. Rather, they must be knowledgeable insofar as the subject matter of the requests is concerned. I find that they were. Indeed, I am persuaded that having those staff members most familiar with their own workstations to

> conduct the searches for responsive records in what was clearly a dynamic environment, was likely the most efficient way of responding to the requests.
>
> Although there may be different methods of conducting computer searches, with attendant efficiencies, I do not find that the approach taken by the OSAA in this case to be unreasonable. Moreover, it is likely that staff members would have had to open the e-mails in any event to determine whether they contained responsive information quite apart from determining the timeframe. In addition, it is noteworthy that each staff member spent only one half of an hour conducting the entire search of his or her workstation, which involved a number of different types of files. I find that any savings in using the approach suggested by the appellant would have been negligible.
>
> It is apparent that each individual search was not particularly time consuming. Rather, the amount of time taken to search for responsive records is a reflection of the number of locations in which the responsive records were located. The OSAA has clearly explained why and how records are maintained in its various branches, and I find that it has established that it maintains a regularized system of information management for active files. As I indicated above, it is clear from the OSAA's representations, that they are organized in a way that makes them most accessible to the area holding them. As I noted above, the OSAA is not obliged to maintain its records in such a way as to accommodate the appellant's request.
>
> I find that the OSAA has provided a sufficiently detailed description of the steps taken to locate responsive records, including the staff members involved, the locations they searched, the time each one took to conduct the search and the results of each search, to enable me to determine that the steps undertaken to search for responsive records was reasonable in the circumstances and supports the fees that have been estimated to date. Accordingly, I uphold the OSAA's fee estimate for the costs of searching for responsive records.

The steps the Town took to locate responsive records were extensive and I am not satisfied that they would have been made more efficient or less expensive by conducting the type of search suggested by the appellants. The narrowed requests were detailed and specific. It is likely that Town staff would have had to open their various e-mails in any event to determine whether they contained responsive information quite apart from determining the timeframe of the records. In all the circumstances, in my view, it was reasonable for the Town to conduct a search in the manner in which it did, as opposed to that suggested by the appellants.

As set out above, although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester must still provide a reasonable basis for concluding that such records exist [Order MO-2246]. Furthermore, the *Act* does not require the institution to prove with absolute certainty that further records do not exist. In my opinion, the Town has provided a reasonable explanation as to why some of the documents the appellants'

obtained under another process were not located or fell outside the scope of the request. I find that the Town has provided a sufficiently detailed description of the steps taken to locate responsive records, including the individuals involved and the manner in which the searches were conducted, to enable me to determine that the steps undertaken to conduct the search were reasonable in the circumstances.

WHICH FEE STRUCTURE APPLIES

Section 45(1) requires an institution to charge fees for requests under the *Act*. More specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of Regulation 823. This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823, as set out below.

Section 45(1) of the *Act* reads:

> 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.

Section 6 of Regulation 823 sets the typical fees for access under section 45(1) of the *Act*. This section reads:

> 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 records provided on CD-ROMs, $10 for each CD-ROM.
>
> 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 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.

A different fee structure applies if the request is for access to personal information about the individual making the request for access. This is set out in section 6.1 of regulation 823, which provides:

> The following are the fees that shall be charged for the purposes of subsection 45(1) of the Act for access to personal information about the individual making the request for access:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> 2. For records provided on CD-ROMs, $10 for each CD-ROM.
>
> 3. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.
>
> 4. 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.

Comparing the two sections of the regulations it is evident that if the request is for access to personal information about the individual making the request, there is no provision for two types of charges, which can become the lion's share of an access fee. They are:

- For manually searching a record, $7.50 for each 15 minutes spent by any person.
- For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.

In this appeal the appellants take the position that their requests are for access to their personal information and, accordingly, any charges for a manual search or preparing the records for disclosure should form no part of the fee for access.

Accordingly, a determination as to whether the request is for personal information will determine which fee provisions apply.

PERSONAL INFORMATION

Section 2(1) of the *Act* generally defines "personal information" as recorded information about an identifiable individual, and in a number of paragraphs that follow, sets out examples of the information that is included in the definition. Paragraph (d) includes in the definition of "personal information" the address or telephone number of the individual and paragraph (h) includes 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, PO-2225, R-980015, MO-1550-F, MO-2432]. 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].

