

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3785-I

Appeal MA16-526

Township of Scugog

June 11, 2019

Summary: The appellant was the subject of a complaint to the Township of Scugog (the township) about her use of a residential property for a business purpose. Under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), the appellant sought access to the township's records relating to this matter. She appealed the township's decision to withhold some records in full or in part on various grounds, including solicitor-client privilege and personal privacy grounds. She also appealed the reasonableness of the township's search for records. In this interim order, the adjudicator finds that all the records remaining at issue before her contain the appellant's personal information; as a result, the appellant's right of access is under Part II of the *Act*, and any applicable exemptions from that right are discretionary exemptions under section 38 in Part II. The adjudicator finds that most of the township's severances to the records qualify for exemption on personal privacy grounds (section 38(b) of the *Act*), but she orders the township to conduct a proper exercise of its discretion in respect of that information. She defers her finding on the application of solicitor-client privilege to one record (section 38(a), in conjunction with section 12 of the *Act*) pending additional information from the township, including about its exercise of discretion under those sections. She also orders the township to conduct another search for records and to provide her with representations on its further search.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, sections 2 (definitions), 12, 14(2), 16, 17, 38(a) and 38(b).

OVERVIEW:

[1] The appellant was the subject of a complaint to the Township of Scugog (the township) about her use of a residential property for a business purpose. However, as

the appellant noted during this appeal, the township later advised the appellant that her use of the property (as reflected in a drawing that she submitted to the township) appears to comply with the relevant township by-law addressing home occupation.

[2] This appeal arises from the appellant's request to the township under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for "any and all records" relating to this matter. Specifically, the appellant sought information "in the possession or under the control of anyone" at the township, at any time, relating to: the property in question (over a particular date range); or to the appellant in connection with her professional designation or another title by which she is known professionally; or to the owners who took legal possession of the property (after a specified date). As will be seen below, all the elements of the request relate to the appellant as an owner of the property in question and as a designated professional in a particular field.

[3] The township responded to the request by granting partial access to 29 records. The township withheld some records or portions of records, relying on exemptions at sections 7 (advice or recommendations), 8 (law enforcement), 12 (solicitor-client privilege) and 14 (personal privacy) of the *Act*.

[4] The appellant appealed the township's decision to this office.

[5] During the mediation stage of the appeal process, the township issued a revised decision in which it disclosed additional records and amended its exemption claims for other records. Specifically, the township withdrew its reliance on sections 7 and 8 of the *Act* and in their place claimed section 14. The township's revised decision was set out in a revised index of records, containing a general description of each record at issue and the exemptions claimed for the withheld portions in each record.

[6] During mediation, the appellant removed some records from the scope of the appeal. She also claimed a public interest in the disclosure of information withheld on the basis of section 14. As a result, the application of section 16 (public interest override) was added as an issue in the appeal. In addition, the appellant took the position that there should exist additional records responsive to her request. The township conducted another search, but did not locate additional records. As the appellant maintains that additional records must exist, the reasonableness of the township's search for records is an issue in this appeal.

[7] As no further mediation was possible, the appeal was transferred to the adjudication stage, where I decided to conduct an inquiry into this matter. While I invited both parties to submit representations on the issues, only the appellant provided representations.

[8] In this interim order, I uphold most of the township's severances to the records based on personal privacy grounds under section 38(b) of the *Act*. However, as I lack evidence to conclude that the township properly exercised its discretion in withholding the appellant's personal information from her on this basis, I return the matter to the

township for a proper exercise of discretion under section 38(b). I also order the township to disclose one discrete portion of one email record that does not qualify for exemption under section 38(b). I defer making a finding on the township's solicitor-client privilege claim (under section 38(a) of the *Act*, in conjunction with section 12) for one record pending representations on this topic from the township. Finally, in view of the township's failure to provide any evidence to show that it conducted a reasonable search, I order the township to conduct another search for responsive records, and to provide me with details of its search. I remain seized of the appeal to address matters arising out of certain order provisions, as described below.

