Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3708

Appeal MA17-482

Township of Oro-Medonte

December 18, 2018

Summary: The township received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to noise measurements from two music festivals that took place in 2016. The township notified three affected parties and then issued a decision to disclose the records in full. This order addresses a third party appellant's claim that access to the records should be denied pursuant to the mandatory third party information and personal privacy exemptions at sections 10(1) and 14(1) of the *Act*, respectively. The adjudicator finds that portions of two records are exempt under sections 10(1)(a), 10(1)(c), and 14(1), but the remainder of the records are not exempt and must be disclosed to the requester.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 14(1)(a), 14(1)(f), 14(2)(a), 14(2)(f), 10(1)(a) and 10(1)(c).

Orders and Investigation Reports Considered: Orders MO-2398 and PO-2511.

OVERVIEW:

[1] The Township of Oro-Medonte (the township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for access to an engineering company's sound level and duration data reports from two specified music festivals that took place in 2016, as well as a consultant's peer review of the same.

[2] The township identified responsive records and, after notifying three affected

parties, issued a decision granting the requester access to the records in full. The township notified the affected parties of its decision to disclose the information and of their right to appeal.

[3] One of the affected parties, the venue where the events were held, appealed the township's decision on the basis of section 10(1) (third party information), thereby becoming the third party appellant (the appellant) in this appeal. The appellant also maintained that the request for access was frivolous or vexatious pursuant to section 4(1)(b) of the *Act*.

[4] During mediation, some information was exchanged between the parties, including the identities of the original requester (the requester) and appellant. The appellant abandoned its frivolous or vexatious claim, but the parties were not able to achieve a mediated settlement on what, if any, information should be disclosed.

[5] No further mediation was possible and the appeal was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*.

[6] During the inquiry, I sought and received representations from the appellant and requester. In its representations, the appellant made submissions on behalf of it and one of the other two affected parties (a sound engineering company) that was notified by the township prior to issuing a decision. The appellant and requester's representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction Number 7*. I also sought but did not receive any submissions from the township, which advised that it was relying on its decision. Staff of this office also contacted the third affected party that was notified by the township (a consultant) advising that it was my understanding that they did not object to township's decision to disclose the records at issue. The consultant confirmed receipt of this correspondence and did not indicate an objection to the township's decision.

[7] Upon further review of the records at issue, I identified address information in one of the records that may constitute "personal information" as defined in section 2(1) of the *Act*. Staff of this office contacted the requester, who advised that he was interested in seeking access to that information. Consequently, individuals at the addresses listed in the record were notified that their interests may be affected by this appeal, and they were invited to contact this office if they wanted to participate in the inquiry. Seven letters were returned as undeliverable.

[8] Ten affected parties responded and asked to be sent a Notice of Inquiry, with which I enclosed a consent form. One affected party requested only to be sent a consent form. Of those eleven affected parties, six provided signed forms consenting to the disclosure of the information relating to them. One affected party advised that they did not consent to the release of information relating to them. The other affected parties did not provide representations or consent forms.

[9] The requester, appellant, and township were then invited to provide representations with respect to the mandatory personal privacy exemption at section 14

of the *Act*. I received supplementary representations from the appellant and the township, but not the requester.

[10] For the reasons that follow, I find that portions of two of the responsive records are exempt from disclosure under sections 10(1)(a), 10(1)(c), and 14(1) of the *Act*. I order the township to disclose to the requester the remaining, non-exempt portions of those records and two other records in their entirety.

RECORDS:

[11] Four responsive records were identified by the township. They are described as:

1. Draft correspondence from an engineering company to the appellant regarding the noise monitoring program and a preliminary summary of the noise monitoring report for the first of two music festivals;
2. 2016 noise monitoring report prepared by an engineering company (2016 report);
3. Correspondence between a consultant and the township regarding the consultant's peer review of the 2016 report; and
4. Correspondence between a consultant and the township regarding the consultant's per review of additional data regarding noise exceedances and off-site impacts.

ISSUES:

A. Does the mandatory third party information exemption at section 10(1) apply to the records?

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

C. Does the mandatory personal privacy exemption at section 14(1) apply to the information remaining at issue in record 2?

DISCUSSION:

Issue A: Does the mandatory third party information exemption at section 10(1) apply to the records?

[12] Section 10(1) establishes the following mandatory exemption for third party information:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
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> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
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> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
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> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[13] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[1] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[2]

[14] For section 10(1) to apply, the party resisting disclosure must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information;
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c), and/or (d) of section 10(1) will occur.

[15] Given that the appellant is the party objecting to disclosure, it bears the onus of establishing each of the three parts of the test. In its submissions, the appellant, being the venue that hosted the two music festivals, advises that it is authorized to make submissions for itself and on behalf of the engineering company that provided the 2016

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[1] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).
[2] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

sound reports that comprise records 1 and 2.[3] The appellant does not purport to provide representations on behalf of the consultants that conducted the peer review (records 3 and 4).[4] The appellant maintains that all three parts of the section 10(1) test are met and therefore the responsive records must not be disclosed to the requester.

Part 1: type of information

[16] To satisfy part 1 of the section 10(1) test, the appellant must show that the records reveal information that is a trade secret or scientific, technical, commercial, financial, or labour relations information.

[17] Both the township[5] and the appellant maintain that the records contain technical information, which has been defined in past orders as follows:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[6]

[18] The appellant submits that the records describe the construction, operation, and subsequent conclusions of its sound monitoring program, and therefore qualify as technical information.

