

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2956

Appeal MA12-402

Municipality of the Township of Tiny

September 30, 2013

Summary: The appellant sought access to records consisting of complaints made about his business. The township denied access applying the discretionary closed meeting exemption in section 6(1)(b) to one record and the discretionary law enforcement exemptions in sections 8(1)(c), 8(1)(d) and 8(2)(a) to the remaining records. This order upholds the application of section 6(1)(b), but not the section 8(1) exemptions. The adjudicator also found that the mandatory personal privacy exemption in section 14(1) applied to the affected persons' personal information in the records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) definition of personal information, 14(1), 14(3)(b), 6(1)(b), 8(1)(c), 8(1)(d), 8(2)(a).

Orders and Investigation Reports Considered: Orders M-1109, MO-2249-I, MO-2759 and PO-1959.

OVERVIEW:

[1] The Municipality of the Township of Tiny (the township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for access to a complete copy of all by-law infractions, officers notes, statements, photos, fines, complaints, investigation logs and notes for an identified business.

[2] The township located the responsive records and granted partial access to them. Access to some of the information was denied pursuant to the discretionary exemptions in sections 6(1)(b) (closed meeting), 12 (solicitor-client privilege) and 8(1)(d) (law enforcement) of the *Act*.

[3] The requester, now the appellant, appealed the decision.

[4] During the course of mediation, the township issued a revised decision letter and disclosed Record 33 (with personal information redacted) and Record 60. The discretionary law enforcement exemptions in sections 8(1)(c) and 8(2)(a) were also added to the list of exemptions.

[5] Also during mediation, the appellant confirmed that he is not seeking access to the non-responsive information in the records and that he does not take issue with the redaction of Record 33. The appellant also confirmed that he is not seeking access to any of the records that were withheld pursuant to section 12 of the *Act*. Accordingly, section 12 is no longer at issue.

[6] As no further mediation was possible, the appeal was transferred to the adjudication stage of the appeals process where an adjudicator conducts an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the township initially seeking its representations. The township provided representations. I sent a Notice of Inquiry to the appellant's representative,¹ along with a copy of the township's representations. Appendix 3 of the township's representations was withheld due to confidentiality concerns. The appellant provided representations in response.

[7] I then sent a Notice of Inquiry to the by-law complainants named in the records (the affected persons) as their personal information may be contained in the records. These individuals provided representations in response, objecting to the disclosure of any information about them in the records.

[8] I then provided a copy of the affected persons' representations to the township and the appellant. Both parties provided representations in response. At the same time, the affected persons provided additional representations.

[9] In this order, I find that only one document in Record 25 is at issue and conclude that it is exempt by reason of section 6(1)(b). I also find that the personal information of the affected persons in the remaining records is exempt by reason of the mandatory personal privacy exemption in section 14(1). I order disclosure of the remaining information in the records.

¹ I will refer to the appellant's representative as the appellant in this order.

RECORDS:

[10] The records remaining at issue are described in the following index of records:

| Record # | General Description | Exemptions Applied by Township |
|-----------------|--|---------------------------------------|
| 25 | Sept 6/11 – Request for Oral Submission | 6(1)(b) |
| 29 | By-law General Occurrence Report with Officer’s log dated July 17/07 | 8(1)(c) & (d) 8(2)(a) |
| 30 | By-law General Occurrence Report with Officer’s log dated Aug 21/07 | 8(1)(d) |
| 36 | By-law General Occurrence Report with officer’s log dated Oct 25/07 | 8(2)(a) |
| 37 | By-law General Occurrence Report with officer’s log dated Oct 25/07 | 8(1)(d) 8(2)(a) |
| 39 | By-law General Occurrence Report with Officer’s log dated Apr 19/08 | 8(2)(a) |
| 40 | By-law General Occurrence Report with Officer’s log dated July 29/08 | 8(1)(c) & (d) 8(2)(a) |
| 41 | By-law General Occurrence Report with Officer’s log dated June 20/09 | 8(1)(c) 8(2)(a) |
| 42 | By-law General Occurrence Report with Officer’s log dated Aug 11/09 | 8(1)(d) 8(2)(a) |
| 43 | By-law General Occurrence Report dated Aug 18/09 | 8(2)(a) |
| 44 | By-law General Occurrence Report with Officer’s log dated Sept 1/09 | 8(1)(c) 8(2)(a) |
| 45 | By-law General Occurrence Report with Officer’s log dated July 6/10 | 8(1)(c) & (d) 8(2)(a) |
| 46 | By-law General Occurrence Report with Officer’s log dated July 13/09 | 8(1)(c) & (d) 8(2)(a) |
| 47 | By-law General Occurrence Report with Officer’s log dated July 20/10 | 8(1)(c) & (d) 8(2)(a) |
| 48 | By-law General Occurrence Report with Officer’s log dated July 27/10 | 8(1)(c) & (d) 8(2)(a) |
| 49 | By-law General Occurrence Report with Officer’s log dated July 27/10 | 8(1)(d) 8(2)(a) |
| 50 | By-law General Occurrence Report with Officer’s log dated Aug 3/10 | 8(1)(c) & (d) 8(2)(a) |
| 51 | By-law General Occurrence Report with Officer’s log dated Aug 10/10 | 8(1)(c) 8(2)(a) |
| 52 | By-law General Occurrence Report with Officer’s log dated Aug 17/10 | 8(1)(c) 8(2)(a) |