RECORDS:

[9] At issue are the withheld portions of email records described as Records 8, 9, 13, 20 and 21 in the township's revised index of records.

[10] The appellant also believes that there exist additional records responsive to her request.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) of the *Act*, and, if so, to whom does it relate?
- B. Does the discretionary personal privacy exemption at section 38(b) apply to any of the information at issue?
- C. Is there a compelling public interest in disclosure of the information withheld under section 38(b) that clearly outweighs the purpose of the exemption?
- D. Does the discretionary exemption for solicitor-client privilege at section 38(a), in conjunction with section 12, apply to any of the information at issue?
- E. Did the township exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?
- F. Did the township conduct a reasonable search for records?

DISCUSSION:

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

[11] Based on the wording of the appellant's request and my review of the records at issue, I asked the parties to address the potential application of sections 36(1) and 38

of the *Act* to this appeal. These sections, contained in Part II of the *Act*, are relevant when an individual requests access to her own personal information. Among other things, they establish the higher right of access of a requester to records of her own personal information as compared to the general right of access, under section 4 in Part I of the *Act*, to records that do not contain the requester's personal information.

[12] As a result, a preliminary question in this appeal is whether the records at issue contain the appellant's personal information within the meaning of the *Act*. In addition, because the township withheld some information in the records on personal privacy grounds, it is necessary to decide whether any of the withheld information constitutes the personal information of individuals other than the appellant.

[13] The term "personal information" is defined at section 2(1) of the *Act*, which states, in part:

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

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

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

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual[.]

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

[15] Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(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.

¹ Order 11.

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

[16] The records at issue are responsive to the appellant's request for complaints and other information relating to a property that she owns and to herself in her professional capacity. The records generally address the matter of whether the appellant's use of her property complies with a township by-law, and include information reported from third parties about the actual use of the property and about the appellant's position on the allegation of non-compliance.

[17] A number of orders of this office have addressed the distinction between personal information and information about a property, and between personal information and information about an individual in a business or professional context. While these are contextual determinations in every case, a guiding principle in these orders is that information may qualify as personal information where it reveals something of a personal nature about an identifiable individual.² This office applied this test in previous orders to find, for example, that information about improper or potentially improper conduct of employees qualified as "personal information,"³ as did information revealing that certain homeowners had applied for building permits.⁴

[18] Applying this principle in the case before me, I conclude that, notwithstanding the references in her request to the property and to her professional role, the appellant's request is a request for her personal information. She seeks information connected to her property and to her professional role that would reveal something of a personal nature about her. The responsive records include such information as the appellant's allocation of space in her home and the appellant's actions and her position in response to the concerns raised about her use of the property. All this information qualifies as the appellant's personal information within the meaning of paragraph (h) of the definition at section 2(1).

[19] I find, in addition, that some of the records also contain the personal information of individuals other than the appellant. This includes the names of individuals who provided information about or who have some other connection to the allegation about the appellant. Disclosure of these individuals' names in this context would reveal something personal about them—including, for example, the fact of their cooperation

² See, for example, Orders P-1409, R-980015, PO-2225 and MO-2344 (on the distinction between personal information and information about an individual in a professional, official or business capacity) and Orders 23, MO-2053 and PO-3616 (on the distinction between personal information and information about a residential property).

³ Among others, see Orders M-642, MO-1285 and PO-3075.

