Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3845

Appeal MA18-557

City of Kawartha Lakes

October 4, 2019

Summary: The appellant filed a request under the *Act* with the city for records relating to a letter that was sent to her in July 2018. After locating responsive records, the city issued an access decision to the appellant granting her partial access to the records. The city withheld some of the records under sections 38(a), read with sections 6(1)(b) (closed meeting), 8(1)(d) (confidential source), 8(1)(e) (endanger life or safety) and 13 (danger to safety or health) and 38(b) (personal privacy) of the *Act*. The appellant appealed the city's decision. In this order, the adjudicator upholds the city's decision, in part. The adjudicator finds that the majority of the information is exempt under section 38(b) and upholds the city's exercise of discretion to withhold that information from disclosure. However, the adjudicator finds that portions of the records are not exempt under the *Act* and orders the city to disclose them to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c.M56, as amended, sections 2(1) (definition of *personal information*), 6(1)(b), 8(1)(d) and (e), 13, 14(1)(f), 14(2)(f) and (h), 14(3)(g), 38(a) and (b).

OVERVIEW:

[1] The appellant filed an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) with the City of Kawartha Lakes (the city) for access to records relating to a letter that was sent to her in July 2018.

[2] The city identified 18 responsive records and issued a decision granting the appellant partial access to the records. The city withheld some of the records or portions thereof under sections 38(a), read with sections 6(1)(b) (closed meeting) and 8(1)(d) (confidential source) and 38(b) (personal privacy) of the *Act*.

[3] The appellant appealed the city's decision.

[4] During mediation, the appellant confirmed her interest in obtaining access to the information withheld from disclosure. The city reviewed its decision and issued a revised access decision granting the appellant additional access to portions of the records. The city maintained its original exemption claims and raised the application of section 38(a), read with sections 8(1)(e) (endanger life or safety) and 13 (danger to safety or health), to withhold the records.

[5] The appellant reviewed the city's revised access decision and confirmed her interest in obtaining access to Records 1, 2, 12, 13, and 14, which were withheld in their entirety. The city maintained its exemption claims for these records.

[6] Mediation did not resolve the issues under appeal and the appeal transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry. I began my inquiry by inviting the city to submit representations in response to a Notice of Inquiry, which outlined the facts and issues under appeal. The city submitted representations.

[7] I then invited the appellant to submit representations in response to the Notice of Inquiry and the city's representations, which were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The appellant submitted representations. The appellant submitted a large number of attachments with her representations. I confirm that I have reviewed all of these materials, but they do not relate to whether the appellant should have access to the records at issue.

[8] I decided to invite the city to submit representations in response to the appellant's representations, which were shared with the city in accordance with Practice Direction Number 7. The city submitted reply representations. In addition, I notified two individuals whose interests may be affected by the disclosure of the information at issue (the affected parties). Both affected parties submitted representations and did not consent to the disclosure of information relating to them.

[9] In the discussion that follows, I uphold the city's decision, in part. I find that the majority of the records are exempt under section 38(b) of the *Act* and uphold the city's exercise of discretion to apply section 38(b) to withhold this information. However, I find that two emails, which are duplicated in the records, are not exempt from disclosure and order the city to disclose them to the appellant.

RECORDS:

[10] The records at issue are email correspondence. The city identified the records as Records 1, 2, 12, 13, and 14. The city withheld these records in full.

ISSUES:

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

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

C. Does the discretionary exemption at section 38(a), read with sections 6(1)(b), 8(1)(d), (e) and/or 13, apply to the information at issue?

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

DISCUSSION:

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

[11] In order to determine which sections of the *Act* may apply to the records, it is necessary to decide whether they contain *personal information* and, if so, to whom it relates. That term is defined in section 2(1) of the *Act* as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
> >
> > (b) information relating to the education or the mental, 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;

[12] 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] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[2]

[13] 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.[3] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[4]

[14] The city submits that the records contain personal information relating to the appellant and other identifiable individuals. Specifically, the city submits that the records contain

- Individuals' names with other personal information relating to them or where disclosure of the names would reveal other personal information about the individuals (as defined in paragraph (h) of section 2(1) of the *Act*);
- The views or opinions of individuals about another individual (paragraph (g)); and
- Correspondence sent to the institution by an 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 (paragraph (f));

[15] The city submits that the records contain personal opinions or views of an

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[1] Order 11.
[2] Oder PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[3] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[4] Orders P-1409, R-980015, PO-2225 and MO-2344.

identifiable individual relating to the appellant.

