Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3208

Appeal MA13-582

Town of Collingwood

June 24, 2015

Summary: The town received a request for access to records relating to an identified by-law enforcement matter. It granted partial access to the responsive records and advised that it was charging a fee for the processing of the request. Subsequently, the requester clarified his request and the town issued a revised decision letter, granting partial access to the responsive records. Access to the remaining information was denied pursuant to the discretionary personal privacy exemption at section 38(a) (discretion to refuse a requester's own information), read in conjunction with sections 8(1) (law enforcement)), 10(1) (third party information), and 12 (solicitor-client privilege); the discretionary personal privacy exemption at section 38(b); and, the mandatory personal privacy exemption at section 14(1) of the *Act*. The town advised that it was reducing the fee to $117.40. The requester appealed the decision to deny access to portions of the records and the fee. During mediation, the appellant advised that he was of the view that the town clerk was in a position of conflict of interest by acting as the Freedom of Information Coordinator in the processing of his request and this was added as an issue. During the inquiry, the town advised that it was no longer relying on sections 8(1) or 10(1) to deny access to portions of the records. Those issues were removed from the scope of the appeal.

In this order, the adjudicator finds that the town's FOIC is not in a conflict of interest position with respect to the processing of the request and upholds the town's decision not to disclose the withheld portions of the records to the appellant. Finally, the adjudicator upholds the town's fee, in part, reducing it to $97.90.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, 2(1) (definition of "personal information"), 12, 14(1), 14(2)(h), 14(3)(b), 38(a), 38(b), and 45(1).

Orders Considered: Orders PO-2381, MO-1519, and MO-2227.

Cases Considered: *Wewaykum Indian Band v. Canada*, 2003 SCC 45 (CanLII).

OVERVIEW:

[1] The Town of Collingwood (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information within a specified time period:

> [The Town] has recently (2012-13) been involved in a by-law enforcement matter involving non-conforming and encroaching detached accessory building location on the residential property with the municipal address of [named address] (the property).
>
> The request is for a copy of the enforcement order issued by the town to the owner of the property in relation to this enforcement matter and a copy of any and all documents pertaining to the efforts of the town to resolve this enforcement matter with the owner of the property including any agreement, understanding or settlement that may have been entered into between the town and the owner of the property.

[2] The town issued a decision granting partial access to the responsive records. Access was denied to portions of the records pursuant to sections 8(1)(law enforcement), 10(1)(third party information), 12(solicitor-client privilege) and 14(1)(personal privacy) of the *Act*. The requester was also advised that the fee for processing his request was $137.90.

[3] Following his receipt of the town's decision, the requester provided additional information about the records he seeks. The requester also clarified that he did not require copies of records that he already has, such as records he sent to the town or records sent to him by the town, and requested that the invoice be revised accordingly. As a result, the town issued a revised decision with a reduced fee of $117.40.

[4] The requester, now the appellant, appealed the town's decision to deny access to the withheld portions of the responsive records and the reduced fee.

[5] During mediation, the town issued a revised decision letter granting partial access to additional records. As some of the records included the requester's own personal information, the town applied the discretionary exemptions at section 38(a)

(discretion to refuse a requester's own personal information), read in conjunction with sections 8(1), 10(1) and 12, and section 38(b) (personal privacy) of the *Act* to deny access to the remaining information. The town also applied the mandatory personal privacy exemption at section 14(1) to the records that did not contain the personal information of the appellant. The town provided the appellant and this office with a revised index of records.

[6] At the conclusion of mediation, the appellant advised that he continued to dispute the fee and wished to pursue access to all of the portions that were withheld from the responsive records. As a mediated resolution could not be reached, the file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry.

[7] Between the conclusion of mediation and the beginning of the inquiry process, the appellant advised that he was of the view that the town clerk is in a position of conflict of interest by acting as the Freedom of Information Coordinator (FOIC) in the circumstances of his request. As a result, the issue of "conflict of interest" was added to the appeal.

[8] During my inquiry into this appeal, I sought representations from the parties. The town's representations were shared with the appellant in accordance with the principles outlined in this office's *Practice Direction 7.* I determined that it was not necessary to share the appellant's representations with the town.

[9] In its representations, the town advised that it was no longer relying on either section 8(1) or section 10(1), read in conjunction with section 38(b), to withhold portions of the records from disclosure. As a result, those exemptions were removed from the scope of this appeal.

RECORDS:

[10] The records that remain at issue are identified on an index of records and include a notice to comply, an occurrence report and a number of emails, including attachments. Records 2, 6, 7, 8, 11, 12, 13, 15, 20, 21, and 23 have been withheld in part and Records 10, 16, 19 and 22 have been withheld in full.

ISSUES:

A: Is the town's FOIC in a conflict of interest position with respect to the processing of the request?

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

C. Does the discretionary exemption at section 38(a), read in conjunction with the solicitor-client privilege exemption at section 12 apply to the information at issue? Does the solicitor-client privilege exemption at section 12 apply, on its own, to the information at issue?

D. Does the mandatory personal privacy exemption at section 14(1) or the discretionary personal privacy exemption at section 38(b) apply to the information at issue?

E. Did the town exercise its discretion under sections 12, 38(a) and 38(b)? If so, should this office uphold the exercise of discretion?

F: Should the town's fee of $117.40 be upheld?

DISCUSSION:

A: Is the town clerk in a conflict of interest position with respect to the issuance of the access decision?

[11] The appellant alleges that the town clerk (who is also the town's FOIC) is in a position of conflict of interest with respect to the responsive records and should not have been permitted to act as the FOIC and process the request on behalf of the town.

