

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3533

Appeal MA16-406

Town of Pelham

November 30, 2017

Summary: A request was made to the town for correspondence, memorandum, text and emails to and from the town CAO, mayor, a specified employee and town Council concerning a trespass on a specified farm. After a search, the town provided access to some records and withheld the remainder, taking the position that they were exempt from disclosure as a result of section 12 (solicitor-client privilege) and section 38(b) (personal privacy). The appellant took the position that further records should exist and that the records the town indicated were non-responsive be disclosed. In this order, the adjudicator upholds the town's decision except for one part of Record 1 where he finds that solicitor-client privilege does not apply and part of Record 21 where he finds that it would be absurd to withhold this record as it was already in the appellant's possession. The remainder of the appeal is dismissed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 12, 14(2), 17, 38(a) and 38(b).

BACKGROUND:

[1] The appellant made the following access request to the Town of Pelham (the town) pursuant to the *Municipal Freedom of Information and Protection of Privacy Act*, (the *Act*):

All correspondence, memo, text & emails, to and from the CAO, Mayor, [a specified employee] & Council regarding the [specified employee's]

trespass in September on [a specified farm]. To include correspondence to date.

[2] The town issued a decision granting partial access to the records responsive to the request. At the time, access to the withheld information was denied pursuant to sections 12 (solicitor-client privilege), and 14(1) (personal privacy) of the *Act*.

[3] The requester (now the appellant) appealed the town's decision.

[4] During mediation, the following occurred:

- The mediator raised the issue of the possible application of section 38(a) and (b)
- The town confirmed that certain information in the withheld records was deemed non-responsive to the request
- The town subsequently issued a revised decision removing sections 14(1)(f), 14(2)(h) and 14(2)(i) of the *Act*, and confirmed that it continued to deny access to the withheld information pursuant to sections 12, 14(3)(b), 38(a) and 38(b) of the *Act*
- The appellant advised the mediator of specific records he was seeking access to, including labelled photographs; further video footage; notes of the specified employee; correspondence between the mayor, CAO and council; and, an index of withheld records
- The town advised that photos and videos were outside the scope of this request and were dealt with in a separate request
- The town advised that notes were outside the scope of this request
- The appellant indicated that he wishes to pursue access to all of the information withheld by the town, including the information the town states is non-responsive
- The appellant believes that further records responsive to his request exist.

[5] As no further mediation was possible, the file was transferred to the adjudication stage of the appeals process, where an adjudicator conducts a written inquiry under the *Act*. The inquiry began by inviting the representations of the parties. Representations were received and shared in accordance with section 7 of IPC's *Code of Procedure* and Practice Direction 7. An affected party did not provide representations and instead signed a consent form that his personal information could be released to the appellant.

[6] In this order, the adjudicator finds that all of the information relating to the specified employee is his personal information. The adjudicator upholds the town's

decision with regard to solicitor-client privilege for all of the records except a portion of Record 1. The adjudicator also upholds the town’s decision with regard to 38(b). Finally, the adjudicator finds that the town conducted a reasonable search and that the records it determined were not responsive to the request are outside of the scope of the request.

RECORDS:

[7] The records at issue consist of 24 records, totaling 150 pages of emails.

[8] The bulk of the records consist of email chains. In my review, I noted multiple duplication of emails throughout the records with the same email chain appearing in many records. Each email will only be dealt with once in my analysis. The following chart sets out where the duplicates appear and in which record it is dealt with.

Record Number	Exemptions that apply	In dispute	Duplicate information	Appellant’s Personal information
1	s. 12	2 emails	No	No
2	s. 12, s. 38(a)	2 emails	4 emails (dealt with in record 12)	Yes
3	s. 12	2 emails	4 emails (dealt with in record 12)	No
4	s. 12, s. 14(1)	1 email	4 emails (dealt with in record 12)	No
5	s. 14(1)	1 email	4 emails (see record 12), 1 email (see record 2), 1 email (see record 4)	No
6	s. 14(1)	1 email	4 emails (see record 12), 1 email (see record 2), 1 email (see record 4)	No
7	s. 14(1)	1 email	4 emails (see record 12), 1 email (see record 2), 1 email	No