⁴ Orders M-138 and MA-990101-1.

with the township in this matter. In this context, these individuals' names qualify as their personal information under paragraph (h) of section 2(1). This finding is consistent with this office's long-standing treatment of the names of complainants and witnesses in various types of investigations as the personal information of those parties.⁵

[20] Personal information also includes, in one record (Record 8), a portion of a summary by the record's author of a position taken on this matter by one named individual. This portion qualifies as the latter individual's personal information within the meaning of paragraphs (e) and (h) of section 2(1). It also contains a detail that would permit identification of the individual, even if the individual's name were severed from the rest of the account. As it is reasonable to expect that disclosure of this portion of the summary would result in identification of the individual, even without its being attached to the individual by name, it too qualifies as the individual's personal information.⁶

[21] However, another portion of the summary in Record 8 can reasonably be severed from the portion that is personal information, and can be disclosed to the appellant without giving rise to a reasonable expectation of identification of the individual. This latter portion does not qualify as the individual's personal information and therefore cannot be subject to the personal privacy exemption. As the township has not made any other claim for withholding this portion, I will order the township to disclose it to the appellant.

[22] In summary, I find that all the records at issue contain the appellant's personal information, and that some of the information withheld in these records is also the personal information of other individuals. Under this office's "record-by-record" approach to requests for one's own personal information,⁷ the appellant's right of access to any information withheld in the records is under Part II of the *Act*, subject to any applicable exemptions. I will therefore consider each of the exemption claims raised by the township under the appropriate section in Part II of the *Act*.

B. Does the discretionary personal privacy exemption at section 38(b) apply to any of the information at issue?

[23] The township withheld discrete portions of Records 8, 9, 20 and 21 on the

⁵ See, for example, Orders P-1485, MO-1682, MO-1964 and MO-3215.

⁶ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] OJ No 4300 (CA).

⁷ See Order M-352. Under this approach, the unit of analysis is the whole record, rather than individual paragraphs, sentences or words contained in a record. In addition, where the information at issue is the withheld portion of a record that has been partially released, the whole of the record (including released portions) is analyzed in determining whether a requester's right to access the withheld information should be considered under Part I or Part II.

ground that disclosure would be an unjustified invasion of the personal privacy of other individuals.

[24] Under section 38(b) of the *Act*, where a record contains personal information of both the requester and another individual, and disclosure of the information would be an “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.⁸

[25] Sections 14(1) to (4) of the *Act* provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy.

[26] If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). In addition, section 14(4) lists situations that would not be an unjustified invasion of personal privacy. Neither of these sections is applicable in this case.

[27] Sections 14(2) and (3) also help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b). In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.⁹

[28] None of the presumptions in section 14(3) applies in this case. In her representations, the appellant addresses section 14(3)(b), which applies to personal information that was compiled and is identifiable as part of an investigation into a possible violation of law (subject to certain exceptions). The township has not claimed that this presumption applies and there is no other information before me to suggest that it does.

[29] I next consider the potential application of the factors at section 14(2), some of which weigh in favour of disclosure and others against. The appellant argues that the factors at sections 14(2)(a), (c) and (d) apply in this case. Also potentially relevant in these circumstances are the factors at sections 14(2)(f), (g) and (h). These sections state:

⁸ See Issue E, below, for a more detailed discussion of the exercise of discretion under section 38(b).

⁹ Order MO-2954.

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

(c) access to the personal information will promote informed choice in the purchase of goods and services;

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

(f) the personal information is highly sensitive;

(g) the personal information is unlikely to be accurate or reliable;

(h) the personal information has been supplied by the individual to whom the information relates in confidence[.]

[30] The appellant asserts that the township's handling of the allegation against her is evidence of improper conduct by the township and by particular township councillors, including improper involvement in an investigatory matter. She maintains that disclosure of the withheld information will support the *Act's* goals of public transparency and accountability. Among other reasons, she asserts that disclosure will reveal clandestine discussions between township councillors that ought to have been conducted publicly, and will deter councillors from unlawfully interfering in future with the rights of private business people. In addition, while she has not yet brought any civil or administrative proceedings in relation to these matters, she states that disclosure will enable her to decide whether to pursue these avenues to address the reputational harms that she has suffered.