| | | |
|----|--|--------------------------|
| 53 | By-law General Occurrence Report with Officer's log dated Aug 31/10 | 8(1)(c) & (d) 8(2)(a) |
| 54 | By-law General Occurrence Report dated Dec 12/10 | 8(1)(d) 8(2)(a) |
| 55 | By-law General Occurrence Report with Officer's log dated July 5/11 | 8(1)(c) & (d) 8(2)(a) |
| 56 | By-law General Occurrence Report with Officer's log dated July 12/11 | 8(2)(a) |
| 57 | By-law General Occurrence Report with Officer's log dated July 12/11 | 8(1)(c) 8(2)(a) |
| 58 | By-law General Occurrence Report with Officer's log dated July 19/11 | 8(1)(d) 8(2)(a) |
| 59 | By-law General Occurrence Report with Officer's log dated July 26/11 | 8(1)(d) 8(2)(a) |
| 61 | By-law General Occurrence Report with Officer's log dated Aug 2/11 | 8(1)(d) 8(2)(a) |
| 64 | By-law General Occurrence Report with Officer's log dated Aug 9/11 | 8(1)(c) & (d) 8(2)(a) |
| 65 | By-law General Occurrence Report with Officer's log dated May 26/12 | 8(1)(d) 8(2)(a) |
| 66 | By-law General Occurrence Report with Officer's log dated July 3/12 | 8(1)(d) 8(2)(a) |
| 67 | By-law General Occurrence Report with Officer's log dated July 10/12 | 8(1)(c) & (d) 8(2)(a) |

ISSUES:

- A. Does the discretionary closed meeting exemption at section 6(1)(b) apply to Record 25?
- B. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- C. Does the mandatory personal privacy exemption at section 14(1) apply to the personal information at issue?
- D. Does the discretionary law enforcement exemption at sections 8(1)(c), 8(1)(d) or 8(2)(a) apply to the remaining information in the records, except Record 25?
- E. Did the institution exercise its discretion under sections 6(1)(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Does the discretionary closed meeting exemption at section 6(1)(b) apply to Record 25?

[11] Section 6(1)(b) reads:

A head may refuse to disclose a record,

that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

[12] For this exemption to apply, the institution must establish that

1. a council, board, commission or other body, or a committee of one of them, held a meeting
2. a statute authorizes the holding of the meeting in the absence of the public, and
3. disclosure of the record would reveal the actual substance of the deliberations of the meeting.²

[13] Previous orders have found that:

- “deliberations” refer to discussions conducted with a view towards making a decision;³ and
- “substance” generally means more than just the subject of the meeting.⁴

[14] Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings.⁵

² Orders M-64, M-102 and MO-1248.

³ Order M-184.

⁴ Orders M-703 and MO-1344.

⁵ Order MO-1344.

[15] The first and second parts of the test for exemption under section 6(1)(b) require the institution to establish that a meeting was held by the institution and that it was properly held *in-camera*.⁶

[16] In determining whether there was statutory authority to hold a meeting *in-camera* under part two of the test, the purpose of the meeting must be to deal with the specific subject matter described in the statute authorizing the holding of a closed meeting.⁷

[17] With respect to the third requirement set out above, the wording of the provision and previous decisions of this office make it clear that in order to qualify for exemption under section 6(1)(b), there must be more than merely the authority to hold a meeting in the absence of the public. Section 6(1)(b) of the *Act* specifically requires that disclosure of the record would reveal the actual substance of deliberations which took place at the institution's *in-camera* meeting, not merely the subject of the deliberations.⁸

[18] Concerning part 1 of the test, the township states that Record 25 was a Request for Oral Submission from a township resident which was considered *in-camera* at a Regular Committee of the Whole meeting and at the Regular Meeting of Council at which time a specific motion was passed and carried.

[19] With respect to part 2 of the test, the township relies on section 239(2)(e) of the *Municipal Act, 2001*, as authorizing the township to hold the meeting in the absence of the public. It states that Motion 560/11 was passed authorizing Council to deliberate in closed session and that the minutes of the Regular meetings referred to above support the fact that the matter was dealt with *in-camera* under "litigation or potential litigation, including matters before administrative tribunals affecting the municipality."

[20] Addressing part 3 of the test, the township states that disclosure of the record would reveal the actual substance of the deliberations of the closed meeting as the documents reveal the name of the individual who sought to make an oral submission to Council and the reason for the request. The township further states that a vote⁹ was taken on the matter in a public meeting, however the motion did not reveal the substance of the deliberation.