[12] Previous orders have considered the issue of conflict of interest or bias.[1] In determining whether there is a conflict of interest, these orders posed the following questions:

(a) Did the decision-maker have a personal or special interest in the records?

(b) Could a well-informed person, considering all of the circumstances, reasonably perceive a conflict of interest on the part of the decision-maker?

[13] These questions are not intended to provide a precise standard for measuring whether or not a conflict of interest exists in a given situation. Rather, they reflect the kinds of issues which need to be considered in making such a determination.

[1] See for example Orders M-640, MO-1285, MO -1519, MO-2073, MO-2605, MO-2867.

Representations

[14] As noted above, the appellant takes the position that the town clerk is in a conflict of interest position vis-à-vis the records responsive to the request and, therefore, should not have been permitted to process his request. He submits that the town clerk was involved in the by-law enforcement matter that is the subject of the requested records. Specifically, he submits that, despite the fact that by-law enforcement matters are not within her responsibilities, the town clerk made a decision, on behalf of the town, not to enforce the town's set-back by-laws with respect to the by-law enforcement matter. He submits that the clerk's decision reversed a prior decision of the town's chief building official to enforce the by-law. The appellant submits that as the records that he requested which are at issue in this appeal relate to her decision not to enforce the zoning set-back by-law, she has "an obvious conflict of interest" and should not have been involved in processing the freedom of information request.

[15] The town acknowledges that it is the appellant's position that the clerk is in a conflict of interest position with respect to the processing of the request, because she acted as clerk in the by-law enforcement matter to which the requested records relate. It submits that despite the appellant's assertion that "by-law enforcement matters are not normally a part of [the clerk's] job description" matters of by-law enforcement for the municipality fall squarely within her responsibilities.

[16] The town takes the position that no conflict of interest exists with respect to the clerk's involvement with respect to the disclosure of the responsive records. It submits that she acted "in a completely professional manner and in accordance with her statutory obligations."

[17] The town points to Order PO-2381, in which Adjudicator John Swaigan found that the individual who made a decision to deny access to the requested record was not in a conflict of interest position in relation to the decision-making process, despite the fact that he was involved in matters directly related to the subject matter of that record. The town submits that the following comments made by Adjudicator Swaigan in that order demonstrate that "there is a high threshold to what will establish a conflict of interest or reasonable apprehension of bias" with respect to an institution's responsibilities the *Act*:

> …the fact that the CEO [Chief Executive Officer] has been personally involved in resolving the question of the disposition of these lands in his capacity as a senior official of the ORC [Ontario Realty Corporation], including participating in exploring options other than sale of the appellant's company, combined with the fact that the ORC and the appellant are in litigation over the appropriate disposition of these lands, is not sufficient to disqualify the CEO from exercising the statutory

> function of deciding access requests under the *Act*. These facts do not establish a conflict of interest or a reasonable apprehension of bias.
>
> In carrying out his functions under the *Act*, the CEO was not required to be impartial in the way that would be expected of an independent adjudicator. As set out in the Imperial Oil decision, the contextual nature may vary to reflect the content of a decision-maker's activities and the nature of his functions. The CEO was required to carry out certain functions and, in doing so, to comply with other legislation governing the ORC. He was also required to exercise his discretion in good faith, taking into account all relevant considerations and disregarding irrelevant ones. I cannot conclude from the evidence before me that he did otherwise.

[18] The town concludes its representations on this issue by submitting that the clerk's responsibilities with respect to the disclosure of the records do not substantiate a finding that she did not carry out her duties in a fair and impartial manner. It submits:

> There is nothing to indicate that [the clerk] has a personal or special interest in the records, notwithstanding that some of the records may have pertained to her and/or her department. Moreover, a well-informed person, considering the all of the circumstances, would not reasonably perceive a conflict of interest on the part of [the clerk] in these particular factual circumstances.

Analysis and finding

[19] A conflict of interest can be recognized at common law and, as will be discussed below, it appears well settled that it is not necessary to provide proof of "actual bias." Rather, the test most commonly applied by the courts is whether there exists a "reasonable apprehension of bias".

[20] In Order MO-2227, Senior Adjudicator John Higgins addressed a situation where it was alleged that the Information and Privacy Commissioner/Ontario was in a conflict of interest or was operating from a position of bias in adjudicating an appeal. In that order, Senior Adjudicator Higgins relied upon the reasoning in *Wewaykum Indian Band v. Canada,*[2] a decision of the Supreme Court of Canada concerning allegations of bias against an adjudicator. In that decision, the Court commented on the grounds for disqualification for bias. It stated:

> In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in

[2] 2003 SCC 45 (CanLII).

Committee for Justice and Liberty v. National Energy Board, [1976 SCC 2 (CanLII)], is the reasonable apprehension of bias:

> …the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly.
>
> …
>
> *The grounds for this apprehension must, however, be substantial,* and I … refuse to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience." [emphasis added]

[21] In Order MO-1519, Adjudicator Laurel Cropley addressed a situation where the appellant in that appeal took the position that the FOIC was in in a conflict of interest in handling both his access request and the appeal. In Order MO-1519, Adjudicator Cropley quoted and adopted the following comment of author Sara Blake in *Administrative Law in Canada:*[3]

> There is a presumption that a tribunal member will act fairly and impartially, in the absence of evidence to the contrary. The onus of demonstrating bias lies on the person who alleges it … Mere suspicion is not enough …

[22] Adjudicator Cropley went on to state that "taking this one step further, in my view, the onus is on the appellant … to provide a credible basis for the allegation."