[31] The only information at issue under this heading is the names of individuals who provided information to the township or who are otherwise named in discussions about the allegation involving the appellant, and, in one record, a portion of a summary of one individual's position on the matter. Given the context in which these names appear, I have no reason to believe that any of these individuals are members of township council or staff. I am bolstered in my view by my observation that the township has already disclosed other information in the records that clearly relates to township councillors and staff, such as their names and their views on this matter.

[32] In this context, I consider the appellant's arguments about the benefits of public transparency and accountability of disclosure. I do not accept that disclosure of the names and other information about identifiable individuals unconnected with the township would serve these purposes. Specifically, I do not accept that disclosure of this information would subject the township to public scrutiny, as contemplated by

section 14(2)(a),¹⁰ or promote informed choice in the purchase of goods and services, as contemplated by section 14(2)(c). For section 14(2)(d) to apply, the appellant must establish that a number of criteria are met, including that the right in question is a legal right grounded in common law or statute, that the right is related to an existing or contemplated proceeding, and that the personal information at issue has some bearing on the determination of the right in question or is required for the proceeding.¹¹ The appellant has not shown how any of these criteria are met.

[33] I conclude that none of these factors favouring disclosure is applicable in these circumstances.¹² In my view, the factors at section 14(2)(f) and (g), weighing against disclosure, are applicable in these circumstances.

[34] I have also considered whether any other listed or unlisted factors apply.

[35] This office has previously found that personal information of individuals who are complainants, witnesses or suspects in criminal investigations may qualify as "highly sensitive" for the purposes of section 14(2)(f) and its provincial equivalent.¹³ This factor has also been applied to the names of complainants and other individuals in other types of matters, such as municipal by-law enforcement matters.¹⁴ To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information were disclosed.¹⁵

[36] I assign this factor moderate weight. While I lack evidence to decide whether the information was supplied in confidence for the purposes of section 14(2)(h), it is clear that the township has treated as confidential the name and other identifying information of the complainant or complainants in this matter. The withheld information also includes the names of other individuals that were mentioned in discussions between township councillors and staff about the allegation involving the appellant. Many if not all of these individuals are likely unaware that their names appear in the records. I find it reasonable to expect that disclosure of their personal information in this context would cause these individuals significant personal distress within the meaning of section 14(2)(f).

[37] It is also relevant that most of these individuals' names appear in the context of secondhand accounts of their words and actions. This raises the application of section

¹⁰ Order P-256.

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

¹² Order P-99.

¹³ See, for example, Orders P-780 and P-1618.

¹⁴ See, for example, Orders MO-1579 and MO-2860.

¹⁵ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

14(2)(g), which takes into account the likelihood of the information's being inaccurate or unreliable. I assign this factor moderate weight.

[38] Having found that no factors weigh in favour of disclosure, while two factors weigh against, I conclude that disclosure of other individuals' personal information to the appellant would be an unjustified invasion of those individuals' personal privacy. I therefore uphold the application of section 38(b) to this information, subject to my consideration of the township's exercise of discretion under this section (at Issue E) and the appellant's public interest arguments for disclosure, which I will consider next.

C. Is there a compelling public interest in disclosure of the information withheld under section 38(b) that clearly outweighs the purpose of the exemption?

[39] The appellant takes the position that the public interest override applies to any withheld information. Section 16 of the *Act* states:

An exemption from disclosure of a record under sections 7, 9, 9.1, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[40] Although section 16 does not explicitly list section 38(b), this office has read in section 38(b) as an extension of a requester's ability to raise the public interest override in cases where information is withheld under the mandatory personal privacy exemption at section 14.¹⁶

[41] In order for section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[42] In considering whether there is a "public interest" in disclosure of a record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government.¹⁷ A public interest does not exist where the interests being advanced are essentially private in nature.¹⁸

[43] The appellant cites the following "public interest" grounds for disclosure: general deterrence; contempt for process; transparency; and fairness. She argues that disclosure would discourage public office holders from inserting themselves in future in the investigatory process, and would address what she describes as the township's

¹⁶ See Order P-541 (addressing the provincial equivalent to section 16), followed in Orders PO-2246, MO-2701, and others.