[21] The appellant submits that the township has failed to provide evidence that the *in-camera* meeting was properly held in accordance with section 239(2)(e) of the *Municipal Act, 2001*. The appellant states that the minutes of the Regular Meeting of Council reveal the identity of the parties requesting the *in-camera* meeting.

⁶ Order M-102.

⁷ *St. Catharines (City) v. IPCO*, 2011 ONSC 2346 (Div. Ct.).

⁸ Orders MO-1344, MO-2389 and MO-2499-I.

⁹ Motion referred to above.

Analysis/Findings

[22] Record 25 consists of three documents, as follows:

1. Request for Leave of Council to Make an Oral Submission *In-Camera* with attachment;
2. The township's decision; and
3. Letter from the township to affected persons.

[23] Document 1 is the document that was put before council at its *in-camera* meeting. I will consider whether section 6(1)(b) applies to this document.

[24] Document 2 is reproduced in full at paragraph 12 in Appendix 2 of the township's representations. Appendix 2 is the publicly available minutes of the Council Regular Meeting. As this document is publicly available and the appellant has a copy, I will not consider it further in this order.

[25] Document 3 is a letter written after the regular meeting of Council. This letter does not contain any further information about the *in-camera* meeting beyond that described in Document 2. As the information has been made available, I will not consider it further in this order.

[26] Considering Document 1 of Record 25, I agree with the township that a meeting was held, as evidenced by the minutes provided by the township, and that the township was authorized to hold the meeting *in-camera* under section 239(2)(e) of the *Municipal Act, 2001*. This section reads:

A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;

[27] The subject matter of Document 1 of Record 25 is litigation and this litigation affects the township. Therefore, both parts 1 and 2 of the test under section 6(1)(b) have been met.

[28] I further agree with the township that disclosure of this document would reveal the actual substance of the deliberations of the closed meeting. As evidenced by the public minutes of the Regular Meeting of Council, a motion was made that:

...the request for leave of council to make an *in-camera* oral submission dated ..., from [names of requesters] be received;

And that Council hereby denies the request.

[29] Although the minutes of the open meeting, where the above-mentioned motion was passed, reveal the names of the individuals who had made a request for leave of Council to make an *in-camera* oral submission, I find that this does not reveal the actual substance of the deliberations of the *in-camera* meeting and that part 3 of the test under section 6(1)(b) has been met.

[30] Therefore, I find that all three parts of the test under section 6(1)(b) have been met. Furthermore, the exception to section 6(1)(b) in section 6(2)(b) does not apply as the subject matter of the deliberations has not been considered in a meeting open to the public.

[31] Accordingly, subject to my review of the township's exercise of discretion, I find that Document 1 of Record 25 is exempt by reason of section 6(1)(b).

B. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[32] I have considered Record 25 above and have found that the responsive information in Document 1 is subject to section 6(1)(b). I will now consider whether the remaining records contain personal information and may accordingly qualify for exemption under section 14(1).

[33] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if 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 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;

[34] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.¹⁰

[35] Sections (2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[36] 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.¹¹

¹⁰ Order 11.

¹¹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

[37] 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.¹²

[38] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.¹³

[39] The affected persons did not provide representations as to whether the records contain personal information.

[40] The township only stated that Record 25 contains personal information, namely, the affected persons' names and address.

[41] The appellant states that only some of the information in the records may contain the affected persons' and other individuals' personal information.

Analysis/Findings

[42] The records, other than Record 25, are all By-law General Occurrence Reports to which are attached the by-law officers' handwritten notes.

[43] The first page of each record is a form completed by the by-law officer listing the occurrence date, type, location, names and addresses of the complainants, the names and addresses of the parties complained about, and the name and badge number of the by-law officer.

[44] The second page of each record contains the comments of the by-law officer investigating the complaint, which includes details of the complaint and the by-law officer's observations and findings.

[45] Attached to each record are the by-law officer's handwritten notes about the complaint.

[46] All of the records are complaints about the appellant's business. Based on my review of the records, I find that portions of the records, except for all of Records 39, 55 and 56, contain the personal information of the affected persons in their personal capacity. None of the records contain the personal information of the appellant.

[47] The personal information in the records includes the affected persons' home address and phone numbers, the personal opinions or views of the affected persons unrelated to another individual, the views or opinions of another individual about the

¹² Orders P-1409, R-980015, PO-2225 and MO-2344.

¹³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

affected persons and the affected persons' names which appear with other personal information in accordance with paragraphs (d), (e), (g) and (h) of the definition of personal information in section 2(1).

[48] The remainder of the information in the records is not personal information, but rather consists of the by-law officer's observations of and findings about the appellant's business activities. This information is information about the appellant in a business capacity made by the by-law officers acting in their official capacity. As this information is not personal information, the personal privacy exemption does not apply. I will consider below whether the law enforcement exemptions in sections 8(1)(c), 8(1)(d) or 8(2)(a) apply to this information, as well as to the information in Records 39, 55 and 56.