The Representations of the Appellants

The appellants submit that the responsive records contain information about them, their home and their personal property. They submit that the information relates to them "in a personal and business/financial capacity as we purchased the home from the builder and have lived in the home ever since" and that "[i]t is reasonable to expect that [one and/or the other of the appellants] would be identified if any of the various parties were to reference the HVAC problems on [their street]". In response to the Town's submission that it performed "keyword searches" to locate the records listed in the Town's Index, the appellants suggest that this would have included their full names, four of their email addresses that incorporated their names and their home address. They submit that "[a]ll of these keywords belong to the appellants and are thus 'personal', so all records found as a result of this search are 'personal information'."

The appellants refer to Order MO-1684 and conclude "[t]he records requested contain our personal information as they relate to us personally and also to our home and thus should be exempt from the fee to manually search for and prepare the records."

The Representations of the Town

The Town submits that "the records in question contain information related to property matters, such as information about the requester's house; specifically its heating, cooling, air circulation and water heating records. Therefore, the records are subject to fees for general information." The Town also submits that this office dismissed a privacy complaint concurrently filed by the appellants, with respect to their privacy concerns about information in the responsive records.

Analysis and Findings

Dealing first with the privacy complaint, I note that it contains no determination about whether the information contained in the responsive records qualifies as personal information. As a result, I find it of no assistance in determining the issue before me, which turns on whether the request can be characterized as being one for personal information as opposed to a request for information concerning a residential property.

In Order 23 former Commissioner Sidney B. Linden addressed the distinction between "personal information" and information concerning residential properties. In that appeal, the information at issue was the estimated market value of properties identified by their municipal address. The former Commissioner made the following findings regarding the distinction to be made between "personal information" and residential properties:

> In considering whether or not particular information qualifies as "personal information" I must also consider the introductory wording of subsection 2(1) of the *Act*, which defines "personal information" as "...any recorded information about an identifiable individual...". In my view, the operative word in this definition is "about". The Concise Oxford Dictionary defines "about" as "in connection with or on the subject of". Is the information in question, i.e. the municipal location of a property and its estimated market value, about an identifiable individual? In my view, the answer is "no"; the information is about a property and not about an identifiable individual.
>
> The institution's argument that the requested information becomes personal information about an identifiable individual with the addition of the names of the owners of the property would appear to raise the potential application of subparagraph (h) of the definition of "personal information".
>
> Subparagraph (h) provides that an individual's name becomes "personal information" where it "...appears with other personal information relating to the individual or where the disclosure of the name would reveal other information about the individual" (emphasis added). In the circumstances of these appeals, it should be emphasized that the appellants did not ask for the names of property owners, and the release of these names was never at issue. However, even if the names were otherwise determined and added to the requested information, in my

> view, the individual's name could not be said to "appear with other personal information relating to the individual" or "reveal other personal information about the individual", and therefore subparagraph (h) would not apply in the circumstances of these appeals. [emphasis in original]

In Order MO-2053, Senior Adjudicator John Higgins reviewed the jurisprudence on this issue following Order 23. He states:

> Subsequent orders have further examined the distinction between information about residential properties and "personal information". Several orders have found that the name and address of an individual property owner together with either the appraised value or the purchase price paid for the property are personal information (Orders MO-1392 and PO-1786-I). Similarly, the names and addresses of individuals whose property taxes are in arrears were found to be personal information in Order M-800. The names and home addresses of individual property owners applying for building permits were also found to be personal information in Order M-138. In addition, Order M-176 and Investigation Report I94-079-M found that information about individuals alleged to have committed infractions against property standards by-laws was personal information. In my view, the common thread in all these orders is that the information reveals something of a personal nature about an individual or individuals.
>
> The information at issue in this case bears a much closer resemblance to information which past orders have found to be about a property and not about an identifiable individual. For example, in Order M-138, the names and home addresses of individual property owners who had applied for building permits were found to be personal information, but the institution in that case did not claim that the property addresses themselves were personal information, and the addresses were disclosed. In Order M-188, the fact that certain properties owned by individuals were under consideration as possible landfill sites was found not to be personal information. Similarly, in Order PO-2322, former Assistant Commissioner Tom Mitchinson found that water analysis and test results concerning an identified property were information about the property, not personal information.