[16] The appellant does not directly address the issue of whether the records contain personal information in her representations. However, it is clear the appellant believes that the records contain her personal information.

[17] During the inquiry, I notified two affected parties. Both affected parties submit that the records contain their personal information.

[18] I have reviewed the records at issue. I find that all of the records contain personal information relating to the appellant, including her email address (paragraph (d)), her personal opinions or views (paragraph (e)), views or opinions of other individuals about her (paragraph (g)), and her name as it appears with other personal information relating to her (paragraph (h)). In addition, I find that the records contain information relating to the appellant that falls within the introductory wording of the definition of *personal information* in section 2(1) of the *Act*.

[19] In addition, I find that all of the records contain information relating to other identifiable individuals, including the two affected parties. Specifically, the records include these individuals' email addresses (paragraph (d)), their personal opinions or views (paragraph (e)), correspondence sent to the city by the individuals that is of a confidential nature and replies to that correspondence that would reveal the contents of the original correspondence (paragraph (f)), the views or opinions of another individual about these individuals (paragraph (g)), and the individuals' names where they appear with other personal information relating to them (paragraph (h)). In addition, I find that the records contain information relating to identifiable individuals that falls within the introductory wording of the definition of *personal information* in section 2(1) of the *Act*.

[20] However, I find that the the second email in Record 2 (reproduced in subsequent pages) does not contain personal information within the meaning of section 2(1) of the *Act*. The city notified the author of this email during the inquiry and this individual did not consent to the disclosure of information relating to them. However, the author of this email was acting in their professional capacity and the record at issue does not reveal any information of a personal nature about them. Therefore, I find that the second email in Record 2 does not contain personal information within the meaning of section 2(1) of the *Act*. Since the city has also claimed section 38(a), read with sections 6(1)(b), 8(1)(d) or (e), or 13, to withhold this email from disclosure, I will consider the application of these exemptions to it under Issue C.

[21] Therefore, I find that the records contain the personal information of the appellant and other identifiable individuals. Because the records contain personal information relating to the appellant, I will consider access to the records under Part II of the *Act* and determine whether the discretionary exemptions at sections 38(a), read with sections 6(1)(b), 8(1)(d) or (e), or 13, or 38(b) apply to them. I will begin with the exemption at section 38(b).

Issue B: Does the discretionary exemption at section 38(b) apply to the personal information at issue?

[22] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an *unjustified invasion* of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.[5]

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

[24] For records claimed to be exempt under section 38(b), this office will also consider and weigh the factors and presumptions in both sections 14(2) and (3) and balance the interests of the parties in determining whether disclosure of the personal information in the records would be an unjustified invasion of personal privacy.[6] Additionally, if any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and is not exempt under section 38(b). I have reviewed section 14(4) and find that none of the exceptions to the exemption apply to the personal information at issue.

[25] The city submits that the presumption in section 14(3)(g) applies to the records. Section 14(3)(g) states,

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information consists of personal recommendations, evaluations, character references or personnel evaluations.

[26] The city submits that the records contain character references relating to the appellant.

[27] The appellant did not directly address the application of the section 38(b) exemption in her representations. However, the appellant submits that the exemptions in the *Act* should not be used to "protect criminal activity", specifically, to protect the individuals who made "false allegations" against her. The appellant submits that the exemptions should only apply to communications made in good faith. I will consider the

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[5] See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion.
[6] Order MO-2954.

appellant's concerns regarding the city and affected parties' conduct in my weighing of the section 14(2) factors, below.

[28] The two affected parties submit that their personal information is exempt under section 38(b) of the *Act*. The affected parties raise a number of concerns regarding the appellant's behaviour and attitude towards them. While not explicitly raised, it is clear the affected parties believe that the factor weighing against disclosure in section 14(2)(f) applies to their personal information. Section 14(2)(f) of the *Act* states,

> A head, in determining whether a disclosure of personal information constitutes and unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether, the personal information is highly sensitive.