[49] I will now consider whether the mandatory personal privacy exemption at section 14(1) applies to the personal information of the affected persons in all of the records at issue, except for Records 25, 39, 55 and 56.

C. Does the mandatory personal privacy exemption at section 14(1) apply to the personal information at issue?

[50] Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

[51] The appellant submits that section 14(1) does not apply as the affected persons have either waived or consented to disclosure of the requested records because they have commenced a civil action against the appellant.

[52] The appellant also submits that disclosure does not constitute an unjustified invasion of personal privacy when considering all of the relevant circumstances listed in section 14(2). The appellant relies in particular on section 14(2)(d), which applies when the personal information is relevant to a fair determination of rights affecting the person who made the request.

[53] With respect to section 14(2)(d), the appellant states that since the affected persons have issued a Statement of Claim in the Superior Court of Justice, they are subject to the various laws and rules of procedure associated with such a proceeding. He states that the information at issue has some bearing or is significant to the determination of the rights arising from this court action and also that the personal information in the records is required in order to respond to the allegations set out in the Statement of Claim.

[54] The appellant further states that in the event that the presumption in section 14(3)(b) applies to the affected person's information the public interest override in section 16 should apply.

Analysis/Findings

[55] As stated above, where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

[56] If the information fits within any of paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure under section 14. The appellant has raised the application of the exception in section 14(1)(a).

[57] For section 14(1)(a) to apply, the consenting party must provide a written consent to the disclosure of his or her personal information in the context of an access request.¹⁴ Section 14(1)(a) reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

[58] I find that section 14(1)(a) does not apply. The initiation of court proceedings by the affected persons against the appellant does not result in a finding that this exception applies. The affected persons have not provided their consent to disclose their personal information in the records.

[59] The exceptions in sections 14(1)(b) to 14(1)(e) do not apply in this appeal.

[60] The section 14(1)(f) exception is more complex, and requires a consideration of additional parts of section 14. Section 14(1)(f) reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

¹⁴ Order PO-1723.

[61] The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f).

[62] If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 14. In this appeal none of the exceptions to section 14(4) apply.

[63] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14.

[64] In this appeal, the presumption in section 14(3)(b) may apply. This section reads:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

[65] Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.¹⁵ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.¹⁶

[66] The presumption can apply to a variety of investigations, including those relating to by-law enforcement¹⁷ and violations of the Ontario Human Rights Code.¹⁸

[67] The records are by-law investigation reports. Previous orders have found that a municipality's by-law enforcement process qualifies as a "law enforcement" matter under section 14(3)(b).¹⁹

[68] In Order MO-2759, the records were about a complaint that a portion of a homeowner's fence encroached on a city right-of-way. In that order, Adjudicator Frank DeVries stated that:

¹⁵ Orders P-242 and MO-2235.

¹⁶ Orders MO-2213, PO-1849 and PO-2608.

¹⁷ Order MO-2147.

¹⁸ Orders PO-2201, PO-2419, PO-2480, PO-2572 and PO-2638.

¹⁹ Orders M-16, MO-1295, MO-2147, MO-2322, MO-2331, MO-2571 and MO-2759.

As determined by the orders referred to by the city,²⁰ this office has established that personal information relating to investigations of alleged violations of municipal by-laws falls within the scope of the presumption provided by section 14(3)(b). In addition, previous orders²¹ have consistently held that section 14(3)(b) may still apply even if no proceedings are commenced against any individuals, and that the presumption only requires that there be an investigation into a possible violation of law. Although the presumption does not apply to information compiled after the completion of an investigation into a possible violation of law, it does apply to information compiled as part of the investigation. Furthermore, because the complaint initiated the investigation, I find that records describing the complaint, including the name of the complainant and the nature of the complaint, were compiled and identifiable as part of an investigation into a possible violation of law. This finding is consistent with many previous orders that have confirmed that the name of a complainant is captured by the presumption in section 14(3)(b).

[69] I agree with the findings in Order MO-2759 and find that information in the records describing the complaint, including the names of the complainants and the nature of the complaint, were compiled and identifiable as part of an investigation into a possible violation of law. Accordingly, I find that the presumption in section 14(3)(b) applies to the personal information in the records.

[70] Once a presumed unjustified invasion of personal privacy is established under section 14(3), it cannot be rebutted by one or more factors or circumstances under section 14(2).²² This includes the factor raised by the appellant in section 14(2)(d).

[71] Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies.²³ As stated above, section 14(4) does not apply in this appeal.

[72] The appellant has raised the application of the public interest override in section 16 to override the application of section 14(1) to the personal information in the records. Section 16 reads:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

²⁰ Orders M-382, MO-1496 and MO-1845.

²¹ Orders P-242 and MO-2235.

²² *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

²³ *John Doe*, cited above.