[23] Having considered the representations of both parties and having reviewed the request, the decision letter, and the records, I acknowledge that the town clerk was originally involved in the by-law enforcement matters that gave rise to the records responsive to the appellant's request. However, I accept that her involvement in such matters falls within the scope of her responsibilities as town clerk. I also accept that in a small municipality, the responsibilities of FOIC are often undertaken by the individual who fills the role of the town clerk and that in such instances, as FOIC, the clerk will necessarily be required to process requests for records that relate to matters in which

[3] (3rd. ed.), (Butterworth's, 2001), at page 106.

she might have been involved. In my view, this is not sufficient to establish a conflict of interest.

[24] I have considered and adopt the reasoning expressed in Order MO-1519, mentioned above, where Adjudicator Cropley, in turn, outlined the position of author Sara Blake in *Administrative Law in Canada* that the onus of demonstrating bias lies on the person who alleges it and that mere suspicion is not enough. Although the FOIC is not a tribunal member, I agree with Adjudicator Cropley that the standard expressed by Professor Blake is appropriate. In the circumstances of this appeal, I find that the appellant has not discharged that onus.

[25] In my view, the appellant's representations have not demonstrated that either the manner in which the request was processed, or the manner in which the records have been severed, substantiate a finding that the town clerk did not carry out her duties as FOIC in a fair and impartial manner when processing the appellant's access request. I find that I have not been provided with sufficient evidence to demonstrate that as a result of the town clerk's involvement in the by-law enforcement matter that gave rise to the creation of the records in the course of fulfilling her responsibilities as town clerk, there is reason to believe that she exercised her obligations and responsibilities as FOIC in an inappropriate manner.

[26] Accordingly, I find that no conflict of interest exists in the town clerk acting as FOIC in the processing of the appellant's request.

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

[27] Under the *Act,* different exemptions may apply depending on whether a record at issue contains or does not contain the personal information of the requester.[4] Where the records contain the requester's own personal information, access to the records is addressed under Part II of the *Act* and the discretionary exemptions at section 38 may apply. Where the records contain the personal information of individuals other than the requester but do not contain the personal information of the requester access to the records is addressed under Part I of the *Act* and the mandatory exemption at section 14(1) may apply.

[28] Accordingly, 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,

[4] Order M-352.

> (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 if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[29] 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.[5]

[30] 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.[6] Even if information relates to an individual in a professional, official or

[5] Order 11.
[6] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[7]

[31] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[8]

Representations

[32] The town submits that records 2, 6, 7, 8, 10, 12, 22, and 23 contain the personal information of an identifiable individual, other than the appellant. It submits that this information meets the definition of "personal information" as that term is defined in section 2(1) of the *Act* as it contains the following:

- the individual's email address, mailing address and telephone number, which is personal information in the affected individual's personal capacity and which falls within the ambit of the definition of personal information in clauses (c) and (d);

- the individual's personal opinions or views on the merits of the by-law enforcement matter and relationship with other individuals is personal information and falls within the ambit of the definition of personal information in clause (e);

- the individual's correspondence with the town, which is of a private and confidential nature, and replies to that correspondence, would also reveal the contents of the original correspondence. Moreover, the affected individual has written to the town and expressly stated that such correspondence was supplied in confidence and should not be disclosed. As such the information falls within the ambit of the definition of personal information in clause (f); and,

- the individual's lawyer's correspondence on behalf of the individual to the town is of a private and confidential nature…. The list of examples of personal information under section 2(1) not exhaustive…therefore, information that does not fall under clauses (a) to (h) may still qualify as personal information. The town therefore asserts that any communications made by the individual's lawyer to the town, and replies to that correspondence, which reveal the contents of the original correspondence, are the personal information of an identifiable individual.

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[7] Orders P-1409, R-980015, PO-2225 and MO-2344.
[8] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[33] The town explains that the records being sought by the appellant are in reference to a by-law enforcement matter concerning a property line dispute between the appellant and his neighbour (the affected party). It submits that given the small number of individuals involved in the enforcement matter and the nature of the information at issue, there is a reasonable expectation that the release of the affected party's lawyer's correspondence with the town would disclose personal information about an identifiable individual (the affected party) even if that individual's name, email or telephone number were not disclosed.

[34] The appellant submits that as the affected party is his neighbour, he already has her email address, mailing address, and telephone number. He also submits that he has the name, email address, mailing address and telephone number of her lawyer.

[35] The appellant submits that the following types of information would not qualify as "personal information" under the *Act*:

- personal opinions and views which may have been expressed in the disputed documents by the affected party or her lawyer regarding him;
- information which relates to boundary issues and property rights and interests relating to the affected party's property as it is information about "property";
- information which relates to his own property and affects his own property rights and interests as property owner;
- information in the Statutory Declaration as it is an assertion of fact; and,
- information relating to the affected party's lawyer as he is acting in a professional capacity.

Analysis and findings

[36] Having reviewed the records at issue, I find that all of them contain the personal information of either the appellant, the affected party or both of them.

[37] Specifically, I find that records 2, 7, 8, 10, 11, 12, 16, 21, 22, and 23 contain the personal information of the affected party as that term is defined in section 2(1) of the *Act*. The personal information includes the affected party's marital or family status (paragraph (a)), her address, telephone number (paragraph (d)), her personal views or opinions that do not relate to another individual (paragraph (e)), correspondence sent to the town that is of implicitly of a private or confidential nature and replies to that correspondence that would reveal the contents of the original correspondence

(paragraph (f)), as well as her name, together with other personal information about her (paragraph (h)).