			(see record 5)	
8	s. 14(1)	3 emails		No
9	s. 14(1)	1 email		No
10	n/a	Entirely duplicated in record 8	Same chain as record 8	n/a
11	n/a	Entirely duplicated in record 12	4 emails (see record 12)	n/a
12	s. 14(1) s. 38(b)	4 emails		Yes
13	s. 14(1) s. 38(b)	3 emails	1 email (see record 9)	Yes
14	s. 14(1)	1 email	1 email (see record 9)	No
15	n/a	Entirely duplicated in record 9	Same email as in record 9	n/a
16	n/a	Entirely duplicated in record 9	Same email as in record 9	n/a
17	n/a	Entirely duplicated in record 9	Same email as in record 9	n/a
18	n/a	Entirely duplicated in record 9	Same email as in record 9	n/a
19	s.14(1) s. 38(b)	2 emails	1 email (see record 13)	No
20	n/a	Entirely duplicated in record 19	2 emails are duplicated in record 19	n/a
21	s. 14(1) s. 38(b)	1 email Incident Report Form Letter from		Yes

		appellant's counsel to town counsel (with attachments)		
22	s. 14(1)	1 email	1 email (see record 21)	No
23	s. 38(b) s. 14(1)	All duplicates	1 email (see record 13) 1 email (see record 19)	n/a
24	Non-responsive		n/a	n/a

ISSUES:

- A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(a) in conjunction with the section 12 exemption apply to the information at issue?
- C. Does the discretionary exemption at section 38(b) apply to the information at issue?
- D. Did the institution exercise its discretion under section 38(a) and 38(b)? If so, should this office uphold the exercise of discretion?
- E. Did the institution conduct a reasonable search for records?
- F. What is the scope of the request? What records are responsive to the request?

DISCUSSION:

Preliminary Issues:

[9] In his representations, the appellant raises a number of issues including some that are not within my jurisdiction to deal with here. However, I will briefly consider two of these issues relating to the town's representations.

[10] The appellant submits that the town did not provide its representations within the set deadlines and argues that he should be refunded the monies he paid concerning his 5 access requests. He further argues for the IPC to investigate whether the town is operating in an acceptable manner throughout this process. However, section 7 of the IPC's *Code of Procedure* sets out the process for requesting a time extension for the submission of representations. During the inquiry into this appeal at the adjudication stage, both the appellant and the town sought and received time extensions for submitting representations. In the circumstances, both parties provided representations within the set time limits and parties were given an opportunity to provide representations in reply. I find that the appellant has not been prejudiced in participating in the inquiry of this appeal by the town being given a time extension to submit its representations.

[11] The appellant also submits that I not consider information in the town's representations which is "untrue." In particular, this relates to the subject matter which forms the basis of the records at issue. Given the exemptions claimed and the records at issue, the issue of whether an assault occurred is not relevant to my determination of the issues. Accordingly, I will not be considering the appellant's submission on this issue further.

A: Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[12] 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.¹ 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.

[13] 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,

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

¹ Order M-352.

- (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;

[14] 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.²

[15] Sections 2(2), (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.

[16] To qualify as personal information, the information must be about the individual

² Order 11.

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.³

[17] 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.⁴

[18] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁵

Representations:

[19] In its representations, the town states that the emails that are the subject of this request relate to an assault against the town's employee involving the appellant. The town acknowledges that while its employee is a civil servant, the investigation into the matter and the legal advice and communications relate to its employee as a party to the assault and as such, go beyond his normal capacity as a municipal employee. The town submits that on this basis the information in the record relating to the employee constitutes personal information and not professional information.

[20] In the appellant's representations, he notes that the individual was clearly acting in his capacity as an employee of the town. According to the appellant, the employee identified himself as a town employee several times and it was apparent that he was intending to complete the duties of his employment. The appellant states that there was no question in the minds of those who were present that this individual was acting as an employee for the town. The appellant also notes that according to a report, prepared by the police relating to this incident, the specified employee recanted his statement that an assault occurred. The appellant submits that all actions took place during the employee's work hours.

[21] The appellant also states that he views all information in the possession of the town, relating to the incident, as his own personal information. He states that he was in attendance and expects that his involvement is front and centre in any notes.

Analysis:

[22] Under section 2(1), "personal information" is defined, in part, to mean recorded information about an identifiable individual. This includes the individual's name where it appears with other personal information relating to the individual or where disclosure of

³ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

the name would reveal other personal information about the individual.

