

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3721

Appeal MA16-609

Town of the Blue Mountains

January 23, 2019

Summary: The Town of Blue Mountains received a request for records related to the settlement of a matter with a named individual. The town granted partial access to the responsive records. It withheld information pursuant to the discretionary exemptions at sections 8(1) (law enforcement) and 12 (solicitor-client privilege) and the mandatory exemption at section 14(1) (personal privacy) of the *Municipal Freedom of Information and Protection of Privacy Act*. The requester appealed the application of the exemptions. In this order, the adjudicator upholds the town's application of section 12 and determines that some of the withheld information is exempt from disclosure under section 14(1), but concludes that none of the remaining information is exempt from disclosure under section 8(1). She orders the town to disclose the non-exempt information to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M. 56, as amended, ss. 8(1), 12 and 14(1).

OVERVIEW:

[1] The Town of Blue Mountains (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all documentation associated with a "minutes of settlement record" between the town and a named individual. The request was accompanied by a copy of the minutes of settlement and a related affidavit.

[2] The town granted the requester partial access to a portion of the responsive records, which consisted of emails, letters and a zoning application. Prior to making its decision regarding the remaining responsive records, the town notified an affected

party in accordance with section 21(1) of the Act that section 10(1) (third party information) may apply. The affected party consented to the disclosure of the information and the town subsequently issued a decision granting the requester partial access to the remaining records.

[3] The town withheld some of the information in the records pursuant to the discretionary exemptions at sections 8(1) (law enforcement) and 12 (solicitor-client privilege) and the mandatory exemption at section 14(1) (personal privacy) of the *Act*.

[4] The requester appealed the town's decision to this office, becoming the appellant in this appeal.

[5] During mediation, the town issued a revised decision and granted access in full to two records that it had previously withheld pursuant to section 12 of the *Act*. It continued to deny access to the remaining information in dispute under sections 8(1), 12 and 14(1).

[6] The issues were not resolved at mediation and the file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*.

[7] The adjudicator began by seeking representations from the town. In its representations, the town indicated that it was prepared to disclose some of the information that it had previously withheld pursuant to the discretionary exemption at section 8(1). The adjudicator noted that a number of individuals other than the requester could potentially be affected by the town's decision to disclose the information it had previously withheld. The adjudicator invited those individuals, and the town, to make representations on whether the mandatory personal privacy exemption at section 14(1) of the *Act* applied to the information the town had decided to disclose. The town and one of the other individuals provided representations.

[8] The adjudicator then sought representations from the appellant. The appellant confirmed that they wanted to pursue the appeal but did not make any representations.

[9] The parties' representations were shared with one another in accordance with this office's *Code of Procedure* and *Practice Direction Number 7*. The affected party's representations, as well as a portion of the town's representations in response to the Supplementary Notice of Inquiry were withheld from the appellant as they met this office's confidentiality criteria set out in *Practice Direction Number 7*. The appeal was then transferred to me to continue the inquiry.

[10] For the reasons that follow, I uphold the town's decision with respect to the discretionary exemption in section 12. I partially uphold the town's decision regarding the mandatory exemption at section 14(1) of the *Act* and also find that this exemption applies to a small amount of additional information in the disputed records. I do not uphold the town's decision with respect to the discretionary exemption at section 8(1)

of the *Act*. I order the town to disclose the non-exempt information to the appellant.

RECORDS:

[11] The records at issue in this appeal, which have all been partially withheld by the town, are summarized in the following chart:

| Page numbers | General description of records | Exemption(s) claimed |
|--|--|-----------------------------|
| 1-5, 38-46, 67-78, 80-84, 86-90 and 93-99 | A single email and 12 email chains between the town and its lawyer | s. 12 |
| 56-57, 64 and 65- 66 | Three letters to the town from its lawyer | s. 12 |
| 36 | Email chain between the town and an individual | s. 14(1) |
| 48 and 102 | Duplicate email between town employees | s. 8(1) |
| 54-55 | Email chain between the town and other individuals | ss. 8(1)(d) and 14(1) |
| 85 | Email from an individual to the town | s. 14(1) |
| 91 | Email from town to an individual | s. 14(1) |
| 108-115, 117, 120, 123, 124, 134-139, 141-148 and 157. | Email chains containing 14 written submissions from individuals to the town in relation to a Zoning By-Law Amendment Application | s. 14(1) |
| 170-181 | Zoning By-Law Amendment Application | s. 14(1) |

ISSUES:

- A. Does the discretionary exemption at section 12 (solicitor-client privilege) apply to the withheld information?