[38] I find that records 2, 6, 8, 10, 11, 12, 13, 15, 16, 19, 20, and 21 contain the personal information of the appellant, as that term is defined in section 2(1) of the *Act*. That personal information includes the appellant's marital or family status (paragraph (a)), his address and telephone number (paragraph (d)), his personal views or opinions that do not relate to another individual (paragraph (e)), correspondence sent to the town that is of implicitly of a private or confidential nature and replies to that correspondence that would reveal the contents of the original correspondence (paragraph (f)), the views or opinions of another individual about him (paragraph (g)), as well as his name, together with other personal information about her (paragraph (h)).

[39] Additionally, I find that record 10 also contains the personal information of the affected party's lawyer. This information amounts to the lawyer's name, together with other personal information relating to him, as contemplated by paragraph (h) of the section 2(1) definition of personal information. This information is not associated with the lawyer in a professional, official or business capacity, but rather, reveals something of a personal nature about him.

[40] In summary, I find that the records at issue contain the personal information of both the appellant and other identifiable individuals within the meaning of the definition of that term at section 2(1) of the *Act*. Records 2, 8, 10, 11, 12, 16, and 21 contain the personal information of both the appellant and the affected party. As described above, in circumstances where the appellant's personal information is mixed with that of another identifiable individual, Part II of the *Act* applies and I must consider whether the information is properly exempt pursuant to the discretionary exemption at section 38(b).

[41] Records 13, 15, 19, and 20 contain only the personal information of the appellant. As the town has claimed the solicitor-client privilege exemption applies to this information and the records also contain the personal information of the appellant, Part II of the *Act* applies and I must consider whether the information is properly exempt under the discretionary exemption at section 38(a), read in conjunction with section 12. Finally, records 7, 22, and 23 contain only the personal information of the affected party. Accordingly, Part 1 of the *Act* applies to this information and I must consider whether the information is properly exempted pursuant to the mandatory exempt at section 14(1).

C: Does the discretionary exemption at section 38(a), read in conjunction with the solicitor-client privilege exemption at section 12 apply to the information at issue? Does the solicitor-client privilege exemption at section 12 apply, on its own, to the information at issue?

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

[43] Section 38(a) reads:

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

[44] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[9]

[45] Section 12 reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[46] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

[47] Branch 2 ("prepared by or for counsel employed or retained by an institution…") is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

[48] In the circumstances of this appeal, the town submits that the severed portions of records 11, 13, 15, 16, 19, 20 and 21 are subject to common law solicitor-client communication privilege.

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[9] Order M-352.

[49] As records 11, 16, 20, and 21 contain the personal information of the appellant, the town relies on section 38(a), read in conjunction with section 12, to exempt portions of those records.

[50] As records 13, 15, and 19 do not contain the personal information of the appellant, the town relies on section 12, on its own, to exempt portions of those records.

Solicitor-client communication privilege

[51] 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.[10] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[11] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[12]

[52] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[13]

[53] 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.[14] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[15]

Representations

[54] The town submits that the severed portions of records 11, 13, 15, 16, 19, 20 and 21 meet the four factors attracting solicitor-client privilege: they are written communications, of a confidential nature, between legal counsel for the town and the town's agents or employees, and they were made for the purpose of giving or obtaining professional legal advice in relation to a by-law enforcement matter.

[55] The town submits that the communications were made in confidence and "the release of any communication between the town's agents or employees and its solicitor would be contrary to the town's historic practice of not disclosing advice subject to solicitor-client privilege, including communications necessary for that purpose."

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[10] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[11] Orders PO-2441, MO-2166 and MO-1925.
[12] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[13] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[14] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[15] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

[56] The town also submits that privilege attaches to this information as it consists of part of a "continuum of communications" between a solicitor and client (the town) whereby information is passed between them for the purpose of keeping them both informed, to allow for advice to be sought and given as required. In the circumstances of this appeal, the town submits, correspondence was exchanged in order to receive advice on the by-law enforcement matter.

[57] Further, the town submits that it has neither implicitly nor explicitly waived its privilege over the records at issue. It states that "at no time" has it disclosed the privileged information to outsiders. Additionally, it explains that the privilege belongs to the town and the only manner in which it may be waived is by council, the governing body of the municipality. It states that "privilege in this case has not been waived by the council for the town."

[58] The appellant submits that communications between the town and the affected party and/or her lawyer would not be protected by solicitor-client privilege. He submits:

> In the present circumstances, the town should exercise its discretion to disclose the information at issue, including the legal opinion of its solicitor (record 16), even if such information may be otherwise subject to solicitor-client privilege. This information directly affects me as it pertains to my property rights and interests….

Analysis and finding

[59] Based on my review of records 11, 13, 15, 16, 19, 20, and 21, I find that the portions that have been identified by the town are subject to exemption under the common law solicitor-client communication privilege aspect of branch 1 of section 12.

[60] I accept that the portions of records 11, 13, 15, 16, 19, 20, and 21, for which section 12 has been claimed, amount to communications between town employees and the town's external legal counsel. I agree with the town that all of these records contain direct solicitor-client communications or form part of a continuum of communication for the purpose of seeking or giving legal advice. Additionally, I have no evidence before me to conclude that the town has waived its privilege with respect to this information.

[61] Accordingly, I find that the portions of records 11, 16, 20, and 21 that are at issue are subject to the exemption at 38(a), read in conjunction with section 12, and that the portions of records 13, 15, and 19 that are at issue are subject to the exemption at section 12. As both of those exemptions are discretionary, all of that information is exempt from disclosure under branch 1, common law solicitor-client communication privilege, subject to my review of the town's exercise of discretion discussed below.