[73] The appellant has not provided any representations as to how section 16 is applicable in this appeal. For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[74] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government.²⁴ Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.²⁵

[75] A public interest does not exist where the interests being advanced are essentially private in nature.²⁶ Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.²⁷

[76] The word "compelling" has been defined in previous orders as "rousing strong interest or attention."²⁸

[77] In this appeal, I find that the interest in the records is private in nature. The appellant seeks access to the records in order to find out about complaints made about his business. Disclosure does not raise issues of more general application pertaining to the conduct or activities of the township.

[78] Although the appellant is engaged in litigation with the affected persons and has provided representations which suggest that he is seeking the records for his defence to this proceeding, I find that a compelling public interest does not exist as the court process provides an alternative disclosure mechanism.²⁹

[79] Accordingly, I find that the public interest override in section 16 does not apply. I find that the mandatory personal privacy exemption in section 14(1) of the *Act* applies to exempt the personal information in the records at issue.

²⁴ Orders P-984 and PO-2607.

²⁵ Orders P-984 and PO-2556.

²⁶ Orders P-12, P-347 and P-1439.

²⁷ Order MO-1564.

²⁸ Order P-984.

²⁹ See Orders M-249 and M-317.

D. Does the discretionary law enforcement exemption at sections 8(1)(c), 8(1)(d) or 8(2)(a) apply to the remaining information in the records, except Record 25?

[80] Sections 8(1) and (2) state in part:

(1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

- (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
- (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

(2) A head may refuse to disclose a record,

- (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

[81] The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

"law enforcement" means,

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

[82] The term "law enforcement" has been found to apply in the following circumstances:

- a municipality's investigation into a possible violation of a municipal by-law³⁰
- a police investigation into a possible violation of the *Criminal Code*³¹
- a children's aid society investigation under the *Child and Family Services Act*³²
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997*³³

[83] The term "law enforcement" has been found *not* to apply in the following circumstances:

- an internal investigation by the institution under the *Training Schools Act* where the institution lacked the authority to enforce or regulate compliance with any law.³⁴
- a Coroner's investigation or inquest under the *Coroner's Act*, which lacked the power to impose, sanctions.³⁵

[84] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.³⁶

[85] Except in the case of section 8(1)(e), where section 8 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.³⁷

³⁰ Orders M-16 and MO-1245.

³¹ Orders M-202 and PO-2085.

³² Order MO-1416.

³³ Order MO-1337-I.

³⁴ Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.).

³⁵ Order P-1117.

³⁶ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

³⁷ Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

[86] It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption.³⁸

[87] The township submits that Records 29 through to 66 are Municipal Law Enforcement Officers' Logs resulting from complaints lodged by resident(s) to investigate noise complaints at a named business. It states that the officers' logs reveal the identity of the complainant(s) and the technique used by these officers to ascertain the level of noise. It further states that the logs are also used to generate reports in the course of municipal law enforcement, inspections and investigations for future reference in the event of court action.

[88] The appellant submits that the township has simply assumed harm will follow if records are disclosed. He points out that under section 8(1)(c), the township has not shown that the technique or procedure is investigative, nor has it demonstrated that disclosure of the technique or procedure to the public "could reasonably be expected to hinder or compromise its effective utilization."

[89] The appellant submits that a concern about the "comfort" of complainants is not a sufficient reason to fall within the section 8(1)(d) exemption. The appellant states that the township has not established that the source's identity would remain confidential in the circumstances, nor has it explained why the record could not be partially redacted to protect a confidential source, were it established that the source's identity would remain confidential in the circumstances.

[90] The appellant refers to Order MO-1416, which indicates that:

...the sensitivity of the subject matter and the seriousness of the potential consequences arising from the report are compelling indications of the reasonable expectation of confidentiality held by the affected parties in providing the information.

[91] The appellant states that as the records concern noise complaints, these complaints attract very little sensitivity and the consequences of such complaints are likely to be minimal. The appellant states that there can be very little legitimate expectation of privacy in making such a complaint, in particular as it relates to a specific family that have filed a public statement of claim which puts their noise complaints at issue.

[92] With respect to section 8(2)(a), the appellant states that the township has not met the requirements to find under that section that the records are reports.

³⁸ Order PO-2040; *Ontario (Attorney General) v. Fineberg*.

[93] The appellant further states that information in the records could be redacted to prevent disclosure of information that is exempt.

[94] The affected persons state that the requested information contains information directly related to the enforcement of by-laws which is exempt under section 8 of the *Act* in particular for the following reasons:

a) Release of information would discourage the public from reporting violations of the law out of fear of retaliation which would interfere with law enforcement matters.

b) Release of information would/could directly interfere with on going reporting of problems related to the [appellant] and his violations of the law.