¹⁷ Orders P-984 and PO-2607.

¹⁸ Orders P-12, P-347 and P-1439.

contempt for the appeal process, as evidenced by its failure to provide representations in this inquiry. She also argues that transparency and fairness objectives would be served through disclosure of records that shed light on the operations of government and that would enable the appellant to clear her name.

[44] Even if I were satisfied of a public interest in the township's handling of the allegation about the appellant's use of her property, I am not satisfied that disclosure of the information withheld under section 38(b) would respond to that interest. As described above, this information consists of the names and other identifying information of individuals unconnected to the township. I am not persuaded that disclosure of this information would deter public officials from engaging in future improper conduct, or provide a satisfactory remedy for any contempt of process. Nor am I persuaded that disclosure of private individuals' names and other information would aid in shedding light on government operations, or would address any unfairness to the appellant as a result of the township's actions.

[45] Furthermore, any public interest in disclosure must be a "compelling" interest, and must also clearly outweigh the purpose of the section 38(b) exemption applied to this information. The word "compelling" has been defined in previous orders as "rousing strong interest or attention."¹⁹ For example, a compelling public interest was found to exist in past orders where the integrity of the criminal justice system was called into question,²⁰ and where records at issue contained information about contributions to municipal election campaigns.²¹ More recently, this office found there to be a compelling public interest in information about physicians who billed the highest amounts to the Ontario Health Insurance Plan (OHIP) over a given period, as disclosure of that information would serve the principles of transparency and accountability in relation to substantial expenditures of public funds.²²

[46] I am not satisfied that any public interest that may exist in this matter rises to the level of a compelling public interest of the type found in these past orders, or that it would outweigh the important privacy protection purposes of section 38(b) applied to the personal information of individuals unconnected with the township. I conclude that the public interest override at section 16 does not apply.

¹⁹ Order P-984.

²⁰ Order PO-1779.

²¹ *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 OR (3d) 773.

²² Order PO-3617, affirmed in *Ontario Medical Association v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 673 (CanLII) (upholding 2017 ONSC 4090 (CanLII)); application for leave to appeal to Supreme Court of Canada dismissed April 11, 2019 (No. 38343).

D. Does the discretionary exemption for solicitor-client privilege at section 38(a), in conjunction with section 12, apply to any of the information at issue?

[47] The township withheld Record 13 in its entirety on the basis of solicitor-client privilege. Because the record contains the appellant's personal information, the appropriate exemption claim is section 38(a) in conjunction with section 12 of the *Act*. These sections state:

38 (a) A head may refuse to disclose to the individual to whom the information relates personal information [...] if section 6, 7, 8, 8.1, 8.2, 9, 9.1, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information;

12 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.

[48] 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.

[49] The common law solicitor-client privilege in Branch 1 encompasses two types of privilege: solicitor-client communication privilege and litigation privilege. While 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,²³ litigation privilege protects records created for the dominant purpose of litigation. The litigation must be ongoing or reasonably contemplated.²⁴

[50] The statutory privilege in Branch 2 also encompasses solicitor-client communication privilege and litigation privilege. The statutory and common law privileges, although not identical, exist for similar reasons.

[51] Both the common law privilege and the statutory privilege in section 12 can be lost through waiver. Generally, disclosure to outsiders of privileged information

²³ *Descôteaux v. Mierzwinski* (1982), 141 DLR (3d) 590 (SCC).