[62] As I have found that solicitor-client communication privilege at common law applies to the information at issue, it is not necessary for me to consider the possible application of the statutory solicitor-client privilege to this information.

D. Does the mandatory personal privacy exemption at section 14(1) or the discretionary personal privacy exemption at section 38(b) apply to the information at issue?

[63] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right. Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.[16]

[64] In contrast, under section 14(1), where a record contains personal information of another individual but *not* the requester, the institution is prohibited from disclosing that information unless one of the exceptions in sections 14(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy [section 14(1)(f)].

[65] Sections 14(1) to (4) are considered in determining whether the unjustified invasion of personal privacy threshold in either section 14(1) or section 38(b) is met. The exceptions in sections 14(1)(a) to (e) are relatively straightforward. None of them apply in the context of this appeal. The exception in section 14(1)(f) (where "disclosure does not constitute an unjustified invasion of personal privacy"), that applies in this appeal is more complex and requires a consideration of additional parts of section 14. The exception at section 14(1)(f) applies in the context of this appeal.

[66] Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Finally, section 14(4) identifies information whose disclosure is not an unjustified invasion of personal privacy.

[67] For records claimed to be exempt under section 14(1) (i.e., records that do not contain the requester's personal information), a presumed unjustified invasion of

[16] See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).

personal privacy under section 14(3) can only be overcome if a section 14(4) exception or the "public interest override" at section 16 applies.[17]

[68] If the records claimed exempt under section 14(1) are not covered by a presumption in section 14(3), it must be determined whether any of the factors in section 14(2) are relevant to the determination of whether disclosure would amount to an unjustified invasion of an individual's personal privacy. The information will be exempt unless the circumstances favour disclosure.[18]

[69] For records claimed to be exempt under section 38(b) (i.e. records that contain the requester's personal and that of other identifiable individuals), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.[19] This represents a shift away from the previous approach under both sections 38(b) and 14, whereby a finding that a section 14(3) presumption applied could not be rebutted by any combination of factors under section 14(2).[20]

Absurd result

[70] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under section 38(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.[21]

[71] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement[22]
- the requester was present when the information was provided to the institution[23]

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[17] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.
[18] Order P-239.
[19] Order MO-2954.
[20] As explained by Adjudicator Laurel Cropley in Order MO-2954 (at page 24): "… [I]t is apparent that the mandatory and prohibitive nature of section 14(1) is intended to create a very high hurdle for a requester to obtain the personal information of another identifiable individual where the record does not also contain the requester's own information. On the other hand, section 38(b) is discretionary and permissive in nature, which, in my view, reflects the intention of the legislature that careful balancing of the privacy rights versus the right to access one's own personal information is required in cases where a requester is seeking his own personal information."
[21] Orders M-444 and MO-1323.
[22] Orders M-444 and M-451.
[23] Orders M-444 and P-1414.

- the information is clearly within the requester's knowledge[24]

[72] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[25]

Representations

[73] In the current appeal, the town relies on section 14(1), to exempt portions of records 6, 7, and 23, which contain only the affected party's personal information, and not that of the appellant. As I have found that record 22 also contains the affected party's personal information, but does not contain the appellant's personal information, I will also determine whether section 14(1) applies to the relevant portions of that record. The town relies on section 38(b), to exempt portions of records 2, 8, 10, 12, and 21. Those records contain both the personal information of the appellant and the affected party.

[74] The town submits that the disclosure of the information that is subject to 14(1) would amount to a presumed unjustified invasion of the affected party's personal information, pursuant to the presumption at section 14(3)(b) which applies to information that was compiled and is identifiable as part of an investigation into a possible violation of law. It submits that the personal information of the affected party contained in records 6, 7, and 23 amounts to information relating to an enforcement matter regarding the affected party's compliance with a zoning by-law.

[75] The town also submits that, if the presumption does not apply to any of this information, the factor at section 14(2)(h) weighing against disclosure applies to the information. Specifically, it submits that the information was supplied to it by the affected party in confidence, she had an expectation that the information would be treated confidentiality, and that her expectation was reasonable in the circumstances. Moreover, it submits that she expressly wrote to the town and stated that she did not want any of the communications between herself and the town or her lawyer and the town to be disclosed to the appellant. Finally, with respect to the possible application of section 14(1) to the information at issue, the town submits that the absurd result principle does not apply to this information as the information contained in the records at issue is not within the appellant's knowledge; nor was it provided to him in any way.

[76] For the records that contain the appellant's personal information as well as that of the affected party, records 2, 8, 10, 12, and 21, and to which section 38(b) might apply, the town also submits that the presumption against disclosure at section 14(3)(b) for records compiled as part of an investigation into a possible violation of law

[24] Orders MO-1196, PO-1679 and MO-1755.
[25] Orders M-757, MO-1323 and MO-1378.

and the factor weighing against disclosure at section 14(2)(h) for records that were supplied in confidence, apply. The town applied the same reasoning for the application of this presumption and this factor as it did for the records for which it was claiming disclosure under section 14(1). Again, the town submits that the absurd result principle does not apply to this information.

[77] The appellant submits that the exemptions at section 14(1) or 38(b) do not apply if the information does not qualify as "personal information" as that term is defined in section 2(1). He also submits that if any of the information relates to him because it directly affects his interests as a property owner he is entitled to it.

[78] With respect to the information that the town claims is subject to the presumption at section 14(3)(b), the appellant submits in a letter from the town's lawyer states "it has not been confirmed to us nor to town staff that there has been a zoning contravention." The appellant submits that given that this statement indicates that "there was no need for by-law enforcement, the information was not compiled for such purpose."