[19] In addition, the appellant maintains that the records contain trade secrets, which have been defined in past orders as:

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
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> (i) is, or may be used in a trade or business,
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> (ii) is not generally known in that trade or business,
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> (iii) has economic value from not being generally known, and

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[3] One of the other affected parties that was notified by the township prior to issuing its decision.

[4] The other affected party notified by the township. The consultant was also contacted by this office during my inquiry.

[5] The township's decision letter to the affected parties advised that it found the information contained within the requested documents to be "technical information" relating to the collection and analysis of sound recordings by professional engineers. As such, it was satisfied that part 1 of the test had been met.

[6] Order PO-2010.

> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[7]

[20] In support of this position, the appellant submits that the reports describe an approach and methodology unique to the sound engineering company and are "tantamount to a roadmap for sound deployment at a major music festival." The appellant advises that the reports include attended and unattended noise measurements, and off-property noise monitoring recorded noise levels 24 hours a day between July 18, 2016 and August 12, 2016. The appellant explains that during the music festival, unattended noise monitoring at stage mixing boards was performed by sound engineers working with real-time sound level readings. Attended noise measurement checks were also performed by the engineering company. As per the section 5 of the Memorandum of Understanding (the MOU)[8] between the township and the appellant, the engineering company's sound engineers provided a report with a log of sound levels.

[21] The requester submits that he only seeks access to the observations, results and conclusions of the engineering company's study, and not the proprietary techniques or devices used to conduct the study. He also maintains that the information sought is consistent with information that has already been made public from the 2015 Environmental Noise Measurements study (the 2015 study), and that access to that information is required to perform year over year comparisons for quality improvement purposes.

[22] In response to the requester's submissions, the appellant states that the purpose of the reports was not to "understand the comparative results year over year", but rather to measure sound levels as required by the MOU, which necessitated providing additional information about the parties' business operations. The appellant maintains that the reports are not the property of the township or its residents for the purpose of a comparative analysis, as desired by the requester.

[23] Based on my review of the records and representations, I find that the first part of the section 10(1) three-part test has been met. I am satisfied that the records contain information relating to the collection and analysis of sound recordings by professional engineers. This includes the equipment and methods used by the engineers in conducting sound recordings and preparing a report for the appellant and the township, as required by the MOU. Accordingly, I accept the township and appellant's position that the records consists of "technical information". I am therefore satisfied that part 1 of the three-part test has been met.

[24] Having reached this conclusion, it is not necessary for me to determine whether the records also contain trade secrets.

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[7] Order PO-2010.

[8] Memorandum of Understanding Amendment (June 29, 2016), available online: Township of Oro-Medonte <https://tinyurl.com/oro-medonte-MOU>.

Part 2: supplied in confidence

[25] To satisfy the second party of the test, the appellant must show that the records were supplied to the township in confidence, either implicitly or explicitly. Both the "supplied" and "in confidence" components of the test must be met. If the appellant fails to establish both of these components, part 2 of the test is not met, and the records are not exempt under section 10(1).

Supplied

[26] The requirement that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.[9] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[10]

[27] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.[11]

[28] There are two exceptions to this general rule, which are described as the "inferred disclosure", and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.[12] The immutability exception applies where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs, and product samples or designs.[13]

<u>Representations</u>

[29] The appellant submits that the 2016 reports were supplied directly to the township.

[30] The appellant accepts that the MOU was a product of negotiation between it and the township. The appellant also accepts that the MOU was made public for the purpose of obtaining township council approval for a special event permit. However, the

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[9] Order MO-1706.
[10] Orders PO-2020 and PO-2043.
[11]This approach was approved by the Divisional Court in *Boeing Co.*, cited above, and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*).
[12] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[13] *Miller Transit*, above at para. 34.

appellant submits that the information contained in the 2016 reports goes beyond what was required by section 4 of Schedule "A" of the MOU, which states:

> Within fourteen (14) days from the conclusion of the event the [engineer] will provide a report to both the Event Organizer and the Chief Municipal Law Enforcement Officer. The report will include a log of the sounds levels and will highlight all exceedances with the specific time and date.

[31] The appellant maintains that the reports provided to the township contain "extensive proprietary information" such as the type and location of monitoring equipment used by the sound engineers. The appellant submits that this constitutes an informational asset within the engineering company's possession that is distinct from and not a product of the MOU negotiation. The appellant submits that the additional information was provided to the township to provide greater context. The appellant submits that the observations, results, and conclusions in the records should not be released, as disclosure would permit accurate inferences to be made with respect to underlying proprietary information that it supplied to the township at great cost.

[32] In the alternative, the appellant submits that if I determine that the records form part of the content of the MOU, which was negotiated between the township and appellant and therefore not "supplied," then the records fall within the "inferred disclosure" exception of section 10(1). In support of this position, the appellant maintains that disclosure of the records would allow the requester to draw conclusions regarding the underlying non-negotiated confidential information that it supplied to the township.

[33] The appellant cites *Miller Transit*, where the court held that the inferred disclosure exception applies "where contractual information gives rise to an inference, not that the very same information may be found in the materials provided by a third party, but that other, confidential, information belonging to the third party may be gleaned by reference to contractual information."[14] The appellant submits that the information contained in the records was provided for the purpose of measuring sound levels, which necessitated providing additional information about the parties' business operations. The appellant submits that it would not provide this information in a non-confidential environment, as it risks subcontractors misusing information that they are not usually privy to, and allows competitors to determine their business strategies.

[34] Finally, the appellant states that its submissions also apply to the consultant's peer review, as disclosure of records 3 and 4 will, by implication, reveal information contained in records 1 and 2, which it submits were supplied to the township in confidence.