[23] The records are mostly comprised of information relating to the incident that occurred on the appellant's farm. I note that the access request was for records relating to the employee's trespass. Much of the information relates to the town's employee while smaller parts are the personal information of the appellant and one other affected party both of whom were involved in the incident.

[24] It has been established in a number of previous orders that information provided by, or relating to, an individual in a professional capacity or in the execution of employment responsibilities is not "personal information" (Orders P-257, P-427, P-1412, P-1621, M-262). The appellant is an employee of the town. It is possible that these records were created because he is an employee, but they do not pertain to the execution of his employment responsibilities. Rather, in the circumstances of this appeal, I find that the records are about him in his personal capacity, as a party in the alleged assault.

[25] After my review of the records, I find that they all contain the personal information of the specified employee, while only some of the records contain the personal information of the appellant and the affected party (see above chart).

B: Does the discretionary exemption at section 38(a) in conjunction with the section 12 exemption apply to the information at issue?

[26] 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.

[27] 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.

[28] 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.⁶

[29] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

⁶ Order M-352.

[30] In this case, the institution relies on section 38(a) in conjunction with section 12.

[31] Section 12 states as follows:

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

[32] Section 12 contains two branches. Branch 1 (“subject to solicitor-client privilege”) is based on the common law. 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.

Branch 1: common law privilege

[33] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

[34] 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.⁷ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.⁸ 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.⁹

[35] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.¹⁰

[36] 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.¹¹ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.¹²

⁷ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁸ Orders PO-2441, MO-2166 and MO-1925.

⁹ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

¹⁰ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

¹¹ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

¹² *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

Representations:

[37] In the town's representations, it describes the records for which it is claiming the section 12 exemption (Records 1 to 7). With regard to Record 1, the town noted that a specified solicitor is the town's legal counsel in relation to an ongoing litigation matter between the town and the appellant. In reference to Record 1, the town states that its lawyer, in relation to an ongoing litigation matter between it and the appellant, provided legal advice to its employee.

[38] With regard to Records 2 and 3, the town states that a newspaper editor contacted the specified employee about a meeting. The town further states that in order to protect its interests, the ability to confide in the town's lawyer on an ongoing legal matter is paramount and the email exchanges, as provided to legal counsel, supports the position that the information was passed between the lawyer and the town to ensure both parties were fully informed of the issues.

[39] For Records 4 to 7, the town notes that these records are email exchanges between the town's CAO, various municipal staff and the mayor in relation to the investigation. The town notes that some of the records are duplicate to Records 2 and 3 and some are better described as relating to the investigation.

[40] The town notes that the litigation in this instance is two-pronged with an ongoing matter and the trespass/assault incident. The town submits that the records, including certain investigation records provided to the town by the police, were prepared in contemplation of litigation. The town further submits that because the appellant may proceed with a trespass charge against the specified employee, the records are exempt from disclosure at this time.

[41] The appellant did not address the issue of solicitor-client privilege specifically in his representations. He stated that he is one of several litigants in a separate action which is more than 10-years-old and unrelated to his access request in this appeal.

Analysis and finding:

[42] As set out above, 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.¹³

[43] I find that most of the information in the records that are claimed to be subject to section 12, falls within the scope of that exemption because disclosure of this information would reveal the nature of confidential communications provided in the context of a solicitor-client relationship or reveal the substance of the confidential communication or legal opinion provided. Accordingly, I find that the withheld

¹³ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

information in Records 1, 2, 3 qualify for exemption under Branch 1 of section 12. However, within Record 1 is an email from the town's solicitor to the appellant's solicitor and I find that this cannot qualify for exemption under section 12 and therefore cannot be withheld under section 38(a).

[44] The town also claimed section 12 for Records 4 to 7. From my review of those records, except for one email in Record 4, section 12 does not apply as they are not communications between a solicitor and client. Therefore, I will consider the application of section 14 to these. However, one email in Record 4, I find is a confidential communication between the town's employee and the town's solicitor for the purpose of seeking legal advice. Accordingly, I find that the withheld information in this email qualifies for exemption under Branch 1 of section 12.