[79] Responding to the possible application of the factor weighing against disclosure at section 14(2)(h), the appellant submits that the letter indicating that the affected party did not wish to have her information disclosed to the appellant was received after the information was submitted to the town and after his request for access to this information. He submits that at the time the information was supplied by the affected party and/or her lawyer to the town, "they had no reasonable expectation that it would be treated confidentially." He submits that "[t]he information related to the town's decision regarding the enforcement of set-back rules against [the affected party's] new building, a decision which directly affected my interests as the adjoining property owner." He submits that the affected party "should have considered and expected that before making its decision in this matter, the town would inform me regarding this information in order to be open and transparent in its decision-making process…."

[80] Regarding the possible application of the absurd result principle, the appellant states that he already has knowledge of the affected party's personal opinions or views regarding the merits of the by-law enforcement matter and he already has the full mailing address, business and/or telephone number of the affected party and her lawyer. The appellant submits that this knowledge and information has been provided directly to him by the affected party and her lawyer in a number of communications that he has received.

Analysis and findings

[81] From my review of the personal information for which either section 14(1) or section 38(b) has been claimed, I accept the town's position that its disclosure would

amount to an unjustified invasion of the affected party's personal privacy for the following reasons.

Absurd result

[82] Although the appellant submits that the absurd result principle applies in the circumstances of this appeal, I find that it does not. It is clear that he did not originally supply the information and was not present when it was supplied to the town. I acknowledge that the appellant submits that he already is aware of the information that is contained in the records as a result of communications with the town, the affected party, and the affected party's lawyer. However, in my view, this is very different than having access to the information contained in the specific records themselves. In the absence of more detailed evidence to support the appellant's position that the specific information that is in the records is clearly within his knowledge, I find that it is not.

[83] Additionally, even if the information is within the appellant's knowledge, taking into consideration the circumstances in which this information was supplied by the affected party to the town and the strained relationship between the appellant and the affected party, I find that disclosure under the absurd result principle would be inconsistent with the purpose of the personal privacy exemptions of the *Act*.

Section 14(3)(b) – investigation into a possible violation of law

[84] 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.[26] The presumption can apply to a variety of investigations, including those relating to by-law enforcement.[27]

[85] From my review of the records at issue, they were clearly compiled by the town in the course of investigations into a possible violation of the town's municipal by-laws. Previous orders of this office have consistently found that a municipality's by-law enforcement activities qualify as "law enforcement" and that the disclosure of personal information compiled and identifiable as part of the investigations into these matters would constitute a presumed unjustified invasion of personal privacy under section 14(3)(b) of the *Act.*[28]

[86] In keeping with previous orders, I find that all of the records for which the personal privacy exemptions have been claimed were clearly compiled and are identifiable as part of an investigation into a possible violation of law, specifically, the investigation into a possible contravention of a zoning by-law. Although the appellant

[26] Orders P-242 and MO-2235.
[27] Order MO-2147, MO-2814, and MO-2860.
[28] Orders MO-1295, MO-2147, MO-2814, and MO-2860.

submits that information contained in correspondence from the town's lawyer indicates that a by-law contravention might not have existed, on the face of the records that are before me, it is clear the town conducted an investigation into a possible zoning by-law contravention. As noted above, the presumption at section 14(3)(b) only requires that there be an investigation into a possible violation of law. It does not require that a violation of law be established. Accordingly, I find that the relevant portions of records 6, 7, 22, and 23, and records 2, 8, 10, 12, and 21, all meet the presumption against disclosure at section 14(3)(b) and their disclosure is presumed to give rise to an unjustified invasion of the personal privacy of the affected party.

[87] As previously described, in the circumstances of the possible application of the mandatory exemption at section 14(1), a presumption against disclosure can only be overcome if a section 14(4) exception or the "public interest override" at section 16 applies.[29] In the circumstances, none of the exceptions in section 14(4) are applicable. Additionally, section 16 has not been claimed, nor does it apply. Therefore, I find that the information at issue in records 6, 7, 22, and 23 are exempt from disclosure under the mandatory personal privacy exemption at section 14(1).

[88] As for records 2, 8, 10, 12, and 21, although the disclosure of the information for which section 14(1) has been claimed is also presumed to give rise an unjustified invasion of the affected party's personal information, as the disclosure of those records must be examined under section 38(b), I will go on to determine whether any of the factors listed in section 14(2) are relevant and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.[30]

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

[89] Section 14(2) provides some factors for the town to consider in making a determination on whether the disclosure of personal information would result in an unjustified invasion of the affected party's personal privacy. The list of factors under section 14(2) is not exhaustive. The town must also consider any circumstances that are relevant, even if they are not listed under section 14(2).[31] Some of these criteria weigh in favour of disclosure, while others weigh in favour of privacy protection.

[90] In the circumstances of this appeal, the town raised the possible application of the factor weighing against disclosure at sections 14(2)(h). Section 14(2)(h) reads:

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[29] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.
[30] Order MO-2954.
[31] Order P-99.

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances including whether,
>
> > the personal information has been supplied by the individual to whom it relates in confidence;

[91] There is no evidence before me to suggest that any of the other factors listed at section 14(2) might apply.

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

[92] The factor at section 14(2)(h) weighs in favour of privacy protection. For this factor to apply, both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.[32]

[93] In my view, regardless of whether or when the affected party advised the town that she did not wish her personal information be disclosed to the appellant, the context and surrounding circumstances of this matter are such that a reasonable person would expect that the information supplied by these individuals to the town would be subject to a degree of confidentiality. Accordingly, in this appeal, I find that the factor in section 14(2)(h) is a relevant consideration that weighs in favour of protecting the privacy of the affected party and withholding her personal information.