[35] The requester's submissions do not specifically address the requirement that the information be "supplied" to the township.

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[14] *Miller Transit*, above at para 33.

Analysis and findings

[36] Having reviewed the records and the parties' submissions, I am satisfied that the records were supplied to the township by the appellant and an affected party.

[37] The records consist of a report commissioned by the appellant and correspondence regarding that report, all of which were produced in accordance with the MOU between the township and the appellant. While the contents of a MOU, which is the equivalent of an agreement, will not typically qualify as having been "supplied",[15] the principle does not necessarily govern information that is generated as a result of the MOU.

[38] In this appeal, records 1 and 2 were prepared by an engineering company and provided to the appellant. The appellant provided the records to the township in accordance with its obligations under the MOU. Past orders of this office have held that reports or information provided by third parties to an institution pursuant to an agreement may qualify as "supplied."[16] Records 1 and 2 do not form part of the MOU itself, nor do they merely reflect the terms of the MOU. Rather, they were generated and provided to the township as a result of the MOU. Having considered the content of these records, I am satisfied that they were "supplied" by the appellant to the township.

[39] Records 3 and 4 were prepared by the consultants that conducted a peer review of the engineering company's work, as required by section 5 of the MOU. These records review the methodologies, data, recommendations, and conclusions from the 2016 report, and provide recommendations on how future sound monitoring programs could be improved.

[40] My review of records 3 and 4 indicates that they were provided by the consultants to the township. The fact that the appellant did not supply the township with these records does not negate the possible application of section 10(1).[17] Again, I find that although records 3 and 4 were generated as a result of an agreement between the parties, in the circumstances of this appeal, they were "supplied" to the township as required to satisfy part 2 of the section 10(1) test.

[41] I will now consider whether the records were supplied in confidence.

In confidence

[42] In order to satisfy the "in confidence" component of the test, the party resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided.

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[15] Order MO-3375.
[16] Orders PO-2020 and PO-2043.
[17] Order 179.

[43] This expectation must have an objective basis.[18]

[44] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances are considered, including whether the information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- treated consistently by the third party in a manner that indicates a concern for confidentiality;
- not otherwise disclosed or available from sources to which the public has access; and/or
- prepared for a purpose that would not entail disclosure.[19]

Representations

[45] The township's decision to disclose the records rested on its determination that part 2 of the section 10(1) test was not met. The township's decision letter explained that section 5 of the MOU between the township and the appellant sets out the requirements around sound at special events. Section 5 details the 2016 Sound Monitoring Program, names the engineering company retained to conduct the study, and identifies the consulting company that would act as an independent peer reviewer. The township maintained that the MOU is a negotiated agreement, which does not contain any reference to supplying the required information in confidence.

[46] The township also advised that the study of the appellant's summer 2015 music festivals is posted on its website. The township stated that the 2016 report was based on the 2015 study. Accordingly, the township determined that part 2 of the test was not met as there was no reasonable expectation that the 2016 report would be considered confidential.

[47] The appellant rejects the township's view that the information was not supplied in confidence. The appellant submits that the information was provided with the understanding that matters relating to its work on this project would be held in strict confidence and would not be disclosed without its consent. The appellant maintains that this belief is evidenced by the fact that the 2016 report bears the phrase "Privileged and Confidential" on every page. That indication aside, that appellant also refers to Order MO-2591, in which Adjudicator Steven Faughnan stated:

> The fact that there is no explicit notation of confidentiality does not displace [the finding that the document was supplied by an affected party

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[18] Order PO-2020.

[19] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

> to the institution with a reasonably held implicit expectation that it would be treated in confidence]. It is not necessary that a document be marked confidential for a finding that it was supplied with a reasonable expectation of confidentiality.

[48] The appellant submits that it has provided previous reports to the township, which it understood would be made public through its application for temporary and permanent zoning bylaws, given that the zoning application is a public process. For example, the appellant maintains that the 2015 study was posted on the township's website pursuant to a land use planning application. Under the circumstances, all parties were aware that the study and all underlying documentation would be made publicly available.

[49] In contrast, the appellant submits that the information at issue in this appeal relates specifically to operational matters and was supplied on a confidential basis to support its application for a special event permit. The appellant maintains that the information was not otherwise disclosed or publicly available. In addition, the appellant maintains that the purpose of the sound provisions in the MOU was to determine if there were noise exceedances during the 2016 festivals. Unlike the 2015 study, the appellant states that there is nothing in the MOU to suggest that the 2016 reports were being generated for the purpose of public disclosure.

[50] Regarding confidentiality, the requester maintains that a reasonable expectation of confidentiality finding could be supported where a limited number of copies were supplied, recipients provided a signed confirmation of receipt, and a confidentiality agreement was in place. The requester submits that these metrics were not in place in this case.

[51] The requester also maintains that the information, observations, results, and conclusions that were presented to township council in the 2016 report were used to formulate local statutes with defined quantitative sound level limits for the public domain. The requester maintains that since the information was used to pass local legislation, the ownership of the data must be in the public domain.

[52] The requester submits that the appellant's claim regarding confidentiality is without merit. He states that it is unreasonable to expect the records were supplied to the township in confidence given their broad distribution to approximately 12 township council and staff members, and the fact that the 2015 study was posted to the township's website. The requester states that it is reasonable to assume that some redistribution of the requested records would occur.