- B. Did the town exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?
- C. Do the records contain "personal information" as defined in section 2(1)?
- D. Does the mandatory personal privacy exemption at section 14(1) apply to the information at issue?
- E. Does the discretionary exemption at section 8(1) (law enforcement) apply to the withheld information?

DISCUSSION:

A: Does the discretionary exemption at section 12 (solicitor-client privilege) apply to the withheld information?

[12] 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.

[13] 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

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

Solicitor-client communication privilege

[15] 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.¹ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.² The privilege applies to a "continuum of communications" and covers not only

¹ *Descoteaux v. Mierzwindski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

² Orders PO-2441, MO-2166 and MO-1925.

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.³

[16] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.⁴

[17] 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.⁵ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.⁶

The town's representations

[18] The town submits that both branches of solicitor-client privilege apply to the information it has withheld pursuant to section 12 of the *Act*. It says that the information in dispute is comprised of direct communications between employees of the town and the lawyer it retained to prosecute the by-law matters associated with the appellant's request. The town submits that the communications were confidential in nature and made for the dominant purpose of either obtaining or giving legal advice, or keeping both the lawyer and the client informed so that advice could be sought and given.

[19] The town also asserts that the information in dispute was prepared in contemplation of litigation. Specifically, it says that the communications in question reveal information and advice about its evidence, litigation strategy and the strengths and weaknesses of its case.

[20] As noted earlier, the appellant did not make any representations in this inquiry.

Analysis and findings

[21] For the reasons that follow, I am satisfied that all of the information that the town withheld under section 12 – the withheld portions of the single email, the 12 email chains and the three letters – consists of confidential communications between the town and its lawyer that were made for the purpose of seeking or receiving legal advice and are therefore subject to the common law solicitor-client communication privilege under Branch 1 of section 12 of the *Act*.

³ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

⁴ *Susan Hosiery Ltd. V. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

⁵ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

⁶ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

[22] I note that the town has disclosed some of the information regarding the sender, the recipient, the dates and the subject lines of the letters and emails, as well as a number of signature blocks. For the most part, only the content of the communications has been withheld.

Emails

[23] There is a significant amount of duplication in the portions of the emails that the town has withheld pursuant to section 12 of the *Act*. For example, the same three-page email to the town from its lawyer appears on pages 40-42, 80-82, and 95-97 while another two-page email from the lawyer starting on page 2 of the records is replicated on pages 87-88. Likewise, an email from the town to its lawyer appears five times in the records on pages 1, 43-44, 45-46, 83-84 and 97-98. Finally, an email exchange between the town and its lawyer on pages 4-5 is also replicated on pages 89-90.

[24] Each of these emails, as well as the emails on pages 38-39 and 93 include only the town and its lawyer and the withheld portions are communications that clearly relate to the provision of legal advice. Based on my review of the records, I accept the town's submission that the withheld information on these pages consists of direct communications with its lawyer that were confidential in nature and I find they are all subject to solicitor-client communication privilege.⁷

[25] However, I note that some email chains in the records include communications with outside parties. For example, the email chain on pages 67-72 includes communications between the town's solicitor and another lawyer and pages 73-79 include the town's email correspondence with an outside party. Based on my review of the communications with outside parties, they are not stand-alone records. Instead, they were forwarded from solicitor to client or vice-versa as part of the continuum of communications between the lawyer and the client, aimed at keeping both informed so that the advice could be sought and given as required. There is no indication that the outside parties were otherwise included in these communications. I accept that they were confidential and find they are subject to solicitor-client communication privilege.

[26] The last email chain that must be considered is on page 86. The town has withheld the content of two emails and disclosed the balance of the information on the page. The parties to the communications are town employees and the lawyer's assistant. Although none of the parties to the communications are lawyers, it is evident from the information the town disclosed that the emails relate to the advice the town sought and received from its lawyer through the lawyer's assistant.