In Order MO-2053, Senior Adjudicator Higgins went on to find that two fields of information titled "street no" and "street name" for locations of septic systems were information about the property and not "about" an identifiable individual.

In Order PO-2322, after referring to the portion of Order 23 reproduced above, Adjudicator Stephanie Haly determined that responsive records pertaining to a request for information about potential salt contamination of a well on the requester's property, was information about a property. She wrote:

> Applying Commissioner Linden's reasoning to the circumstances of this appeal, I find that all of the requested records contain information about a property, specifically the property currently owned by the appellant. Back in 1987, a new well was drilled on this property, along with others in the same vicinity, in order to address contamination issues caused by road salt used by the Ministry that had leaked into the existing wells. The Ministry retained the services of MOE to investigate the cause of the problems on these properties and, as a result of MOE's investigation, administrative arrangements were made with the various property owners, including the former owner of the appellant's property, in order to proceed with the well drilling project. No particular personal considerations were relevant in this context and, in my view, the records created by the Ministry contained information about the various properties and not about the former owner in any personal sense.
>
> I should also note that none of the records contain "information relating to financial transactions" (paragraph (b) of the definition) involving the former property owner. Although one of the records is titled "Settlement Agreement", this record contains no financial information and the transaction reflected in this record is not accurately characterized as a "financial" one.
>
> Simply stated, the information at issue in this appeal is "about" the property in question and not "about" the former owner. As such, it falls outside the scope of the definition of "personal information" in section 2(1) of the *Act*. Because only "personal information" can qualify for exemption under section 21(1), this exemption has no application in the circumstances of this appeal.

I agree with the approaches outlined in the excerpts reproduced above. The requests are, in substance, for information relating to the installation, operation and remediation of an HVAC system. In my view, the requests are for information "about" the appellants' property, not "about" the appellants personally. All of the records that the Town identified as responsive to the request discuss the installation, operation and remediation of the HVAC system. Some records, including Records D40 and D42 (addressed in more detail below), also contain a discrete amount of what might qualify as personal information relating to the appellants. However, I conclude that this information is so intermingled, that there is no meaningful way to separate out the personal information to establish that a differentiated fee structure should be applied [see in this regard Orders MO-1285 and PO-1647].

Finally, the fact that the identity of the appellants could be determined by reverse directories or some other way does not convert information about the installation, operation and remediation of the appellants' HVAC system from information about a property into personal information. In Order PO-1847, Adjudicator Katherine Laird noted that, in the context of a discussion about correspondence concerning possible land use, "… where records are about a property, and not about an identifiable individual, the records may be disclosed, with appropriate severances,

notwithstanding the possibility that the owners of the property may be identifiable through searches in land registration records and/or municipal assessment rolls."

I find that the request and the responsive records relate to the installation, operation and remediation of the appellants' HVAC system, the vast majority of which is information about a property, and does not qualify as the personal information of the appellants. I find that for the purposes of establishing the appropriate fee structure, the request at issue in this appeal is not a request for access to personal information about the individuals making the request for access, but rather a request for information about a property.

Accordingly, I find that the fee structure set out in section 6 of Regulation 823 applies.

QUANTUM OF FEES CHARGED

In all cases where an institution provides a fee estimate it must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated [Orders P-81 and MO-1614]. Where a requester disputes the amount of the fee, this office will review an institution's fee and determine whether it complies with the fee provisions in the *Act* and section 6 of Regulation 823, as set out above.

The appellants take issue with respect to the amount of the fee for access.

The Representations of the Town

The Town submits that the original estimate of 66 hours to manually search and prepare the records for disclosure in response to the initial requests was in fact the actual time spent. The Town submits that the original fee estimate was revised to 14.5 hours of time as a result of the appellants narrowing the scope of the requests. The Town states that the revised time was based on the actual work done to respond to the requests. As discussed above, an affidavit supplied by the Town described the nature and extent of the search that was conducted and the time spent preparing the records for disclosure.