[53] In response, the appellant states that the test regarding whether a document has been supplied in confidence is clearly set out in section 10(1) of the *Act*. The appellant states that while the metric proposed by the requester may illustrate a reasonable expectation of confidentiality, it is not the test used by this office to adjudicate these matters. Rather, the appellant notes that the only two components that it must establish are that the records were: (1) *supplied* to the township, (2) *in*

confidence.

[54] Regarding the requester's claim that the information was used to formulate and pass local statutes, the appellant maintains that they are not aware of any such legislation.

Analysis and findings

[55] On my review of the parties' representations and the information at issue, I am satisfied that records 1 and 2 were supplied in confidence by the appellant to the township. However, I find that records 3 and 4 do not meet the "in confidence" requirement of part two of the section 10(1) test.

[56] The four records at issue were provided to the township by the appellant and a third party peer reviewer in accordance with the Sound Monitoring Program requirements set out in section 5 of the MOU between the township and the appellant. The provisions of the MOU describe the purpose of the Sound Monitoring Program as follows:

> […] to enable [the appellant] and township to establish a permanent regime of sound regulations that will govern events at [the appellant's property] subject to appropriate land use controls/permission. It is recognized that the Sound Monitoring Program may need to be extended into future years if the 2016 results are not sufficient to establish the sound regulations. Township staff shall have full access to and be able to consult with [the appellant's] acoustical engineer.

[57] The MOU further states:

> [The appellant] agrees and acknowledges that the aforementioned sound limits and times shall apply only to the 2016 events, but that the data and information collected from the monitoring initiatives for 2016 will be analyzed and utilized in consultation with [the appellant] by the township to set the performance standards for 2017.

[58] The express wording of the MOU indicates that the records were generated and supplied to the township to inform and aid in establishing public sound regulations. Since the records were created with this purpose in mind, this could suggest that they were prepared for a purpose that could reasonably be expected to entail disclosure to the public.

[59] The appellant maintains that there is nothing in the MOU to suggest that the 2016 reports were being generated for the purpose of public disclosure; conversely, however, I find that the MOU itself also does not refer to supplying the required information in confidence, nor does it imply or provide any assurances that such information would be held in confidence. In my view, the MOU itself is of limited assistance in determining the extent to which the records at issue in this appeal were

supplied with a reasonable expectation of confidence.

[60] Having established the general context in which the four records were created, I will now consider whether each record was supplied to the township with a reasonable expectation of confidentiality, as required by part 2 of the section 10(1) test.

[61] Record 1 provides a preliminary summary of the noise measurement results from the first of two music festivals in 2016. The engineering company prepared this record for the appellant's consideration in determining how to improve the sound monitoring program at the second music festival of 2016. I am satisfied that record 1 contains information that is not otherwise disclosed or available from sources to which the public has access, and that record 1 was prepared for a purpose that was not considered to entail public disclosure. Therefore, I find that record 1 was supplied to the township in confidence.

[62] Record 2 is the 2016 report, which was prepared by the engineering company and provided by the appellant to the township in accordance with the MOU. The appellant compares record 2 with the 2015 study, which was prepared by the same engineering company and provided by the appellant to the township for the purpose of a zoning bylaw application. Upon review of record 2 and the 2015 study, I note that the 2015 study does not contain the same "confidential" marking that is found in record 2. Past orders of this office have held that a confidential marking alone will not meet the "in confidence" part of the test; however, it does provide some evidence of an expectation that the information was communicated on the basis that it was confidential.[20] Accordingly, while not determinative, the fact that record 2 was marked confidential when other records provided by the appellant to the township were not, may support the appellant's belief that the 2016 report would be held in confidence and would not be disclosed without its consent.

[63] The requester maintains that the fact that the township posted the 2015 study to its website indicates that the township does not consider the type of information contained in the records to be confidential. The suggestion is that this act by the township undermines any reasonable expectation of confidentiality that the appellant and other third parties would have with respect to the information contained in the records. This is consistent with past orders of this office, which have held that where an institution does not regard a particular kind of information to be supplied in confidence, the supplier of that information cannot have a reasonable expectation of confidence in respect of that information.[21]

[64] However, my review of record 2, the 2015 study, and the township's website reveals that some information in record 2, such as the specific equipment used by the sound engineers and the steps taken to conduct noise measurement recordings at the appellant's venue, is not otherwise publicly available. This type of information was not included in the 2015 study, nor is it set out in the MOU or otherwise found on the

[20] Order MO-2557.
[21] Order P-1276.

township's website. I find, therefore, that the appellant's implicit expectation that the additional information would be held in confidence is not undermined by the fact that the township has posted past noise measurement reports on its website.

[65] In the circumstances of this appeal, including the fact that record 2 is marked as confidential and contains information that has not previously been made publicly available by the township or the appellant, I find that record 2 was supplied to the township in confidence as required by part 2 of the section 10(1) test.

[66] This expectation of confidentiality does not extend to records 3 or 4, which together form the consultant's peer review of the engineering company's report. These records were addressed directly to the township from the consultants in accordance with the MOU, and neither the township nor the consultants have objected to their disclosure. While records 3 and 4 relate to record 2, they do not themselves provide a "roadmap for sound deployment at a major music festival," as suggested by the appellant, but rather review the 2016 report and advise the township of methods for improving future sound monitoring programs. In my view, the party resisting disclosure has not provided sufficient evidence to allow me to conclude that these records were supplied to the township by the consultants on the basis that they were to be kept confidential. I make this finding despite the "privileged and confidential" marking on records 3 and 4 as, in my view, the overall circumstances do not support a finding that these records were supplied in confidence.