[95] The affected persons have also tried to raise additional discretionary exemptions, in particular sections 8(1)(e) and 8(2)(c). These sections read:

(1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

(e) endanger the life or physical safety of a law enforcement officer or any other person;

(2) A head may refuse to disclose a record,

(c) that is a law enforcement record if the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability;

[96] In Order MO-2249-I, Adjudicator Steven Faughnan decided not to consider the application of the sections 8(1)(e) and (l) and 13 discretionary exemptions raised by the affected party in that appeal. He stated that:

In Order PO-1705, former Assistant Commissioner Mitchinson dealt with an affected party raising the possible application of discretionary exemptions in the context of the *Freedom of Information and Protection of Privacy Act (FIPPA)*, the provincial equivalent of the *Act*. He wrote:

During mediation, the third party raised the application of the sections 13(1) and 18(1) [the provincial equivalent to section 11 of the *Act*] discretionary exemption claims for those records or partial records Hydro decided to disclose to

the requester. The third party also claimed that Hydro had improperly considered, or neglected to consider, these discretionary exemptions in making its access decision.

This raises the issue of whether the third party should be permitted to raise discretionary exemptions not claimed by the institution. This issue has been considered in a number of previous orders of this Office. The leading case is Order P-1137, where former Adjudicator Anita Fineberg made the following comments:

The *Act* includes a number of discretionary exemptions within sections 13 to 22 [of *FIPPA*, the equivalent of sections 6 to 16 of the *Act*] which provide the head of an institution with the discretion to refuse to disclose a record to which one of these exemptions would apply. These exemptions are designed to protect various interests of the institution in question. If the head feels that, despite the application of an exemption, a record should be disclosed, he or she may do so. In these circumstances, it would only be in the most unusual of situations that the matter would come to the attention of the Commissioner's office since the record would have been released.

The Act also recognizes that government institutions may have custody of information, the disclosure of which would affect other interests. Such information may be personal information or third party information. The mandatory exemptions in sections 21(1) [the equivalent of section 14(1) of the Act] and 17(1) [the equivalent of section 10(1) of the Act] of the Act respectively are designed to protect these other interests. Because the Office of the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme, the Commissioner's office, either of its own accord, or at the request of a party to an appeal, will raise and consider the issue of the application of these mandatory

exemptions. This is to ensure that the interests of individuals and third parties are considered in the context of a request for government information.

Because the purpose of the discretionary exemptions is to protect institutional interests, it would only be in the most unusual of cases that an affected person could raise the application of an exemption which has not been claimed by the head of an institution. Depending on the type of information at issue, the interests of such an affected person would usually only be considered in the context of the mandatory exemptions in section 17 or 21(1) of the *Act*.

I agree with these conclusions and adopt them for the purposes of this appeal...

With respect to the additional discretionary exemptions on which Enwave seeks to rely, I am not satisfied that this qualifies as the "most unusual of cases [where] an affected person could raise the application of an exemption which has not been claimed by the head of an institution." Discretionary exemptions all indicate that the head "may refuse to disclose...." In other words, as discussed earlier, the legislature expressly contemplates that the head of the institution is given the discretion to claim, or not claim, these exemptions. In this case, the City has exercised its discretion against claiming these additional discretionary exemptions, and there is no evidence that it considered improper or irrelevant factors in doing so. In my view, for the reasons set out above, including my determination that the safety and security of the City infrastructure can be addressed in the section 11 analysis, Enwave has not provided sufficient evidence in this case to support a finding that compelling circumstances exist that would justify the extraordinary approach of permitting an affected party to claim a discretionary exemption when the head has elected not to do so.

In all the circumstances, therefore, I will not consider the application of the section 8(1)(e) and (l) and 13 discretionary exemptions raised by Enwave.

[97] Similarly, in this appeal, I find that the affected persons have not provided sufficient evidence to support a finding that compelling circumstances exist that would

justify the extraordinary approach of permitting them to claim a discretionary exemption when the head has elected not to do so. The information at issue does not include the personal information of the affected persons, which I have ordered withheld above. The affected persons have publicly stated in their statement of claim and otherwise that they have made complaints against the appellant's business. The information remaining at issue concerns the by-law officers' observations of the appellant's business in response to the affected persons', by-law officers' or anonymous complaints. As a result, I will only consider the application of the discretionary exemptions in sections 8(1)(c), (d) and 8(2)(a) raised by the township to this remaining information.

Analysis/Findings - Section 8(1)(c): investigative techniques and procedures

[98] The township has claimed the application of section 8(1)(c) to Records 29, 40, 41, 44 to 48, 50 to 53, 55, 57, 64, and 67.

[99] In order to meet the "investigative technique or procedure" test, the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public.³⁹

[100] The techniques or procedures must be "investigative". The exemption will not apply to "enforcement" techniques or procedures.⁴⁰

[101] In the Notice of Inquiry sent to the township it was asked to respond to the following questions concerning the information in the records:

- What is the technique or procedure in question?
- Is the technique or procedure "investigative" in nature?
- Is the technique or procedure currently in use or likely to be used in law enforcement?
- Could disclosure of the technique or procedure reasonably be expected to hinder or compromise its effective utilization? Is the technique or procedure generally known to the public? Please explain, with reference to the above.

[102] Addressing section 8(1)(c), the township merely stated in its representations that "...the officers' logs reveal the technique used by these officers to ascertain the level of noise."

³⁹ Orders P-170, P-1487, MO-2347-I and PO-2751.