[45] I have also considered whether the records at issue can be severed and portions provided to the appellant. In light of the appellant's familiarity with underlying matters in the records at issue, I am satisfied that the records cannot be severed without disclosing information that I have found to fall within the scope of section 12 of the *Act*. Furthermore, as identified in previous orders, an institution is not required to sever the record and disclose portions where to do so would reveal only "disconnected snippets," or "worthless" or "meaningless" information.¹⁴

[46] Therefore, I find that the withheld information in Records 1¹⁵, 2, 3, and one email in Record 4 are solicitor-client privileged information and qualify for exemption under Branch 1 of section 12 and 38(a).

C: Does the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply to the information at issue?

[47] As I have found that only Records 12, 13 and 21 contain the personal information of the appellant, I will consider the application of the discretionary personal privacy exemption in section 38(b) to these records only. For the remaining records that relate to the employee only, I will consider the application of the mandatory personal privacy exemption in section 14(1).

[48] 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.

[49] 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

¹⁴ See Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, (1997), 192 O.A.C. 71 (Div. Ct.).

¹⁵ with the exception of one email.

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

[50] In contrast, under section 14(1), where a record contains the personal information of another individual but *not* that of the requester, the institution is prohibited from disclosing the personal 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)).

[51] In determining whether the disclosure of the personal information in the records *would not* be an unjustified invasion of personal privacy under section 14(1)(f) or *would* be an unjustified invasion of personal privacy under section 38(b), sections 14(1) to (4) provide guidance. The information at issue in this appeal does not fit within any of paragraphs (a) to (e) of section 14(1) of the *Act*.

[52] The factors and presumptions at sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Additionally, if any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and is not exempt under either section 14(1) or 38(b).

Sections 14(2) and (3)

[53] 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.

[54] Even if the records are not covered by a presumption in section 14(3), section 14(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy and the information will be exempt unless the circumstances favour disclosure.¹⁷

[55] For records claimed to be exempt under section 38(b) (i.e., records that contain the requester's own personal information), this office will consider, and weigh, the factors and presumptions in both sections 14(2) and (3) and balance the interest of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.¹⁸

[56] I have found above that the records contain the personal information of the specified employee. Now I will decide whether disclosure of this information (the

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

¹⁷ Order P-239.

¹⁸ Order MO-2954.

personal information at issue) would be an unjustified invasion of his personal privacy.

[57] Sections 14(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy. The town has referenced the section 14(3)(b) presumption to the personal information at issue.

[58] I will begin by examining the section 14(2) factors in order to determine if disclosure of the specified employee's personal information in Records 12, 13, 19 and 21,¹⁹ which also contain the appellant's personal information, constitutes an unjustified invasion of personal privacy. I will also examine the section 14(2) factors in order to determine if disclosure of the specified employee's personal information in Records 5, 6, 7, 8, 9, 14 and 22²⁰, which do not contain the appellant's personal information, constitutes an unjustified invasion of personal privacy.

Section 14(2): factors for and against disclosure

[59] In situations where the records are claimed to be exempt under section 38(b), section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of privacy under section 38(b).²¹

[60] The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).²²

[61] In its initial access decision, the town referred to section 14(2)(h) (supplied in confidence) and (i) (unfair damage to reputation) as factors that weighed in favour of non-disclosure. However, the town subsequently issued another access decision wherein it indicated that it no longer relied on either of these factors. In my review of the records, however, I find that section 14(2)(h) is relevant to this appeal as well as section 14(2)(f) (highly sensitive).

[62] The appellant does not refer specifically to section 14(2) factors, however, implicitly in his representations, I note that he relies upon section 14(2)(a) (public scrutiny), 14(2)(d) (fair determination of rights) and an unlisted factor (damage to reputation).

[63] These sections state:

¹⁹ As per the chart above, Records 11, 20 and 23 are duplicates and not specifically referred to in this analysis.

²⁰ As per the chart above, Records 10, 15, 16, 17 and 18 are duplicates and not specifically referred to in this analysis.

²¹ Order P-239.

²² 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,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence;

Factors that favour disclosure:

Section 14(2)(a): public scrutiny

[64] In determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, section 14(2)(a) requires the town to consider whether releasing the personal information is desirable for the purpose of subjecting the activities of the institution to public scrutiny.

[65] In his representations, the appellant takes issue with the town's representations which suggest that an assault actually did take place when the police report and all three parties agree that an assault did not occur. The appellant suggests that releasing the records should clarify what the town is stating behind landowners' backs.