[67] As I have indicated previously, a failure to meet any part of the section 10(1) test means that the exemption does not apply. Accordingly, I find that records 3 and 4 are not exempt under section 10(1) of the *Act*, and I uphold the township's decision to disclose them to the requester.

Part 3: harms

[68] To satisfy the third part of the test, the appellant must provide evidence about the potential for harm resulting from disclosure. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[22]

[69] The failure of a party resisting disclosure to provide such evidence will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 10(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.[23]

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[22] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[23] Order PO-2435.

Representations

[70] The appellant maintains that disclosure of the records could reasonably be expected to result in the harms envisioned by sections 10(1)(a), 10(1)(b), and 10(1)(c).

Section 10(1)(a): prejudice to competitive position; Section 10(1)(c): undue loss or gain

[71] With respect to the harms set out in sections 10(1)(a) and (c), the appellant submits that disclosure will harm its competitive position and result in undue loss to it and undue gain to its competitors.

[72] The appellant states that the records are tantamount to a roadmap for sound deployment at major music festivals, the worth of which is invaluable to it and its competitors. The appellant maintains that public disclosure would divulge information for which it has made a significant investment of time and money. Once this information is made public, the appellant states that its competitors will realize undue gains as they will be able to adopt its strategies, operational data, and practices without the expense of considering other options or designing their own plans. The appellant submits that this will also prejudice its competitive position by causing it to have significantly greater operating costs than those of competing music festivals.

[73] The appellant maintains that these harms are especially possible in the live entertainment industry in Canada. The appellant states that due to oversaturation in the market, the cost of hosting a major music festival is increasingly oppressive.[24] The appellant submits that obtaining the 2016 report was an "enormous financial expense" and, given the prevailing environment, it would be "highly detrimental" if the information was disclosed to its competitors.

[74] The appellant refers to Order PO-2435, in which then-Assistant Commissioner Beamish stressed that the role of access to information legislation in promoting government accountability and transparency is even more compelling when the information sought relates directly to government expenditure of taxpayer money. In contrast, the appellant submits that the records at issue are the property of their author, and were produced at the appellant's cost. Accordingly, the appellant maintains that the policy considerations set out in Order PO-2435 do not apply in this case. Given that the records were generated using the expenditure of private, rather than public, funds, the appellant submits that it should be held to a lower evidentiary burden with regard to the harms envisioned by section 10(1)(a).

[75] The appellant also maintains that disclosing the information to the requester will facilitate the latter's ability to make "unwarranted and fruitless" inquiries and demands of the appellant. The appellant states that this will result in it incurring significantly increased professional expenses, as well as a significantly reduced ability to devote time

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[24] In support of this submission, the appellant referenced the following article: Joel Rubinoff, "There's a music fest smackdown in Southern Ontario", Toronto Star (July 18, 2016), online: <https://www.thestar.com/entertainment/music/2016/07/18/theres-a-music-fest-smackdown-in-southern-ontario.html>.

and effort to other necessary tasks. The appellant maintains that this constitutes a form of undue harm that will result from disclosure.

[76] The requester submits that the appellant's claims of commercial harm are purely speculative and unfounded. The requester states that the appellant has provided no supporting data as to the scope and scale of the expected harm, nor has it identified specific deleterious impacts. The requester suggests that the claim is a nuisance to prevent the township from disclosing data to correlate annual comparisons to prior events.

[77] In response, the appellant reiterates much of its original submissions. In addition, the appellant submits that the harms described in its initial representations do not lend themselves to measurement, and cannot be compared, contrasted, or quantified absent a wholesale dissolution of its business operations. The appellant submits that the prospect of the alleged harms is evidenced by the fact that it suspended one of its major music festivals for the 2018 festival season due to poor ticket sales in an ever-growing and exceedingly competitive market. The appellant states that the margins are narrow in its market, and any variation in a music festival's operating costs may ultimately result in the failure of another festival.

Section 10(1)(b): similar information no longer supplied

[78] The appellant submits that the records were not provided to the township as part of a statutory requirement, but were provided voluntarily to facilitate a cooperative approach to the development of permanent noise regulations governing special events at the appellant's facilities. The appellant states that if the circumstances were different, it would not have provided such detailed information to the township, as the breadth of the information is "far greater" than that which was contemplated by the MOU.

[79] The appellant maintains that if the records are disclosed, it will be unwilling to provide such detailed information to the township in the future and the township will have less accurate data on which to base its decisions. The appellant states that the harm that would result is self-evident in this case, and that the submissions are neither speculative nor vague.

<u>Analysis and findings</u>

[80] As stated above, to meet part 3 of the section 10(1) test, the appellant must provide sufficient evidence to establish a "reasonable expectation of harm." The appellant submits that disclosure of records could reasonably be expected to result in the harms envisioned in sections 10(1)(a), (b) and (c). However, the appellant's evidence fails to sufficiently explain how disclosing the information in the records could reasonably be expected to lead to those harms, especially when some of that information or similar information is already in the public domain. Evidence amounting to speculation of possible harm is not sufficient. In my view, with two notable exceptions, the appellant has not provided evidence to support a finding that part 3 of the test has been met with respect to records 1 and 2.

[81] I accept the appellant's submissions regarding the competitive nature of the music festival industry in Canada. I also accept, based on my review of past years' sound reports, that the measurement of environmental noise at live music events is not a standardized system. In this context, I find that certain information in records 1 and 2 represents a comprehensive methodology for carrying out sound deployment at music festivals, particularly at the appellant's venue. As a result, I find that a "risk of harm that is well beyond the merely possible or speculative" is established with respect to the disclosure of certain discrete portions of those records.