⁴⁰ Orders PO-2034 and P-1340.

[103] The records contain the township's by-law officers' notes about their response to complaints about noise and other issues at the appellant's property. The township has applied this exemption to selective records. It is not apparent to me how these records, which are the occurrence reports and logs of the by-law officers differ from the remaining records, which are also by-law officers' reports and logs.⁴¹

[104] The township has not identified the investigative technique or procedures that the officers utilize. Nor has the township identified where in the records any particular investigative techniques or procedures are located or how disclosure of any such technique or procedure to the public could reasonably be expected to hinder or compromise their effective utilization. In addition, I cannot ascertain this information from my review of the records.

[105] In order to meet the "investigative technique or procedure" test, the township must provide "detailed and convincing" evidence that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. Even if the records contain investigative techniques or procedures, I find that I do not have sufficient evidence to find that disclosure of these techniques or procedures could reasonably be expected to hinder or compromise their effective utilization.

[106] Accordingly, I find that section 8(1)(c) does not apply to the records.

Analysis/Findings - Section 8(1)(d): confidential source

[107] The township has claimed the application of section 8(1)(d) to Records 29, 30, 37, 40, 42, 45 to 50, 53 to 55, 58 to 59, 61, and 64 to 67.

[108] The institution must establish a reasonable expectation that the identity of the source or the information given by the source would remain confidential in the circumstances.⁴²

[109] Although both Records 39 and 55 contain complaints made by anonymous complainants, the township has only applied section 8(1)(d) to Record 55. The township did not provide an explanation as to why it has not applied section 8(1)(d) to Record 39. I find that Record 55, which contains the by-law complaints of an anonymous complainant, contains no information that would identify the source of the complaint. Accordingly, I find that section 8(1)(d) does not apply to Record 55, as disclosure would not reveal the identity of the source.

⁴¹ Other than Record 25, which is a completely different type of record, namely, a request made to council to make an oral submission at an *in-camera* Council meeting.

⁴² Order MO-1416.

[110] The township has claimed the application of section 8(1)(d) for reports and logs of the by-law officers in which the complainants are named. The representations of the appellant and the affected persons include references to public documents that include information about the identity of the complainants being publicly known. Therefore, I find that the township has not established that disclosure of the records at issue could reasonably be expected to identify the confidential source of the complaints under section 8(1)(d).

[111] Based on my review of the records and the parties' representations, I find that in the circumstances of this appeal, the township has not established that there was a reasonable expectation that the identity of the source or the information given by the source would remain confidential. Accordingly, I find that the records are not exempt by reason of section 8(1)(d).

Analysis/Findings - Section 8(2)(a): law enforcement report

[112] The township has claimed the application of section 8(2)(a) to all of the records in the index of records, except Records 25⁴³ and 30. The township did not provide an explanation as to why it did not apply section 8(2)(a) to Record 30, even though it is the same type of record as the remaining records.⁴⁴

[113] In order for a record to qualify for exemption under section 8(2)(a) of the *Act*, the institution must satisfy each part of the following three-part test:

1. the record must be a report; and
2. the report must have been prepared in the course of law enforcement, inspections or investigations; and
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.⁴⁵

[114] The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact.⁴⁶

[115] The title of a document is not determinative of whether it is a report, although it may be relevant to the issue.⁴⁷

⁴³ Record 25 is not a by-law officer general occurrence report and log but is a request made to council to make an oral submission at a closed Council meeting.

⁴⁴ Except Record 25.

⁴⁵ Orders 200 and P-324.

⁴⁶ Orders P-200, MO-1238 and MO-1337-I.

⁴⁷ Order MO-1337-I.

[116] Section 8(2)(a) exempts “a report prepared in the course of law enforcement *by an agency which has the function of enforcing and regulating compliance with a law*” (emphasis added), rather than simply exempting a “law enforcement report.” This wording is not seen elsewhere in the *Act* and supports a strict reading of the exemption.⁴⁸

[117] An overly broad interpretation of the word “report” could create an absurdity. If “report” means “a statement made by a person” or “something that gives information”, all information prepared by a law enforcement agency would be exempt, rendering sections 8(1) and 8(2)(b) through (d) superfluous.⁴⁹

[118] The records consist of by-law general occurrence reports and the handwritten or typed notes of by-law officers. The township did not provide direct representations on this exemption but merely stated that the by-law officers’ logs are “...used to generate reports in the course of municipal law enforcement, inspections and investigations for future reference in the event of court action.”

[119] The by-law officers’ notes consist of these officers recordings of facts. With respect to the occurrence reports in the records, generally these reports and similar records of law enforcement agencies have been found not to meet the definition of “reports” under the *Act*, in that they are more in the nature of recordings of fact than formal, evaluative accounts of investigations.⁵⁰

[120] In Order PO-1959, Senior Adjudicator Sherry Liang considered whether certain records, including notes of police officers and general occurrence reports, constituted “reports” for the purpose of this section 14(2)(a) of the *Freedom of Information and Protection of Privacy Act*.⁵¹ In addressing this issue, she wrote:

[The identified records] consist of either Sarnia Police Service incident reports, supplementary reports, or excerpts from police officers’ notebooks. Generally, occurrence reports and similar records of other police agencies have been found not to meet the definition of “report” under [the *Act*], in that they are more in the nature of recordings of fact than formal, evaluative accounts of investigations: see, for instance, Orders PO-1796, P-1618, M-1341, M-1141 and M-1120.