Summary

[94] In conclusion, I have found that the presumption at section 14(3)(b) applies to the personal information at issue because it consists of information that was compiled as part of an investigation into a possible violation of law, the contravention of a municipal by-law. Accordingly, I find that disclosure of the information at issue is presumed to result in an unjustified invasion of the personal privacy of an individual other than the appellant.

[95] For the severed portions of records 6, 7, 22, and 23 the mandatory personal privacy exemption at section 14(1) applies and I will uphold the town's decision not to disclose them.

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[32] Order PO-1670.

[96] For the severed portions of records 2, 8, 10, 12, and 21, in addition to finding that the presumption at section 14(3)(b) applies, I find that the factor weighing against disclosure in section 14(2)(h) is a relevant consideration as the information was supplied to town by the individual to whom it relates in confidence. No factors favouring disclosure of this information have been established. Therefore, the discretionary personal privacy exemption at section 38(b) applies to the information in these records and, subject to my discussion below on the exercise of discretion, I will uphold the town's decision not to disclose it.

E. Did the town exercise their discretion under sections 12, 38(a), and 38(b)? If so, should this office uphold the exercise of discretion?

[97] The exemptions at sections 12, 38(a), and 38(b) are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[98] 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.

[99] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[33] This office may not, however, substitute its own discretion for that of the institution.[34]

[100] With respect to its exercise of discretion, the town submits that it was exercised appropriately. The town submits that it considered whether the information should be made public in the interests of transparency and accountability, weighed against the wording of the solicitor-client privilege exemption at section 12 and the interests that it seeks to protect. It submits that the portions that it severed under section 38(a), read with section 12, were limited and specific; specifically limited to communications with the town's solicitors. It submits that under section 38(b) it considered the nature of the information and the sensitivity of its disclosure vis-à-vis the affected parties.

[33] Order MO-1573.
[34] Section 43(2).

[101] The town submits that it appropriately exercised its discretion and was "mindful at all times that it must not act in bad faith, withhold information for an improper purpose or act in contravention of the *Act*."

[102] The appellant submits that the town erred in exercising its discretion in that it took into account irrelevant considerations, including the personal privacy of one of the affected parties with respect to information that is already within his knowledge. He also submits that it failed to consider that he has a right of access to his own personal information and the withheld records relate to his property and his interests as a property owner. Finally, he submits that he has a "significant and compelling need" to receive the information.

[103] Considering the circumstances, I am satisfied that the town exercised its discretion in good faith and for a proper purpose taking into account all relevant factors. The town disclosed a fair amount of the responsive information and made only limited severances. I accept it did not err in exercising its discretion to deny the appellant access to the information that I have found to be subject to the discretionary personal privacy exemptions at section 38 and the discretionary solicitor-client privilege exemption at section 12.

[104] I acknowledge that the appellant believes that the town's application of the exemptions to the information at issue was based on irrelevant considerations. Although I accept that most of the considerations that he raises are indeed relevant, based on my review of the information that was severed from the records, I accept these considerations were taken into account by the town when applying sections 12, 38(a), and 38(b), specifically with respect to the information for which I have upheld the town's exemption claims.

[105] Accordingly, I find that the town considered all relevant factors and exercised their discretion under sections 12, 38(a), and 38(b) of the *Act* appropriately.

F. Should the town's fee of $117.90 be upheld?

[106] An institution must advise the requester of the applicable fee where the fee is $25 or less. Where the fee exceeds $25, an institution must provide the requester with a fee estimate [Section 45(3)]. Where the fee is $100 or more, the fee estimate may be based on either

- the actual work done by the institution to respond to the request, or
- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records.[35]

[35] Order MO-1699.

[107] The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access.[36] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.[37]

[108] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.[38] 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.

[109] Section 45(1) requires an institution to charge fees for requests under the *Act*. That section 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.

[110] More specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of Regulation 823. Those sections read:

> 6. 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.

[36] Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.
[37] Order MO-1520-I.
[38] Orders P-81 and MO-1614.

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.

6.1 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.

7. (1) If a head gives a person an estimate of an amount payable under the Act and the estimate is $100 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.

(2) A head shall refund any amount paid under subsection (1) that is subsequently waived.

> 9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

Representations

[111] In its decision letter, the town advised the appellant that it was charging a fee of $137.90 for access to the records responsive to his request. Attached to its decision letter was a breakdown of the fee identifying the amounts charged for search, preparation, and photocopying.

[112] Subsequently, the appellant provided the town with additional information regarding the records and advised that he was not seeking access to copies of records that he already had in his possession. As a result, the town issued a revised decision with a reduced fee of $117.40. The town provided the appellant with a breakdown of the fee as follows:

	Amount Due
Retrieval (12 x $7.50 (15 minute intervals))	$90.00
Preparation (2 x $7.50 (15 minute intervals))	$15.00
Photocopying (62 x $0.20)	$12.40
TOTAL	**$117.40**

[113] In its representations, the town explained how it arrived at $90.00 for "retrieval" expenses. It submits that as the majority of the responsive records involved email communication, town staff was required to search their emails accounts for a period spanning over one year. It submits that the town's Information and Technology (IT) services also undertook a comprehensive search of the email system to ensure that all responsive emails were retrieved. The town submits that this search took two hours to complete and 399 records were located. The town submits that town staff then reviewed each email to remove duplicate records and ensure the content of the email was responsive to the request, a process that took "an extensive amount of time, but only 45 minutes were charged in the invoice." The town also submits that a search of its enforcement software for occurrence reports, inspections, and violation notices relevant to the enforcement matter referred to in the request took approximately 15 minutes. It explains that it applied a fee of $90.00, reflecting a fee of $7.50 for each 15 minutes spent searching (2 hours, 45 minutes, and 15 minutes) and submits that this is in accordance with the provisions outlined in Regulation 823 made under the *Act*.