[66] In the circumstances of this appeal, I am not satisfied that the factor in section 14(2)(a) applies to the information at issue. The objective of section 14(2)(a) of the *Act* is to ensure an appropriate degree of scrutiny of government and its agencies by the public. After reviewing the appellant's representations along with the withheld portion of the record, I am not satisfied that disclosing the subject matter of the withheld personal information contained in the records would result in greater scrutiny of the town. The withheld portions of the records contain the personal information of the employee, the appellant and an affected party and includes the employee's personal information, including his personal opinions or views regarding the incident. The information at issue does not contain details regarding the manner in which the town handled the employee's complaint or how it conducted its investigation. Therefore, I find that the factor in section 14(2)(a) does not apply to the information at issue and give this factor no weight.

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

[67] For section 14(2)(d) to apply, the appellant must establish that:

1. the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
2. the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
3. the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
4. the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.²³

[68] In his representations, the appellant states that he would expect to have all the data from the town available to ensure that he is cleared of any wrongdoing. He notes that both he and the affected party are business people in the agricultural community, and do not want their reputation harmed by false accusations.

[69] The appellant submits that notes, emails, and communication from and to the CAO are very important to ensure that the two taxpaying landowners have been treated fairly within the town and to ensure the event was handled properly by the town. The appellant submits that it is very disconcerting that others, including the CAO, would inform individuals, such as town's Council, of events that took place, without documentary proof of any of the events alleged. The appellant submits, in summary, that a full and open disclosure of the events is required, and should be a minimum expectation from the town.

[70] The appellant's representations do not establish that the personal information is relevant or required for a fair determination of his rights, and there is no specific evidence before me to demonstrate that the requirements for the application of section 14(2)(d) have been met. Accordingly, I find that the factor favouring disclosure at section 14(2)(d) does not apply in the circumstances of this appeal.

Unlisted factor: unfair damage to reputation

[71] The applicability of this factor is not dependent on whether the damage or harm envisioned by the clauses is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved.²⁴

[72] The appellant submits, in his representations, that he was falsely accused of a wrongdoing, which clearly could affect his career and standing in the community. The

²³ Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

²⁴ Order P-256.

appellant essentially argues that non-disclosure of the records may unfairly damage his reputation. Section 14(2)(i) (unfair damage to reputation) applies if actual disclosure of the records might unfairly damage the reputation of any person referred to in the records. Therefore, the appellant refers to an unlisted factor, that non-disclosure of the records may unfairly damage his reputation.

[73] The personal information of the appellant, in the records, consists of his name and the fact that he is a landowner. As opposed to the appellant's assertion that the requested information is personal to himself, a review of the actual records shows that this is not the case. In fact, most of the information in the record is the personal information of the specified employee and I therefore give this factor little weight.

Factors that favour non-disclosure:

Section 14(2)(f): highly sensitive

[74] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.²⁵ Given the nature of the information that is at issue, I accept that the personal information that has been withheld can be considered highly sensitive and that its disclosure could reasonably be expected to result in significant personal distress to the individual about whom it relates. Accordingly, I find that this factor, weighing against disclosure, is relevant and give it moderate weight.

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

[75] The factor at section 14(2)(h) weighs in favour of privacy protection. For it 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.²⁶

[76] The context and surrounding circumstances of this matter are such that a reasonable person would expect that the information supplied by the employee 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 other identified parties and withholding their personal information.

[77] I am also satisfied that the specified employee provided his information at issue in confidence to the town during its investigation. Upon review of the records and representations, it appears that the specified employee provided his account of the circumstances at issue in the records with the expectation that his statements would be

²⁵ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

²⁶ Order PO-1670.

kept confidential. Accordingly, I find that section 14(2)(h) applies in favour of non-disclosure and give this factor significant weight.

[78] In conclusion, I give the unlisted factor mentioned above (which favours disclosure) moderate weight and give the factors that favour non-disclosure at sections 14(2)(f) moderate weight and 14(2)(h) significant weight. Accordingly, on balance of the factors, I am satisfied that the disclosure of this information would constitute an unjustified invasion of the personal privacy of the specified employee whose personal information is contained in the records and that the personal information is exempt under section 38(b) with regard to records that also contain the appellant's personal information and section 14(1) for all other records. I uphold the application of the discretionary exemption at section 38(b) with respect to the personal information that remains undisclosed in the records, subject to my finding in regard to the town's exercise of discretion.