⁷ Pages 1-5, 38-46, 80-84, 87-90 and 93, 95-98. I note that although the town claims section 12 applies to page 94 in its representations, it has not severed any information from that page.

[27] This office has previously applied section 12 of the *Act* to internal client communications not involving a lawyer where the exchange of information contained in the communication is either in the context of planning to seek legal advice from counsel, processing and implementing the privileged legal advice or where it would directly or indirectly reveal the content of communications with legal counsel.⁸ I find that this analysis applies to page 86 and as such, it is subject to solicitor-client communication privilege.

Letters

[28] The balance of the information the town withheld pursuant to section 12 is comprised of partially disclosed letters from the town's lawyer to the town.⁹ The town disclosed the sender and recipient information as well as the subject lines, which indicate the communications are reports. However, the content has been severed. The information the town has withheld in these pages contains the lawyer's opinion regarding the matters identified in the subject lines and as such, consists of a direct communication related to the provision of legal advice. There is no evidence any other parties received these reports and in my view, they are confidential in nature. I find that the withheld portions of the three letters on pages 56-57, 64 and 65-66 fall within the solicitor-client communication privilege aspect of section 12.

[29] For the reasons set out above, I am satisfied that the withheld portions of the single email, the 12 email chains and the three letters are confidential communications between a lawyer and client made for the purpose of obtaining or giving legal advice and as such, are subject to the common-law solicitor-client communication privilege and may be withheld under section 12 of the *Act*.

[30] The town submits that privilege over this information was not waived and I find no evidence to suggest that it was. I find, therefore, that subject to my findings on the town's exercise of discretion, the information may be withheld under the first branch of section 12 of the *Act*.

[31] In light of my findings above, i.e. that the information is exempt pursuant to the common-law solicitor-client communication privilege, I do not need to decide whether it is also exempt under either the common-law solicitor-client litigation privilege, or the statutory (Branch 2) privilege, as claimed by the town..

B: Did the town exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

[32] The section 12 exemption is discretionary, and permits an institution to disclose

⁸ Order MO-3326.

⁹ Pages 56-57, 64 and 65-66 in the records.

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.

[33] 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.

[34] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁰ This office may not, however, substitute its own discretion for that of the institution.¹¹

[35] The city submits that it considered a number of relevant factors when it exercised its discretion under section 12. It says it took into account only relevant considerations, including the purpose of the *Act*, the wording of the exemption and the purpose it seeks to protect, as well as the fact that the appellant was not seeking their own personal information and has no compelling need to receive the information. It also says that the information exchanged between the town and its solicitor was sensitive and that its response to the request for information kept with its past practices.

[36] Having regard to the circumstances of this appeal, I am satisfied that the town considered a number of relevant factors when exercising its discretion under section 12. I find that it did not take into account irrelevant considerations or fail to take into account relevant considerations. I also note that the appellant has made no representations regarding the town's exercise of its discretion.

[37] Accordingly, I am satisfied that the town properly exercised its discretion in withholding portions of the records under section 12.

C: Do the records contain "personal information" as defined in section 2(1)?

[38] The personal privacy exemption in section 14(1) of the *Act* applies only to records that contain "personal information." Consequently, it is necessary to determine whether the records at issue in this appeal contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

¹⁰ Order MO-1573.

¹¹ Section 43(2).

“personal information” means recorded information about an identifiable individual, including,

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

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

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual’s name 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;

[39] 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.

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

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

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their

dwelling and the contact information for the individual relates to that dwelling.

[41] 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.¹²

[42] 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.¹³

[43] Order PO-2225 sets out a two-step analysis for determining whether to characterize information as "personal" or "professional":

1. In what context do the names of the individuals appear? Is it in a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?
2. Is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

Analysis and findings

[44] The town says that there is personal information in the records it seeks to withhold pursuant to section 14(1).¹⁴ Specifically, it submits that the records contain information about identifiable individuals including names, addresses and telephone numbers. It also says that the records contain information sent to the town by an individual that is implicitly or explicitly of a private or confidential nature, as well as replies from the town that would reveal the contents of the original correspondence.