²⁴ Order MO-1337-I and *General Accident Assurance Company v. Chrusz*, 1999 CanLII 7320 (ON CA); see also *Blank v. Canada (Minister of Justice)* (2006), 270 DLR (4th) 257 (SCC) (also reported at [2006] SCJ No 39).

constitutes waiver of privilege.²⁵ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.²⁶

[52] In its revised index of records, the township describes Record 13 as an email from a planning consultant to its director of community services, forwarding a legal opinion from another municipality on the topic of home occupation at the appellant's residential address. The record is an email chain composed of three separate emails. Despite being invited to, the township did not provide representations at the inquiry stage. As a result, I do not have any other information from the township about the basis for its solicitor-client privilege claim for this record.

[53] However, based on my review of the record and the information in the file, I make the following observations. One of the emails in the chain appears to contain a summary of legal advice, and the entire chain is forwarded to a person identified by the township as a member of township staff. It is not clear to whom that advice was originally provided, by whom it was provided, or the relationship between those individuals and the township. It is also not evident whether the advice was provided in confidence. Moreover, in view of the apparent distribution of the legal advice beyond its original recipients, it is not clear whether any privilege that may have originally attached to the advice is lost through waiver by the holder of the privilege, or whether the township's claim is that the common interest exception to waiver of privilege applies here.

[54] In the circumstances, given the potential application of solicitor-client privilege to the record, and in view of the fundamental importance of that privilege, as recognized by the Supreme Court of Canada,²⁷ I have decided to defer my findings on this issue pending the receipt of additional information from the township. Below, I order the township to provide me with representations on its application of sections 38(a) and 12 to this record, and on its exercise of discretion under these sections. In making these representations, the township should have regard to the guidance provided on these topics in the Notice of Inquiry that I sent to the township during the inquiry stage.

E. Did the township exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

[55] Above, I upheld most of the township's severances to the records under section 38(b), pending my finding on the township's exercise of discretion. I also deferred my findings on the application of section 38(a), in conjunction with section 12, pending the

²⁵ J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] OJ No 4495 (Div Ct).

²⁶ *General Accident Assurance Company v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

²⁷ In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), and others.

receipt of additional information from the township on this topic.

[56] The section 38(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so. 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, or it takes into account irrelevant considerations, or it fails to take into account relevant considerations.

[57] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁸ This office may not, however, substitute its own discretion for that of the institution.²⁹

[58] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:³⁰

- the purposes of the *Act*, including the principles that:
 - information should be available to the public,
 - individuals should have a right of access to their own personal information,
 - exemptions from the right of access should be limited and specific,
 - the privacy of individuals should be protected;
- the wording of the exemptions and the interests they seek to protect;
- that the requester is seeking her own personal information;
- whether the requester has a sympathetic or compelling need to receive the information;
- that the requester is an individual and not an organization;
- the relationship between the requester and any affected persons;

²⁸ Order MO-1573.

²⁹ Section 43(2).

³⁰ Orders P-344 and MO-1573.

- whether disclosure will increase public confidence in the operation of the institution;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;
- the age of the information;
- the historic practice of the institution with respect to similar information.

[59] The appellant asserts that if the township exercised its discretion under this section, it did so in bad faith and for an improper purpose. This is based on her arguments, summarized above, about the township's improper conduct in handling the allegation about her, and her observation that the township initially claimed (though later withdrew) a law enforcement exemption for withholding some of the information at issue.

[60] Without making a finding on the appellant's claims, I observe that the township has not demonstrated, either in its decisions or through representations, that it properly exercised its discretion under section 38(b). I will therefore order the township to conduct a proper exercise of discretion under this section, and to provide me with representations on its exercise of discretion.

[61] I also remind the township that its representations on the application of sections 38(a) and 12 of the *Act* to Record 13 should address the considerations that it took into account in exercising its discretion under those sections.

F. Did the township conduct a reasonable search for records?

[62] During the appeal process, the appellant raised concerns about the reasonableness of the township's search for records. While the township conducted another search at the mediation stage, it did not locate additional records. At the inquiry stage, I asked the township to provide representations about its search for records, but it did not.