[79] Because of this finding, it is not necessary for me to review the possible application of the presumption in section 14(3)(b) (investigation into a possible violation of law).

[80] I am also satisfied, after reviewing the undisclosed records, that they cannot be reasonably severed without revealing information that is exempt under section 38(b) or resulting in disconnected snippets of information being revealed.

Absurd Result

[81] I have also considered the absurd result principle. 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. I find that based on the circumstances in this appeal, it is clear that the appellant would not have been aware or present at the time the specified employee gave his personal information to the town and the absurd result therefore does not apply to most of the records.

[82] However, Record 21 contains correspondence that was clearly sent to the town solicitor by the appellant's solicitor. This correspondence attached the police occurrence reports, three pages of which were attached to the appellant's representations. Therefore, I find that it would be absurd to withhold this portion of Record 21 as the appellant is already aware of it and it is in the possession of his lawyer.

D: Did the institution exercise its discretion under sections 38(a) and 38(b)? If so, should this office uphold the exercise of discretion?

[83] The section 38(a) and (b) exemptions 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.

[84] 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.

[85] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁷ This office may not, however, substitute its own discretion for that of the institution.²⁸

[86] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²⁹

- 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

²⁷ Order MO-1573.

²⁸ Section 43(2).

²⁹ Orders P-344 and MO-1573.

- the age of the information
- the historic practice of the institution with respect to similar information.

Representations:

[87] In its representations, the town states that in determining whether to disclose information to the appellant, careful consideration was undertaken particularly given the litigation history between the town and the appellant. The town notes that it also considered the principle that the privacy of the employee should be protected particularly in light of the misleading statements made publicly regarding the assault charges.

[88] The town states that the decision to deny access was not one made lightly nor was it made in bad faith, but was deliberate in the desire to protect the privacy of identifiable individuals, and the town in its litigation and investigation. It submits that all were pursuant to the exemptions provided for in the *Act*.

[89] The appellant states that the legal issue the town refers to in its representations is a civil action commenced by several landowners and not just himself and, in fact, he is "only one small part of the action." The appellant also refers to the police investigation noting that the information provided by the town was not accurate as there was no assault on the specified employee.

Analysis:

[90] The section 38(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.

[91] On the whole, I am satisfied that the town did not exercise its discretion in bad faith or for an improper purpose. The town considered the purpose of the *Act* and has given due regard to the nature and sensitivity of the information in the specific circumstances of this appeal and I have upheld its decision with respect to most of the information they have claimed is exempt. Accordingly, I find that the town took relevant factors into account and I uphold its exercise of discretion in this appeal.

E: Did the institution conduct a reasonable search for records?

[92] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.³⁰ If I am satisfied that the

³⁰ Orders P-85, P-221 and PO-1954-I.

search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[93] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.³¹ To be responsive, a record must be "reasonably related" to the request.³²

[94] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.³³

[95] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.³⁴

[96] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.³⁵

Representations:

[97] In its representations, the town noted that the appellant had submitted five very detailed requests for information, all of which were in-depth in terms of information requested and the number of departments involved in the search. The town notes that contact was made with each department head and member of Council to request that all records that may be responsive to the request be provided for review. The town notes that consistent follow-up was done where needed, and if no records were in the custody of a certain department, they were required to inform the clerk for her file documentation.

[98] In her affidavit, the clerk noted that following receipt of the records, a thorough review of every page is conducted to determine what, if any, exemptions and/or redactions might apply. The clerk noted that it might be discovered during this review that additional records might be relevant, which are then requested and a further review conducted. The town included a copy of its search requests relating to this appeal with its representations.

[99] In the appellant's representations, he referred to the town's representations which stated that the specified employee involved has no hand-written notes. The

³¹ Orders P-624 and PO-2559.

³² Order PO-2554.

³³ Orders M-909, PO-2469 and PO-2592.

³⁴ Order MO-2185.

³⁵ Order MO-2246.

appellant states that this was quite surprising, given that the employee told the police he was assaulted twice. The appellant states that one would have expected that his supervisor would have ensured that he had written up the incident, at a minimum for his health and safety team. Given the employee indicates that he has no notes, the appellant submits that notes available from others within the town become more important.