[45] For the reasons set out below, I find that some of the records in dispute contain the personal information of individuals other than the appellant. None of the records contain the appellant's personal information.

[46] The key issue that must be addressed in order to determine whether the majority of the information in dispute is personal information is whether it identifies

¹² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

¹³ Orders P-1409, R-980015, PO-2225 and MO-2344.

¹⁴ Pages 36, 54, 55, 85, 91, 108-115, 117, 120, 123, 124, 134-139, 141-148, 157 and 170-181.

individuals in a personal capacity, or in a business, professional or official capacity.

[47] Pages 108-115, 117, 120, 123, 124, 134-139, 141-148 and 157 of the records are email submissions from individuals to the town about the by-law matter that is the subject of the appellant's request for information (the Submissions). The town says that it disclosed the content of the Submissions because they were collected and maintained specifically for the purpose of creating a record available to the general public. However, the town says that it withheld the telephone numbers and physical and email addresses of the individuals who made Submissions because that information was not intended to be part of the public record. It is clear from the content of the Submissions that the individuals were acting in a personal capacity when they wrote to the town and as a result, I find that their telephone numbers and email and physical addresses are personal information.

[48] For the same reasons, I find that the names and email addresses that the town withheld in the email chain on pages 54 and 55 are also personal information. Although the town withheld the content of those emails as well, I find that once the individuals' names and email addresses have been severed the remaining information does not identify any individual and on that basis, is not personal information.

[49] The remaining information in dispute primarily relates to an individual who was communicating with the town about the use of a number of properties that were the subject of the by-law matter. Based on my review of the records, it is clear that this person was acting in a business capacity through a company.¹⁵ The individual refers to the company multiple times in his emails with the town. He also wrote a letter to the town about the properties and the by-law matter using a company letterhead, which included that company's email address.¹⁶ The company email address, which the individual used to communicate with the town about the by-law matter, also appears on pages 36 and 91 of the records. I find that it is not personal information.

[50] However, I do find that a different email address used by the same individual, which appears in the records on pages 36, 85 and two times on page 170, is personal information. This email is not listed on the company's letterhead and although it is used in a business context, given the particular characteristics of this email address I find that if the email provider the account is associated with were disclosed, it would reveal something of a personal nature about the individual.

[51] Next, I find that the telephone numbers that the town has withheld in the Zoning By-Law Amendment Application (the Application) at page 170 of the records are not

¹⁵ I note that there are a number of slight variations to the name of the company referred to by the town and the other individuals in the records. I refer to that entity (or those entities) simply as "the company" or "a company" in this order.

¹⁶ Page 104.

personal information. The telephone numbers were provided in the "applicant information" section of the Application alongside associated companies. As such, I find that the telephone numbers were intended to be used as business contacts. In circumstances where there is no other information before me that suggests disclosing the telephone numbers would reveal something of a personal nature about any of the identified individuals, and where none of those individuals made representations regarding the telephone numbers, I find that they are not personal information.¹⁷

[52] The only remaining information withheld by the town pursuant to section 14(1) is the four signatures in the Application.¹⁸ Previous orders have concluded that if a signature is contained on records that were created in a professional or official government context, it is generally not "about the individual" in a personal sense, and would not normally fall within the scope of the definition of personal information.

[53] The first signature in the Application that has been withheld by the town is that of a Commissioner of Oaths who notarized the Application. The next three signatures belong to one of the individuals who submitted the Application on behalf of a company. In my view, it is reasonable to conclude that both the Commissioner of Oaths and the individual were acting in a professional or business context when they signed the Application. As such, I find that their signatures are not personal information.¹⁹

[54] In addition to the personal information identified by the town, I find that there is a small amount of personal information on pages 36, 48, 85, 91, 102 and 104. Pages 36 and 91 contain an email that lists a company and a number of individuals that the town intended to serve with summonses to appear in relation to the by-law matter. The information in the records indicates that the town intended to issue the summonses to all but one of the individuals in their business capacity. However, the word "personally" is written beside one of the individual's names. There is no indication in the records before me that this person was connected to, or acting for, a company. As a result, I find that the person's name, when combined with the content of the email, constitutes personal information pursuant to section 2(1) of the *Act*.