[63] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.³¹ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[64] While the *Act* does not require the institution to prove with absolute certainty

³¹ Orders P-85, P-221 and PO-1954-I.

that further records do not exist, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.³² A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.³³

[65] I have no evidence from the township about the searches that it conducted in response to the appellant's request. The appellant, on the other hand, asserts that there are several reasons to doubt the township's claim that no further records exist. Her first argument is that one of the records contains a statement from a township councillor about a named individual's having called the councillor again. In the appellant's submission, the use of the word "again" indicates that there exist earlier records documenting a previous discussion between the councillor and the individual. The appellant also reports that some of the councillors involved in her matter were subjects of an investigation by an integrity commissioner. While the appellant concedes that the investigation was about an unrelated matter, she suggests that this may qualify as similar fact evidence relevant to this appeal. She also reports that because of the integrity commissioner's findings, she continues to have concerns that council members have attempted to suppress records and to disparage her.

[66] I am not satisfied that either of these arguments raises a reasonable basis for concluding that additional records exist. Nonetheless, I agree with the appellant that, in this case, the township's failure to respond to my request for information is a basis for ordering further searches. Without representations or other evidence from the township providing such basic details as who conducted the searches and what areas were searched, I cannot uphold the reasonableness of the township's search efforts. For this reason, I will order the township to conduct another search for records responsive to the appellant's request, and to provide me with a written summary of all steps taken in response to the request. This summary must be provided in affidavit form, and include the information outlined in order provision 4, below.

ORDER:

1. I order the township to exercise its discretion with respect to the information that I found to be exempt under section 38(b) in Records 8 (in part), 9, 20 and 21, and to provide me with representations on its exercise of discretion by **July 9, 2019**. If the township decides to exercise its discretion in favour of disclosure, it must provide notice to any affected persons in accordance with its obligations under the *Act*.

³² Orders P-624 and PO-2559.

³³ Orders M-909, PO-2469 and PO-2592.

2. I order the township to disclose to the appellant the portion of Record 8 that I found not to be exempt under section 38(b). I enclose with this order a highlighted copy of Record 8, with the portion to be disclosed to the appellant highlighted in **green**. The township is to disclose this information to the appellant by **July 15, 2019**.

The exempt portion of Record 8 is highlighted in yellow. This portion is to be withheld from the appellant.

3. I order the township to provide me with representations on whether the solicitor-client privilege exemption at section 38(a) of the *Act*, in conjunction with section 12, applies to Record 13. These representations must also address the township's exercise of discretion under these sections. The township must submit these representations to me by **July 9, 2019**.
4. I order the township to conduct a further search for records responsive to the appellant's request, and to provide me with representations on its search by **July 9, 2019**. These representations are to be provided in the form of an affidavit signed and sworn or affirmed by the person or persons who conduct the search, and should include the following information:
 - a. the names and positions of the person or persons who conduct the search and who are contacted in the course of the search;
 - b. the names and positions of the person or persons who conduct the search and who are contacted in the course of the search;
 - c. details of the searches carried out, including the date of the search and the nature and location of the files searched;
 - d. the results of the search; and
 - e. whether it is possible that responsive records existed but no longer exist. If so, the township must provide details of when such records were destroyed and any relevant record maintenance policies and practices, such as evidence of retention schedules.
5. If the township locates additional records as a result of its further search, it must issue a decision to the appellant in accordance with the *Act* regarding access to such records. The township is to treat the date of this order as the date of the request. I direct the township to provide me with a copy of this decision.
6. I may provide the appellant with a copy of the township's representations described in order provisions 1, 3 and 4, unless there is an overriding confidentiality concern. If the township believes that portions of its representations should remain confidential, it must identify these portions, and it

must explain why the confidentiality criteria in Practice Direction 7 of the IPC's *Code of Procedure* apply to these portions.

7. I remain seized of this appeal to address matters arising from order provisions 1, 3 and 4.

Original Signed By: _____

Jenny Ryu
Adjudicator

_____ June 11, 2019