The Town submits that staff members performed keyword searches to locate responsive e-mail messages, and that:

> The resulting collection of e-mail messages were printed and reviewed to ensure any non-applicable records were removed in addition to all paper files being searched. The resulting fees were based entirely on time spent searching for the records, time spent preparing the records by eliminating duplicate copies of emails, organizing the records and finally for the cost of photocopies.

The Representations of the Appellants

The appellants submit that 66 hours is an unreasonable amount of time to fulfill their first request. It is their position that "if the search had been completed by an agent or third party, the electronic files could have been located in a few minutes." They submit that "[t]he immediacy and widespread nature of the problems that the Town was investigating (52 homes in our street alone), indicates that our files ought to have remained identifiable and accessible, i.e. not in storage." They submit that a manual search such as that conducted by the Town is neither effective, nor reasonable. In their view, it would have been more efficient and effective for someone to conduct an "automated search" of the computer database and "they should not be penalized if the Town prefers to use an inefficient process".

They also take issue with the time it took the Town to complete the narrowed search. By their calculations, the Town took "29-minutes to prepare each of the 30 pages." The appellants submit that it is not clear how this time was accumulated and find it "excessive."

Analysis and Finding

In Order PO-2592, discussed above, Adjudicator Cropley found that although there may be different methods of conducting computer searches, with all of their attendant efficiencies, the approach taken by the institution in that case was reasonable. I make the same finding here. The steps the Town took to locate responsive records were extensive and I am not satisfied that they would have been made more efficient or less expensive by conducting a computer search. As I discussed above, it is likely that Town staff members would have had to open their various e-mails in any event to determine whether they contained responsive information quite apart from determining the timeframe of the records. In all the circumstances, in my view, it was reasonable for the Town to conduct a search in the manner in which it did as opposed to that suggested by the appellants.

The extent of the Town's search efforts are discussed in the section on reasonableness of search, above. The Town states that the original estimate of 66 hours to manually search and prepare the records for disclosure in response to the initial requests was, in fact, the actual time spent. The Town states that the revised time of 14.5 hours was based on the actual work done to respond to the specific and detailed narrowed requests. In all the circumstances, although there appears to be a calculation discrepancy in one of the decision letters, and it would have been of great assistance to receive a more extensive accounting of the time spent, I am satisfied that the Town actually spent a total of twelve hours to search for the records responsive to the detailed narrowed requests.

Section 45(1)(b) of the *Act* allows for the costs of preparing a record for disclosure. This includes time for severing a record [Order P-4] or running reports from a computer system [M-1083]. The Town claims 2.5 hours of time simply for "preparing the records" by "eliminating duplicate copies of emails" and "organizing the records". Without further particulars of what that entailed, I am not satisfied that the Town has established its entitlement to the preparation time claimed.

The Town is entitled to charge $7.50 for each 15 minutes of time spent searching for the records. The fee for the twelve hours of search time that I have allowed is therefore $360.00.

In accordance with the findings made above, I therefore reduce the Town's fee for searching for the records from the sum of $465.00 to the sum of $360.00.

SOLICITOR CLIENT PRIVILEGE

The Town claims that the discretionary exemption at section 12 of the *Act* applies to Records D40 and D42. I have determined above that these Records contain some discrete amounts of information that, in my view, qualifies as the personal information of the appellants under paragraph (h) of the definition of "personal information". As a result, I need to consider the application of section 38(a) of the *Act*, which provides that:

> 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.

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. Branch 1 arises from the common law and branch 2 is a statutory privilege. 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) 257 (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 [Orders PO-2441, MO-2166 and MO-1925].

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.)].

Loss of privilege

Waiver

Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege.

Waiver of privilege is ordinarily established where it is shown that the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege

[*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)].

The Representations of the Town

The Town explains that the basis for the application of this exemption (and the section 7 exemption discussed in more detail below) stems from a proceeding brought by the appellants before the License Appeals Tribunal.