[55] Page 85 is an email from an individual acting on behalf of a company to the town regarding the by-law matters. The majority of the email is related to the business of the company and is not personal information. However, I find that one line of the email constitutes personal information because it would reveal something of a personal nature about the individual.

[56] Finally, pages 48 and 102 contain the same email between town employees and

¹⁷ PO-2857.

¹⁸ The signatures are on pages 179-181. I note that although the town claimed that section 14(1) applied to pages 170-181 in its representations, it has only severed information on pages 170 and 179-181.

¹⁹ MO-1194 and PO-2632.

page 104 is a letter from a company to the town regarding the properties subject to the by-law matter. As in page 85, there is one line in each of these pages that is personal information which may be subject to the personal privacy exemption in 14(1).

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

[57] I have found that the following information qualifies as “personal information”:

- the telephone numbers and physical and email addresses in the Submissions on pages 108-115, 117, 120, 123, 124, 134-139, 141-148 and 157;
- the names and email addresses of individuals in the email chain on pages 54 and 55;
- the email address on pages 36, 85 and 170; and
- the name of an individual on pages 36 and 91 and the single lines of information regarding other individuals on pages 48, 85, 102 and 104.

[58] I will now determine whether this personal information is subject to the mandatory exemption under section 14(1) of the *Act*.

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

[60] The section (a) to (e) exceptions are relatively straightforward. If the information fits within any of paragraphs (a) to (e) of section 14(1), it is not exempt from disclosure. In this appeal, none of the paragraphs in section 14(1)(a) to (e) apply.

[61] The section 14(1)(f) exception, which allows personal information to be disclosed if it would not be an unjustified invasion of personal privacy, is more complex and requires a consideration of additional parts of section 14. Sections 14(2) and 14(3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, if any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 14(1). None of the paragraphs in section 14(4) applies here, so I must go on to consider sections 14(2) and (3).

[62] First, 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, a presumed unjustified invasion of personal privacy under section 14(3)

can only be overcome if section 14(4) or the “public interest override” at section 16 applies.²⁰

[63] The town submits that the presumption in section 14(3)(b) applies to the information on pages 54 and 55. This section states:

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

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

[64] Previous orders have established that section 14(3)(b) applies to by-law investigations.²¹

[65] The personal information on pages 54 and 55 is comprised of email addresses and names of individuals that were included in an email chain with the town about the by-law matter that is the subject of this appeal. On my review of the records and the town’s representations, I am satisfied that the names and email addresses of the parties communicating with the town about the by-law matter were compiled by the town in the course of its investigation into a possible by-law infraction and are identifiable as part of that investigation. Accordingly, I find that the disclosure of the names and email addresses is presumed to constitute an unjustified invasion of the personal privacy of identifiable individuals under section 14(3)(b) of the *Act*.

[66] A presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if a section 14(4) exception or the “public interest override” at section 16 applies.²² As noted earlier, the appellant made no representations for this inquiry, and based on my own review of the records, I find that neither sections 14(4) nor 16 apply. Accordingly, the information at issue on pages 54 and 55 is exempt under the mandatory personal privacy exemption in section 14(1).

[67] Based on my review of the remaining information, I am satisfied that none of the section 14(3) presumptions apply to it.²³ In circumstances where section 14(3) does not

²⁰ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 1993 CanLII 3388 (ON SCDC), 13 O.R. (3d) 767 (Div.Ct.).

²¹ MO-2147.

²² *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 1993 CanLII 3388 (ON SCDC), 13 O.R. (3d) 767.

²³ The remaining personal information consists of the telephone numbers and physical and email addresses in the Submissions on pages 108-115, 117, 120, 123, 124, 134-139, 141-148 and 157, the

apply, section 14(2) lists various factors that may be relevant in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy.²⁴ Paragraphs (a) to (d) list factors which, if present, favour disclosure, while paragraphs (e) to (i) list factors which, if present, favour non-disclosure.