[100] The appellant states that notes circulated within the town are clearly needed to ensure that the event is openly aired and investigated. He states that notes, emails, and communication from and to the CAO are very important to ensure that the he and another affected party have been treated fairly within the town and to ensure the event was handled properly. The appellant submits that it remains very disconcerting that others, including the CAO, would inform individuals, such as town Council, of events that took place, without documentary proof of any of the events alleged. In summary, the appellant states that a full and open disclosure of the events is required and should be a minimum expectation from the town.

[101] The appellant also states that the specified employee turned over pictures from his camera, however, it is submitted that he did not turn over all the pictures/videos from the camera. The appellant states his belief that the provided photographs make up only part of the employee's notes of the day. The appellant states that he continues to seek the remainder of what is on the camera/phone. In addition, the appellant states that with each picture on the camera, there is typically a date and time stamp (metadata) which he notes is also missing from the provided records. The appellant requests complete metadata for each photo/video/picture.

[102] A copy of the appellant's representations was sent to the town who provided reply representations. In its reply, the town notes that it provided the appellant with photographs taken by the specified employee in responding to another freedom of information request which is not at issue in this appeal. The town notes that in that other request, it provided 85 pages with 2 photographs per page. Further, the town submits that the appellant is arguing that it should create a new record by labelling the photographs which is not an obligation under the *Act*.

Analysis and finding:

[103] In this appeal, I have considered the appellant's representations in which he identifies what he regards as evidence to show that further responsive records exist. I have also considered the town's initial and reply representations. In the circumstances of this appeal, I find that the town has provided sufficient evidence to establish that a reasonable search was conducted for responsive records. I make this finding for a number of reasons.

[104] First, as noted above, although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response,

the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist. On my review of the appellant's representations, I note that all of his representations focus on a belief or expectation that records exist.

[105] Further, the appellant refers to photographs that were provided as a result of his access request and notes that other photographs and/or video should exist. He also states that the photographs provided by the town were not labelled and he requests complete metadata for each picture. In its representations, the town noted that the appellant made five separate access requests in 2016 and that a request for photos was made but is related to another request.

[106] In any event, the appellant has provided no reasonable basis that more pictures exist than what he already received by the town. Further, if the town severed any information from the photographs, it would have noted so and cited an exemption under the *Act* for doing so. The appellant simply states what his expectation is, that the pictures would have metadata and requests same. I do not find that this is a basis to order the town to conduct a further search.

[107] Further, the appellant finds it incredulous that the specified employee has no hand-written notes from the incident. However, he provided no evidence on which I would conclude a reasonable belief that hand-written notes exist. For example, the appellant did not indicate that he saw the employee writing notes at the scene. I find that there is no evidence to support that hand-written notes should exist.

[108] Having reviewed the representations and evidence of the parties, I am satisfied that the town conducted a reasonable search for responsive records in this appeal. I accept the affidavit evidence provided, that it has made reasonable efforts to identify and locate responsive records. I find that the appellant's suggestions that further records exist is not supported by information which establishes that there is a reasonable basis for concluding that additional records should exist.

[109] Accordingly, I uphold the town's search for responsive records.

F: What is the scope of the request? What records are responsive to the request?

[110] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;

(b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[111] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.³⁶

[112] To be considered responsive to the request, records must "reasonably relate" to the request.³⁷

Analysis and finding:

[113] The town did not specifically speak to this issue in its representations, however, the emails in Record 24 were determined by it to be non-responsive.

[114] In the appellant's representations, he refers to, as mentioned above, the fact that pictures that he received did not have metadata information. His representations do not actually address the records located by the town which it states are non-responsive to the request.

[115] After a review of the emails in Record 24, I conclude that they are unrelated to the access request in this appeal for records regarding a "trespass" in September on a specified farm. While some of these records may relate to the appellant, they do not relate to the September incident and, therefore, I find that they are not responsive to the appellant's request to the town.

ORDER:

1. I order the town to disclose the following:

Record 1 - email from the town's solicitor to appellant's solicitor.

Record 21 – correspondence and attachments sent from the appellant's solicitor to the town's solicitor.

³⁶ Orders P-134 and P-880.

³⁷ Orders P-880 and PO-2661.

For greater certainty, I have provided a copy of these records to the town with a copy of this order. Highlighted portions are to be disclosed. I order the town to disclose this information by sending it to the appellant by January 8, 2018 but not before January 3, 2018.

2. The remainder of the town's decision is upheld.

Original Signed by: _____

Alec Fadel
Adjudicator

November 30, 2017