[82] The first category of information that satisfies the harms test consists of the engineering company's recommendations for minimizing sound emissions at the second music festival in 2016, based on noise measurement results from the first festival. In particular, the engineers explained that sound emissions from several models of a particular type of equipment were measured and compared at the first festival. Based on those results, the engineers recommended the use of one model over the others at the second festival to minimize sound emissions.

[83] I find that disclosure of this information could reasonably be expected to result in undue gain to the appellant's competitors, as they would not need to perform the same testing and analysis, nor bear the same expense, to acquire these insights and employ these methods on their own. Accordingly, this type of information, which is found under subheading five on the third page of record 1, is exempt from disclosure under section 10(1)(c) of the *Act*.

[84] The second category of information that I find satisfies the harms test consists of the details describing the exact equipment and strategies used by the engineering company to conduct the 2016 sound monitoring program at the appellant's venue. Specifically, this type of information is found at sections 1.3, 2.3, 3.3, and 3.4, and Appendix E of record 2.

[85] I am satisfied that disclosure of this type of information could reasonably be expected to lead to the harms envisioned by sections 10(1)(a) and 10(1)(c). The level of detail provided goes beyond what was required by the MOU, and I am satisfied that it was provided voluntarily by the appellant to assist the township in interpreting the 2016 report. If it were disclosed, the appellant and engineering company's competitors would have access to detailed information such as the particular sound monitoring and music festival equipment that was used, and why and how that equipment was set up. This information reveals not only the strategy employed by the appellant and engineering company in carrying out the noise management program, but also the reasoning behind that strategy. If competitors obtain access to this information, they will be able to rely on the engineering company's strategies and recommendations without incurring the same costs that the appellant was required to incur to comply with the MOU. Therefore, I am satisfied that this information would be valuable to others in both the music festival and sound engineering industries, and aligns with the "informational assets" that section 10(1) was intended to protect.

[86] Accordingly, I find that disclosure of this information could reasonably be

expected to prejudice the appellant's competitive position, as contemplated by section 10(1)(a), by causing it to have significantly greater operating costs than those of competing music festivals. I am also satisfied that disclosure could reasonably be expected to provide the appellant's competitors with undue gains, as contemplated by section 10(1)(c), by revealing information that the appellant had to purchase at a great expense, and allowing competitors to adopt strategies without incurring their own expense.

[87] In my view, the information in these two categories differs in a significant way from the remaining information contained in records 1 and 2. For the reasons that follow, I am not satisfied that the harms set out in section 10(1) could reasonably be expected to result from disclosure of the rest of the information contained in those records.

[88] My review of the records and other documents cited by the parties reveals that some of the information in records 1 and 2 is publicly available. For example, the allowable sound levels, types of sound data to be collected, rationale for the dates and times that data was to be collected, and other similar information is available in the MOU, which is published on the township's website. The appellant has failed to establish how disclosing this information as it appears in the report can reasonably be expected to lead to the harms envisioned by any of paragraphs (a), (b), or (c) in section 10(1).

[89] In addition, I note that maps of the music festival perimeters and stage layouts are publicly available in past noise measurement reports. While I appreciate that the maps may differ slightly year over year, the appellant has failed to establish how disclosing this information as it relates to the 2016 festivals could reasonably be expected to result in the harms enumerated in sections 10(1)(a) or (c), when it provides no persuasive evidence of such harms resulting from past disclosures of a similar nature.

[90] I also find that certain information in the records is highly specific to the appellant's property and the specific dates during which the noise measurements were recorded. For example, much of record 2 consists of raw data, such as weather data, and noise monitoring levels. This information would be unique to the appellant's venue and the two 2016 music festivals, and not applicable to other venues. I am not satisfied that disclosure of this information could reasonably be expected to compromise the appellant's competitive position, nor result in it suffering undue losses or its competitors realizing undue gains for the purposes of sections 10(1)(a) or (c).

[91] Finally, I note that for much of the information remaining at issue, similar information has been provided to, and made publicly available by, the township in the past. Despite this, the appellant continued to provide the township with a report containing more information than was required by the MOU. Accordingly, I am not satisfied that disclosure of that information in this case could reasonably be expected to result in the appellant withholding similar information in the future as contemplated by section 10(1)(b), especially since the township could amend the MOU terms to require

it.

[92] Therefore, I am not satisfied that disclosure of the rest of the information in records 1 and 2 could reasonably be expected to result in the harms specified in sections 10(1)(a), (b) or (c).

[93] In summary, I find that part 3 of the test is established for the following portions of records 1 and 2, which are therefore exempt under section 10(1):

- Record 1: Paragraphs under subheading number 5 on page 3.
- Record 2: Sections 1.3, 2.3, 3.3, and 3.4, and Appendix E.

[94] I find that the remainder of the information in records 1 and 2, as well as the entirety of records 3 and 4, is not exempt under section 10(1).

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

[95] As noted above, I identified the mandatory personal privacy exemption at section 14(1) as a potential issue in this appeal. For section 14(1) to apply, one or more of the records must contain "personal information" as that term is defined in section 2(1) of the *Act*.

[96] During my inquiry, I noted that discrete portions of record 2 contain information that may constitute the personal information of affected parties, as that term is defined in the *Act*. This information is found in Appendix D of record 2, which contains tables setting out the addresses where noise complaints were made during the two music festivals in 2016. The tables indicate the dates and addresses of these complaints, as well as the noise measurements recorded by sound engineers, the time the measurements were taken, and any additional comments from the engineers.