[68] The list of factors under section 14(2) is not exhaustive. The town must consider any circumstances that are relevant, even if they are not listed under section 14(2).²⁵ In order to find that a disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure in section 14(2) must be present. In the absence of such a finding, the exception in section 14(1)(f) is not established and the mandatory section 14(1) exemption from disclosure will apply to the information in dispute.²⁶

[69] The appellant, who did not make representations, has not identified any section 14(2) factors favouring disclosure of any of the personal information at issue.

[70] The town made representations about the personal information on pages 85, 91 and 104, which are pages that it proposes to disclose. The town submits that some of the section 14(2) factors favour the disclosure of the personal information on pages 85, 91 and 104.²⁷ Specifically, it says that disclosure would not constitute an unjustified invasion of personal privacy because the disclosure may now be desirable for the purpose of subjecting the activities of the institution to scrutiny (section 14(2)(a)). The town also submits that several of the section 14(2) factors weighing *against* disclosure do not apply.

[71] The town offers no further explanation or evidence in support of its assertion that the factor favouring disclosure at section 14(2)(a) applies such that the disclosure of the personal information on pages 85, 91 and 104 would not be an unjustified invasion of personal privacy. Given the amount of information already disclosed and the nature of the withheld information, I am not satisfied that its disclosure would offer any additional public scrutiny of the town. Additionally, I am not satisfied from my own review of the withheld information that any other factors favouring disclosure in section 14(2) apply to it.

[72] As noted above, in order to find that a disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances

email address on pages 36, 85 and 170, the name of an individual on pages 36 and 91 and the single lines of information on pages 48, 85, 102 and 104 regarding other individuals.

²⁴ Order P-239.

²⁵ Order P-99.

²⁶ Orders PO-2267 and PO-2733.

²⁷ This personal information on these pages is comprised of an email address, the name of an individual and two additional lines of information about an individual.

favouring disclosure in section 14(2) must be present. Here, I find that no such factors are present and as a result, I find that the exception at section 14(1)(f) is not established and the mandatory exemption at section 14(1) applies to this information. Since there are no factors favouring disclosure present, I do not need to determine whether any of the factors weighing against disclosure apply.

[73] With respect to the remainder of the personal information in the records, the appellant did not raise any factors favouring disclosure and from my own review of the information, I find that there are no factors that would favour disclosure. Accordingly, I find that the mandatory exemption at section 14(1) applies to this information.

[74] In summary, I find that the information at issue on pages 54 and 55 is exempt from disclosure under the mandatory personal privacy exemption in section 14(1) by reason of the application of the presumption in section 14(3)(b). The remainder of the personal information in the records, that is, the telephone numbers and physical and email addresses in the Submissions on pages 108-115, 117, 120, 123, 124, 134-139, 141-148 and 157, the email address on pages 36, 85 and 170, the name of an individual on pages 36 and 91 and the single line of information on each of pages 48, 85, 102 and 104 are all subject to the mandatory exemption at section 14(1) and are also exempt from disclosure.

E: Does the discretionary exemption at section 8(1) apply to the withheld information?

[75] Given my findings on section 12 and section 14(1), it is no longer necessary to consider whether section 8(1) applies to the information I have concluded is exempt from disclosure pursuant to those sections. The outstanding information in dispute that the town has withheld under section 8(1) is on pages 48, 54 to 55 and 102 and consists of emails, other than those portions I have found are exempt under section 14(1).

[76] The town relies on section 8(1) to withhold the information. This section states:

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

- (a) interfere with a law enforcement matter;
- (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
- (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

- (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
- (e) endanger the life or physical safety of a law enforcement officer or any other person;
- (f) deprive a person of the right to a fair trial or impartial adjudication;
- (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
- (h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;
- (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
- (j) facilitate the escape from custody of a person who is under lawful detention;
- (k) jeopardize the security of a centre for lawful detention; or
- (l) facilitate the commission of an unlawful act or hamper the control of crime.

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

"law enforcement" means,

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

[78] The term "law enforcement" has been found to apply to a municipality's

investigation into a possible violation of a municipal by-law.²⁸

[79] It is not enough for an institution to take the position that the harms under section 8(1) are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.²⁹ As set out by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, the institution 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.³⁰

The town's representations

[80] The town says it withheld the information on pages 54 and 55 pursuant to section 8(1)(d). It did not specify which subsection of section 8(1) it relies on in relation to the information it withheld on pages 48 and 102.