Record D40

The Town describes Record D40 as containing a thread of three e-mails flowing between its building department staff and its legal counsel. The Town explains that the first e-mail in the string was sent by building staff to the Town's CAO and Town Solicitor and describes the chronology of events leading up to a motion being brought to add the Town as a party to the License Appeal Tribunal proceedings. The Town further submits that this e-mail is a record prepared for counsel employed by an institution for use in giving legal advice in contemplation of litigation. The Town submits that this "is information passed by the client to the solicitor as part of the continuum aimed at keeping both informed so that advice may be sought and given as required". The Town submits that the second e-mail in the thread is an exchange between the Town Solicitor and Assistant Town Solicitor forwarding on the previous e-mail so that the Assistant Town Solicitor could provide legal advice to staff.

The Town submits that the final e-mail in the thread is a communication from the Assistant Town Solicitor to members of building staff seeking information with respect to the appellants' litigation. The Town says this was to elicit information to enable the Town to properly prepare a response to the motion to add it as a party.

Record D42

The Town submits that this record also contains a string of e-mails and the second e-mail is a "communication between staff and the Town solicitor and is part of the continuum aimed at keeping both informed so that advice may be sought and given as required".

The final e-mail in the thread is a communication between two members of the Town's building staff which the Town submits contains advice and recommendations and falls within the scope of section 7(1) of the *Act*. I will address the application of section 7(1) to Record D42, below.

The Representations of the appellants

The appellants submit that at no time did they discuss or contemplate suing the Town. The inference being that there was no litigation in contemplation that would give rise to a litigation privilege. They further state that they did not initiate the motion to add the Town to the License Appeal Tribunal proceeding, which was brought by another party to the proceeding. They also confirm that they ultimately withdrew the proceeding, so there is no longer any contemplated litigation. Finally, they submit that, by its conduct, the Town waived any privilege that may have existed.

Analysis and Findings

I am satisfied that the first and final email in Record D40 and the second email in Record D42 represent confidential communications between a solicitor and client, made for the purpose of giving professional legal advice. I have not been provided with any evidence that the Town has waived that specific privilege, notwithstanding the assertions of the appellant. The actions of the Town recounted in the appellants' representations simply do not meet the requirements of waiver of privilege with respect to the portions of Records D40 and D42 that I have found to fall within

the scope of section 12 of the *Act*. As a result, I find that these emails fall under the solicitor-client communication aspect of Branch 1 of section 12. Accordingly, these e-mails are exempt under section 38(a) of the *Act*.

The final e-mail in Record D42 is a communication between two members of building staff. I find that this email does not fall within the scope of section 12 of the *Act*. I will consider whether that email falls within the scope of section 7(1) of the *Act*, below.

ADVICE OR RECOMMENDATIONS

The Town claims that section 7(1) applies to the final e-mail in the string of emails identified by the Town as Record D42. I have determined above that this record contains some discrete amounts of information that, in my view, qualifies as the personal information of the appellants under paragraph (h) of the definition of "personal information". As a result, I need to consider the application of section 38(a) of the *Act*, in conjunction with section 7(1). The text of section 38(a) is reproduced above.

Section 7(1) states:

> A head may refuse to disclose a record where 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 Order PO-1993, upheld on judicial review in *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].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above)].

Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above); Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above)].

The representations of the Town

The Town submits that the final email in the string of emails in Record D42 is between two members of building staff and is a communication pertaining to the first e-mail. The Town submits that it contains advice and recommendations from one staff member to another with respect to certain information in the first e-mail.

The representations of the appellants

The appellants' point out that during mediation the Town claimed that Record 42 was only subject to exemption under section 12 of the *Act*. They submit that "the Town has changed their position and they now claim that these records cannot be released as Section 7 of the *Act* applies. This change may indicate that an inaccurate denial was originally made, and casts doubts upon subsequent denials."

The appellants' further submit that since they do not know the contents of the record it is difficult for them to comment on how "deliberative" the Town has been.

Analysis and Findings

Section 11.01 of this office's *Code of Procedure* provides:

> In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

Analysis and Findings

In its initial decision letters, the Town expressly relied on section 7(1) of the *Act* to deny access to the information it withheld. Its supplementary decision letters following the narrowing of the requests also refer to the possible application of section 7(1). However, the Town's final decision letter make no mention of section 7(1). The report of the mediator does not indicate that the application of section 7(1) remained an issue in dispute in the appeal. The Town's revised index only lists section 12 as being the exemption applicable to Record D42. Yet, in its representations the Town claims that this portion of Record D42 is exempt under section 7(1).