[114] With respect to the preparation fee, the town submits that its initial charge was a fee of $22.50 which reflected two minutes per record, with 23 records in total, to redact and to prepare the record index. For the revised fee, the town submits that it deducted the fee associated by removing one fifteen minute interval which reduced the fee to $15.00.

[115] With respect to the photocopy fee, the town explains that the records responsive to the request ultimately amounted to 62 pages and that it charged $0.20 per page for a total photocopy fee of $12.40 which, it submits, is in accordance with the fee provisions in Regulation 823.

[116] The town also submits that although it has invited the appellant to attend to review the records at no cost, he has declined the invitation and has not yet picked up the records to which he was granted partial access.

[117] With respect to the fee charged by the town for the responsive records, the appellant submits:

> A total fee of $117.50 seems excessive for providing one set of copies for what cannot amount to much more than 100 pages of records. Most of these records, if not all, were already in the personal possession of [the town clerk] who was the town staff member who took over the file and assumed direct responsibility for the town's handling of the enforcement matter.
>
> The fees of the town should not include any extra costs incurred as a result of unnecessary document searches, photocopying or other time and effort expended by the town due to its misinterpretation of the scope of my request or the fact that the civil litigation…was in progress at the time. Costs issues relating to that litigation have already been resolved by the parties.

Analysis and findings

[118] Having considered the representations of both parties regarding the fee charged by the town, I am prepared to uphold the fee, in part.

[119] In its representations, the town refers to "retrieval fees." Section 45(1)(a) of the *Act* requires the town to charge fees as prescribed in the regulations for "the costs of every hour of manual search required to locate a record." Although the town down not use the same term as used in the *Act,* I accept that when referring to "retrieval fees" the town is referring to the fees that it charged to manually search for the records responsive to the appellant's request.

[120] In its representations, the town submits that there were three components to its search. First, it took two hours to locate a total of 399 emails. Second, it took 45 minutes to review each record for duplication and to ensure that the content was relevant. Third, it took 15 minutes to search the law enforcement software.

[121] Under section 45(1)(a) of the *Act* and section 6(3) of Regulation 823, the town is entitled to charge $30.00 for each hour of search time. Although the town's total search fee of $90.00 conforms to the three total hours of time that it characterizes as search time, I do not accept that the town is entitled to charge for the 45 minutes taken to review each record for duplication and to ensure that the content is relevant. Moreover, section 6.1 of Regulation 823 does not include search time for manually searching a record for the requester's personal information. As some of the records contain the personal information of the appellant I will disallow this portion of the fee. As a result, I find that the town's search fee should be reduced by $22.50. Accordingly, I uphold a search fee of $67.50.

[122] With respect to preparation fees, under section 45(1)(b) of the *Act* and section 6(4) of Regulation 823, the town is permitted to charged $30.00 for each hour spent preparing a record for disclosure. This includes time taken to sever a record. Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances.[39]

[123] The town initially charged $22.50 reflecting two minutes per record with 23 records in total. This appears to be on a two minute per record standard, rather than accepted two minutes per page. In its revised decision letter, the town identified 62 pages of responsive records and advised that in its revised fee it deducted 15 minutes of preparation time from the original $22.50 charged, resulting in a fee of $15.00. In its representations, it does not explain why it reduced the preparation fee in this manner.

[124] Given that in its revised decision letter the town identified 62 pages of responsive records, I find that under the *Act* and regulations, the calculation that should have been made by the town was to charge a total of 2 hours of time for severing the records which amounts to $60.00. However, as section 6.1 of Regulation 823 does not permit the charging of fees for preparing a record for disclosure that contains the requester's personal information, and some of the records contained the requester's personal information, I find that the town is not entitled to charge for the preparation of all 62 pages of responsive records.

[125] As the town has already applied a reduced preparation fee of $15.00 and this amount is significantly less than what it was entitled to charge even taking into consideration that some of the records contained the appellant's personal information, I will uphold it. However, I will not allow it increase its fee for preparation time at this stage of the process. Additionally, the town is reminded that under section 45(1)(b), it is not entitled to charge preparation fees for preparing an index of records[40] as mentioned in its representations.

[39] Orders MO-1169, PO-1721, PO-1834 and PO-1990.
[40] Orders P-741 and P-1536.

[126] Finally, I uphold the town's fee for photocopying charges in the amount of $12.40 for 62 pages of responsive records. This fee is calculated in accordance with the rate in both sections 6 and 6.1 of Regulation 823 which permit a charge of $0.20 per page for records that either contain or do not contain the requester's personal information.

[127] In summary, I uphold the town's fee, in part. The town is permitted to charge a search fee of $67.50, a preparation fee of $15.00, and a photocopying fee of $12.40, for a total charge of $94.90.

[128] The appellant is reminded that the town has invited him to attend and review the records at issue, at no cost.

ORDER:

1. I uphold the town's decision not to disclose the severed portions of the records to the appellant.

2. I reduce the town's fee to a total charge of $94.90.

3. I dismiss the appeal.

Original Signed by: June 24, 2015
Catherine Corban
Adjudicator