[97] It is necessary to decide whether this information in Appendix D constitutes "personal information" and, if so, to whom it relates. In this appeal, paragraphs (d) and (e) of the definition of the term in section 2(1) is relevant, and they state:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (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 …

[98] 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.[25]

[99] 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.[26]

[100] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[27]

Representations

[101] None of the affected parties provided representations regarding whether their addresses constitute personal information as defined in the *Act*.

[102] The township acknowledges that addresses may generally be personal information as defined in section 2(1); however, it maintains that is not the case in this appeal, as the record does not contain addresses for the purposes of providing individuals' contact information, but rather to note the physical locations where sound monitoring occurred.

[103] The appellant submits that the addresses in Appendix D constitute the personal information of affected parties, many of whom have not consented to disclosure. In support of this position, the appellant points to the wording of the definition of "personal information" in section 2(1), which expressly includes the address of an identifiable individual under paragraph (d).

[104] The appellant notes that to qualify as personal information, the information must be about an individual in a personal, not professional, capacity. The appellant submits that, "a cursory google search of the first address [in the Appendix] reveals a residential home, which is in keeping with the general makeup of the properties abutting" the appellant's property. Accordingly, the appellant maintains that the "professional, official or business capacity" exception does not apply in this case.

[105] The appellant also submits that the individuals will be easily identified if the address information is disclosed. The appellant points to Canada411 as a process for identifying individuals using a municipal address, but also maintains that the analysis should consider the community in particular. The appellant states that the township is small and one in which the residents know each other; therefore, disclosing someone's address is akin to disclosing their identity.

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[25] Order 11.

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

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

Analysis and findings

[106] In Order PO-2511, Senior Adjudicator John Higgins considered whether information relating to individuals should be disclosed under the *Freedom of Information and Protection of Privacy Act*. In that order, Adjudicator Higgins stated, "In some instances, the street address of a property may be sufficient to identify an individual tenant where for example, there are no units in the building, or where other factors may serve to identify which unit is involved."

[107] In another order, MO-2398, the same adjudicator considered the disclosure of police records identifying the street addresses of multi-residence buildings and the number of calls that the police received in relation to each. In determining whether the information qualified as "personal information," such that the personal privacy exemption applied to it, Adjudicator Higgins stated:

> Based on the information provided to me, it appears that the multiple residence dwellings whose addresses are included in the records, in conjunction with the number of calls, may be small enough to result in the disclosure of information about identifiable individuals. More specifically, information about calls to these addresses may be about individuals who could reasonably be identified as being associated with calls made to the Police, and this would qualify as personal information (see *Ontario (Attorney General) v. Pascoe*, cited above). If these individuals are identifiable, the number of calls involving them is their personal information. This information may be exempt under the mandatory exemption provided by section 14(1) of the *Act* […]
>
> If the street number is severed, however, and only the street name and the information about calls are disclosed, this could not relate to any identifiable individual. On this basis, I find that the record, in that form, does not contain personal information. As only personal information is exempt under section 14(1), the record, severed in this manner, is not exempt under that section.

[108] I adopt Adjudicator Higgins' reasoning for the purposes of this appeal.

[109] Based on my review of the records and the parties' representations, I find that together, the street number and street name fall within paragraph (e) of the definition of personal information under section 2(1), as it relates to the views or opinions of individuals who could be identified if that information as disclosed. Namely, it relates to those individuals' views or opinions regarding the sound levels emanating from the two music festivals.

[110] However, following the reasoning set out in the above-noted appeals, I find that if the street numbers are severed, the remaining information would no longer constitute personal information under the *Act*, as I am satisfied that it would no longer relate to any identifiable individual. Section 4(2) of the *Act* obliges institutions to disclose as

much of any responsive record as can reasonably be severed without disclosing material which is exempt. Given my finding that the street names alone do not constitute the personal information of the individuals who made noise complaints to the township, the street names cannot be exempt under the section 14(1) personal privacy exemption. Therefore, as no other exemptions have been claimed for this information, I will order the street names to be disclosed to the requester.

[111] I will now consider whether the street numbers appearing in Appendix D are exempt under the mandatory personal privacy exemption in section 14(1) of the *Act*.

Issue C: Does the mandatory personal privacy exemption at section 14(1) apply to the information remaining at issue in record 2?

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

[113] If the information fits within any of paragraphs (a) to (f) of section 14(1), the street numbers are not exempt from disclosure. The section 14(1)(a) to (e) exceptions are relatively straightforward. The section 14(1)(f) exception, allowing disclosure if it would not be an unjustified invasion of personal privacy, is more complex, and requires a consideration of additional parts of section 14.

[114] In this appeal, I find that with the exception of the full addresses for which consent for disclosure was obtained from affected parties, the street numbers listed in Appendix D are exempt from disclosure under section 14(1). This finding is based on my determination that the sections 14(1)(b)-(e) exceptions to the exemption are not relevant for the purposes of this appeal, as well as my analysis of sections 14(1)(a), 14(1)(f), 14(2)(a), and 14(2)(f).

Section 14(1)(a): consent

[115] The exception to the personal privacy exemption at section 14(1)(a) provides that:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates, except
>
> > Upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access.

[116] None of the affected parties provided representations on the possible application of section 14 in particular; however, six affected parties provided written consent to the disclosure of their addresses to the requester, while one expressly declined to provide consent. The appellant acknowledges that some of the affected parties provided this consent.