The purpose of this office's 35-day policy is to provide institutions with a window of opportunity to raise new discretionary exemptions, but only at a stage in the appeal where the integrity of the process would not be compromised and the interests of the requester would not be prejudiced. The 35-day policy is not inflexible, and the specific circumstances of each appeal must be considered in deciding whether to allow discretionary exemption claims made after the 35-day period (Orders P-658, PO-2113). The 35-day policy was upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg* (21 December 1995), Toronto Doc. 110/95, leave to appeal refused [1996] O.J. No. 1838 (C.A.).

In Order PO-2113, dealing with the provincial equivalent of the *Act*, Adjudicator Donald Hale set out the following principles that have been established in previous orders with respect to the appropriateness of an institution claiming additional discretionary exemptions after the expiration of the time period prescribed in the Confirmation of Appeal:

> In Order P-658, former Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary in order to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will

> not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*. She also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, this could require a re-notification of the parties in order to provide them with an opportunity to submit representations on the applicability of the newly claimed exemption, thereby delaying the appeal. Finally, she pointed out that in many cases the value of information sought by appellants diminishes with time and, in these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.
>
> The objective of the 35-day policy established by this Office is to provide government organizations with a window of opportunity to raise new discretionary exemptions, but to restrict this opportunity to a stage in the appeal where the integrity of the process would not be compromised or the interests of the appellant prejudiced. The 35-day policy is not inflexible. The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.

In my view, the Town's expressly relying on section 7(1) in its representations has not resulted in any significant prejudice to the appellants, nor has it compromised the integrity of the process. This exemption was claimed by the Town in its initial decision letters. The appellants have had an opportunity to make representations on the application of section 7(1) and did so. In the circumstances, I find that the prejudice to the Town in disallowing its section 7(1) claim would outweigh any prejudice to the appellants in allowing it. As a result, I will consider the application of section 7(1) in this appeal.

Having considered the parties' representations and reviewed the contents of the portion of Record D42 remaining at issue, I am satisfied that the first three lines of the email qualifies as "advice or recommendations" within the meaning of section 7(1). In particular, that portion of Record D42 contains information that suggests a course of action that will ultimately be accepted or rejected by the person being advised or, if disclosed, would permit one to accurately infer the advice or recommendations given. I find that neither sections 7(2) or 7(3) apply to this information. In my view, however, the remaining portion of that email consists of factual or background information that I find does not qualify as advice or recommendations. Accordingly, I will order that the Town disclose to the appellants that portion of the email that I have highlighted on a copy of Record D42 which I have provided to the Town with this order.

In light of my findings above, I am satisfied that a portion of the final email in the string of emails in Record D42, falls within section 7(1) of the *Act*. Accordingly, that portion of the e-mail is exempt under section 38(a) of the *Act*.

EXERCISE OF DISCRETION

Despite any finding that some information falls within the scope of section 38(a) of the *Act*, the Town must exercise its discretion in deciding whether or not to disclose the records. On appeal the Commissioner may determine whether the Town failed to do so.

In addition, the Commissioner may find that the Town erred in exercising its discretion where, for example,

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

In such a case, this office may send the matter back to the Town 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 Town [section 43(2)].

In the circumstances of this appeal and considering the representations on this issue, I conclude that the exercise of discretion by the Town to withhold the information that I have not ordered to be disclosed was appropriate, given the circumstances and nature of the information.

ORDER:

1. I uphold the reasonableness of the Town's search for responsive records.

2. I uphold the Town's fee claim only to the extent of $360.00.

3. I order the Town to disclose to the appellants the second email in the email thread in Record D40, which is dated August 28, 2006, as well as the portion of Record D42 that I have highlighted on a copy of this record provided to the Town with this order, by sending them a copy by **December 3, 2009** but not before **November 27, 2009**

4. In order to verify compliance with the terms of provision 3, I reserve the right to require the Town to provide me with a copy of the portions of Records D40 and D42 that are disclosed to the appellants.

Original Signed By: October 29, 2009
Steven Faughnan
Adjudicator