[121] In Order M-1109, former Assistant Commissioner Tom Mitchinson made the following comments about police occurrence reports:

⁴⁸ Order PO-2751.

⁴⁹ Order MO-1238.

⁵⁰ See, for instance, Orders PO-2967, PO-1959, PO-1796, P-1618, M-1341, M-1141 and M-1120.

⁵¹ The section at issue in that order was section 14(2)(a) of the *Freedom of Information and Protection of Privacy Act*, which is the provincial equivalent of section 8(2)(a) at issue in this appeal.

An occurrence report is a form document routinely completed by police officers as part of the criminal investigation process. This particular Occurrence Report consists primarily of descriptive information provided by the appellant to a police officer about the alleged assault, and does not constitute a "report".

[122] I agree with the approach taken in these previous orders issued by this office, and adopt it for the purpose of my analysis in this appeal. On my review of the records at issue, I am satisfied that they do not meet the definition of a "report" under section 8(2)(a) of the *Act*. The records primarily consist of observations, recordings of fact and collection of information, rather than formal statements of the results of the collation and consideration of information obtained during investigations.⁵² Accordingly, I find that section 8(2)(a) of the *Act* does not apply, and the records do not qualify for exemption under that section.

[123] Accordingly, I find that all of the records that the township has applied the discretionary law enforcement exemptions in sections 8(1)(c) and (d) and 8(2)(a) are not exempt under these sections.

E. Did the institution exercise its discretion under section 6(1)(b)? If so, should this office uphold the exercise of discretion?

[124] I will now consider whether the township properly exercised its discretion concerning the remaining document in Record 25, Document 1, which I have found to be subject to section 6(1)(b).

[125] The section 6(1)(b) exemption is discretionary and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[126] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

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

⁵² See Orders M-1109, MO-2065, PO-1845 and PO-1959.

[127] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁵³ This office may not, however, substitute its own discretion for that of the institution.⁵⁴

[128] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:⁵⁵

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

⁵³ Order MO-1573.

⁵⁴ Section 43(2).

⁵⁵ Orders P-344 and MO-1573.

[129] The township states that it exercised its discretion under section 6(1)(b) as it relied on Section 239 of the *Municipal Act* in an effort not to reveal to the general public the substance of the matter under consideration at an *in-camera* Council meeting. It argues that disclosure of Record 25 would divulge information that is considered "litigation or potential litigation, including matters before administrative tribunals affecting the municipality." It states that the request in Record 25 was provided to the township in confidence and Council deliberated *in-camera* and decided not to entertain a presentation *in-camera* or otherwise.

[130] The appellant states that he is seeking records related to his business and requires the information with respect to litigation commenced by his neighbours arising from alleged noise complaints. He states that the information requested is directly relevant to the allegations contained in the statement of claim issued against him, arguing that:

Failure by the [township] to release the requested information runs counter to the purposes of the *Act*, including that information should be available to the public, that individuals should have a right of access to their own personal information and that exemptions from the right of access should be limited and specific.

[131] The affected persons did not provide representations on this issue.

Analysis/Findings

[132] Based on my review of Document 1 of Record 25 and the township's and appellant's representations, I find that the township properly exercised its discretion in withholding the information in Document 1 of Record 25. This document is a detailed request to make an oral submission to an *in-camera* meeting of Council. The township has already disclosed the outcome of the *in-camera* meeting, where it denied the request. Remaining at issue in Document 1 of Record 25 are the reasons for this request. I find that the appellant does not have a sympathetic or compelling need to receive this information and disclosure will not serve to increase public confidence in the township.

[133] Accordingly, I am upholding the township's exercise of discretion under section 6(1)(b) concerning Document 1 of Record 25 on the basis that the township did not rely on improper considerations when it decided not to disclose this document.

ORDER:

1. I order the township to withhold Record 25.
2. I find that the affected persons' personal information in Records 29, 30, 36, 37, 40 to 54, 57 to 59, 61, and 64 to 67 is exempt by reason of the mandatory personal privacy exemption in section 14(1).
3. I order disclosure of the remaining information in Records 29, 30, 36, 37, 39 to 59, 61, and 64 to 67 to the appellant by **November 6, 2013** but not before **October 31, 2013**. For ease of reference, I have provided the township with a copy of these records highlighting the portions of these records that should not be disclosed to the appellant.
4. I reserve the right to require the township to provide me with a copy of the records disclosed to the appellant.

Original signed by: _____
Diane Smith
Adjudicator

_____ September 30, 2013