[117] I am satisfied that the section 14(1)(a) exception to the section 14(1) exemption

applies to the personal information of the affected parties who provided written consent for the disclosure of their addresses to the requester. This exception does not apply to the other street numbers found in Appendix D of record 2, and I will continue by reviewing the other relevant parts of section 14 to these remaining street numbers.

Section 14(1)(f): not an unjustified invasion of personal privacy

[118] Section 14(1)(f) provides that:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates, except
>
> > If the disclosure does not constitute an unjustified invasion of personal privacy.

[119] Under section 14(1)(f), if disclosure would not be an unjustified invasion of personal privacy, it is not exempt from disclosure. Sections 14(2) and 14(3) are relevant in making this determination. 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. Once established, the unjustified invasion under section 14(3) can only be overcome if one of the provisions at section 14(4) applies or the public interest override at section 16 applies.

[120] Section 14(2) lists various criteria that might be relevant in determining whether disclosure of the personal information would amount to an unjustified invasion of personal privacy. The parties seeking disclosure in this appeal did not raise any factors favouring disclosure in their submissions, however, I have considered them in my analysis.

Section 14(2)(f): highly sensitive

[121] Section 14(2)(f) reads:

> 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 is highly sensitive.

[122] Whether the affected parties' addresses are highly sensitive for the purpose of section 14(2)(f) depends on the context of the appeal. To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[28]

[123] The affected party who responded with representations expressed concern that disclosure of their address may jeopardize employment or other opportunities with the

[28] Orders PO-2518, PO-2617, MO-2262, and MO-2344.

township. I do not find this position persuasive in establishing the factor at section 14(2)(f) because this appeal is about the disclosure of that information to the requester, not the township. The township is already in possession of the information.

[124] This office has recognized that, in general, it is reasonable to expect that individuals who make complaints or allegations about other individuals to an institution would suffer some personal distress if the information was later disclosed.[29]

[125] In this appeal, complaints were made to the township's noise complaint call centre not about other individuals, but about noise levels emanating from the appellant's venue during a music festival. The appellant maintains that the highly sensitive nature of this information is self-evident, as it identifies the addresses of affected parties and their subjective comments with respect to noise complaints. However, upon review of record 2, I confirm that the tables in Appendix D do not contain the affected parties' subjective comments, but rather merely indicate the addresses where noise complaints were made in conjunction with other information, such as the engineers' comments. I find the nature of these complaints to be less sensitive than ones made to an institution regarding another individual; however, I accept that information regarding complaints made to an institution is sensitive nonetheless. Accordingly, I am satisfied that the factor weighing against disclosure at section 14(2)(f) is relevant in this appeal.

Section 14(2)(a): public scrutiny

[126] I note that the township's submissions indicate that disclosure of the entire record is "essential to understanding where the sound monitoring occurred, leading the consultants to the conclusions made in the reports." These reports were then submitted to the township in accordance with the MOU for consideration in developing municipal noise regulations. In my view, this argument raises the possible application of section 14(2)(a), which states:

> 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 disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny.

[127] In order to support a finding that section 14(2)(a) applies, two points must be established by the evidence: first, the activities of the institution have been called into question publicly; and second, the information sought will contribute materially to the scrutiny of those specific activities.

[128] In his submissions on section 10(1), the requester maintains that the information was used to pass local legislation and therefore must be in the public domain. In

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[29] Order PO-3458.

response, the appellant indicated that they were unaware of any such legislation.

[129] When specifically asked by staff at this office if he was interested in obtaining access to the addresses listed in Appendix D, the requester stated that obtaining full access is important because if he does not know where the noise complaints originated, the other information will be meaningless.

[130] To the extent that the public scrutiny factor is raised by the parties' submissions, I am satisfied that the interest is served by disclosure of the street names, with the addresses severed. I am not persuaded that disclosure of the individual street numbers is also required to facilitate or add to the public scrutiny of the township's activities in relation to the development of municipal noise regulations. Accordingly, I find that section 14(2)(a) is not a relevant factor and, therefore, does not weigh in favour of disclosure of the affected parties' street numbers in Appendix D.

[131] Based on my consideration of the evidence and the circumstances of this appeal, I find that no other section 14(2) factors favouring disclosure are established. Given that there is one factor favouring non-disclosure and no factors favouring disclosure, it is not necessary for me to consider the presumptions listed under section 14(3) that were argued in the appellant's representations. As well, I am satisfied that none of the exceptions in section 14(4), which identify information whose disclosure is not an unjustified invasion of personal privacy, are applicable in the circumstances of this case. Therefore, as the section 14(1)(f) exception to the exemption is not established, I find that the street numbers of the affected parties who did not consent to their information being disclosed are exempt under section 14(1).

ORDER:

1. I find that section 10(1) applies to the information under subheading number 5 on page 3 of record 1, and sections 1.3, 2.3, 3.3, and 3.4, and Appendix E of record 2, and I order the township to withhold this information. I find that section 10(1) does not apply to the rest of records 1 and 2, or to records 3 or 4.

2. I find that section 14(1) does not apply to the street numbers of the six affected parties who provided written consent for the disclosure of their full addresses in Appendix D of record 2. However, I find that section 14(1) applies to the remaining street numbers in Appendix D of record 2 and the township must withhold this information.

3. I order the township to disclose the non-exempt portions of records 1 and 2, and the entirety of records 3 and 4, to the requester by **January 28, 2019** but not before **January 21, 2019.**

4. With respect to provision 3 of this order, I reserve the right to require the township to provide me with severed copies of the records ordered disclosed to the appellant.

Original Signed by: December 18, 2018

Jaime Cardy
Adjudicator