[81] The town's representations regarding the application of section 8(1) are as follows:

- The law enforcement matter was the Town's prosecution of several defendants in a case before the Provincial Offences Division of the Ontario Court of Justice.
- As part of the "Minutes of Settlement" of the matter before the Provincial Offences Division, the defendants in that case submitted an application for an amendment to the town's zoning by-law and the decision of that application was appealed to the Ontario Municipal Board (the OMB).

[82] The town submits that "some of the records which have been withheld by the Town under the law enforcement exemption will be relevant to and constitute part of the Town's case before the OMB."

[83] The town refers me to *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, where it was held that a "matter" may extend beyond a specific investigation or proceeding.³¹ It says that the "matter" it has applied section 8(1) to is the "use of the subject properties for short

²⁸ Orders M-16 and MO-1245.

²⁹ Order PO-2040 and *Ontario (Attorney General) v. Fineberg* (1994), 1994 CanLII 10563 (ON SC), 19 O.R. (3d) 197 (Div. Ct.). (*Fineberg*).

³⁰ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4. (*Ontario*).

³¹ [2007] O.J. No. 4233 (Div. Ct.).

term accommodation.” It says that the case before the OMB involves the same parties, the same properties and the related issue as to the appropriateness of changing the land use permissions on the subject properties to allow short term accommodations.

[84] The town makes no further representations with regard to the application of section 8(1)(d) to pages 54 and 55. With regard to pages 48 and 102, it says that “in light of the on-going litigation between [the parties]” it ought to be able to continue to rely on section 8(1) to withhold information on those pages.

Analysis and findings

[85] I accept the town’s representation that some of the information from the Provincial Offences Division case may be relevant to the OMB proceeding. However, in my view, the town has not taken the necessary step of explaining how section 8(1) applies to that information. It simply asserts that because the matter is before the OMB, the information should not be released.

[86] As set out in the Notice of Inquiry for this appeal, and in previous orders of this office, it is not enough for an institution to take the position that the section 8(1) exemption applies because the record at issue is part of a continuing law enforcement matter.³² The institution must provide evidence about the potential for harm and show that there is a reasonable expectation of harm.³³

[87] In my view, the town has not provided satisfactory evidence in that regard. Specifically, it has not explained how the release of the information it has withheld on pages 48 and 102 could affect the case before the OMB.

[88] It has also not specified how the release of the content of the emails on pages 54 and 55 could reasonably be expected to reveal the information of a confidential source or information provided only by that source. Based on my review of the records themselves, I do not accept that disclosing the information in them could reasonably be expected to reveal information furnished only by the confidential source, as required by section 8(1)(d). I cannot elaborate without revealing the content of the record.

[89] To summarize, I find that the town has not established that section 8(1) applies to any of the information on pages 48, 54, 55 or 102. I will, therefore, order that the remaining information on these pages that is not subject to section 14(1) be disclosed to the appellant.

³² Order PO-2040 and *Fineberg*.

³³ *Ontario*.

ORDER:

1. I uphold the town's application of section 12 of the *Act* to the information it withheld pursuant to that section.
2. I uphold the town's application of section 14(1) of the *Act*, in part, and also find that additional information is subject to the section 14(1) exemption. I have attached a highlighted copy of the records to the copy of this order that I am providing to the town, highlighting the exempt information that is not to be disclosed to the appellant. I order the town to disclose the remaining information, which has not been highlighted, to the appellant.
3. I do not uphold the town's application of section 8(1) of the *Act* to pages 48, 54 to 55 and 102 and order that this information be disclosed to the appellant in accordance with the highlighted copy of the records referred to in paragraph 2.
4. I order that the town make the disclosure referred to in order provisions 2 and 3 by **February 27, 2019** but not before **February 22, 2019**.
5. In order to verify compliance with this order, I reserve the right to require the township to provide this office with copies of the information disclosed to the appellant.

Original Signed by: _____
Meganne Cameron
Adjudicator

January 23, 2019 _____