[29] I have reviewed the personal information at issue in this appeal. This information relates to the appellant, two affected parties and other identifiable individuals. I find that the information relating to the appellant is inextricably intertwined with that of the affected parties and other identifiable individuals and cannot be reasonably severed because to attempt to sever the appellant's personal information from the records would result in disconnected meaningless snippets being disclosed to the appellant.[7]

[30] On my review of the records, I find that the presumption at section 14(3)(g) does not apply to the personal information at issue. The terms *personal evaluations* or *personnel evaluations* in section 14(3)(g) refer to assessments made according to measurable standards.[8] Also, the thrust of section 14(3)(g) is to raise a presumption concerning recommendations, evaluations or references about the identified individual in question rather than evaluations, recommendations or references by that individual.[9] I have reviewed the personal information at issue and find that it does not fall within section 14(3)(g) as it does not constitute personal recommendations, evaluations, character references or personnel evaluations. Rather, this personal information constitutes opinions of third parties relating to themselves combined with their opinions of the circumstances that resulted in the creation of the records. In my view, this does not constitute a personal recommendation or character references for the purposes of the section 14(3)(g) presumption and I find that it does not apply.[10]

[31] With respect to the factors in section 14(2), I accept that the factors at paragraphs (f) (highly sensitive) and (h) (supplied in confidence) are both factors weighing against the disclosure of the personal information contained in the records. The personal information at issue relates to a number of identifiable individuals,

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[7] Orders PO-1735 and PO-1663.
[8] Orders PO-1756 and PO-2176.
[9] Order P-171.
[10] See Order MO-2654.

including the two affected parties. Based on the contents of the records and the circumstances surrounding the correspondence, I find that it could reasonably be expected that the personal information at issue is highly sensitive and was communicated with the city in confidence. Therefore, I find that the factors weighing against disclosure in sections 14(2)(f) and (h) apply to the personal information at issue. From my review, and considering the evidence before me, I find that no factors weighing in favour of disclosure, whether listed or unlisted, apply. While I have considered the appellant's submission that the other individuals made their statements in bad faith, I am not satisfied that this is a factor weighing in favour of disclosure in the circumstances.

Absurd Result

[32] The absurd result principle holds that in instances where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under section 38(b), because to withhold it would be absurd and inconsistent with the purpose of this exemption.[11] The absurd result principle has been applied where, for example,

- The requester sought access to his or her own witness statement[12]
- The requester was present when the information was provided to the institution[13]
- The information is clearly within the requester's knowledge[14]

[33] If disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[15]

[34] The appellant did not address the absurd result principle in her representations.

[35] The city submits that Records 1 and 13 include communications that stem from the appellant's communications. The city submits that the absurd result principle does not apply because the appellant was not privy to nor aware of the communications stemming from her original communication. The city submits that the absurd result principle does not apply to the remainder of the records at issue because they do not contain any communication that the appellant is aware of.

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[11] Orders M-444 and MO-1323.
[12] Orders M-444 and M-451.
[13] Orders M-444 and P-1414.
[14] Orders MO-1196, PO-1679 and MO-1755.
[15] Orders M-757, MO-1323 and MO-1378.

[36] Based on my review of the records, I find that the absurd result principle applies to portions of Records 1 and 13. Specifically, I find that the absurd result principle applies to the email sent by the appellant, which is contained in both Records 1 and 13, and the attachment to that email, which is contained in Record 1. In my view, it would be absurd to withhold these portions of the records that were created and/or sent by the appellant and are clearly within her knowledge.

[37] However, I find that the absurd result principle does not apply to the remaining personal information at issue. The personal information that remains at issue consists of correspondence between identifiable individuals that relate to the appellant, but do not appear to be within the appellant's knowledge. Based on my review of the personal information that remains at issue, I find there is insufficient evidence to establish that the appellant is clearly aware of the contents of the records.

[38] Finally, while I found that the records refer to the appellant or otherwise contain her personal information, I have found that these portions cannot be reasonably severed from the portions of the records that contain the personal information of other identifiable individuals, such as the affected parties, because her personal information is inextricably intertwined with theirs. Accordingly, I find that the disclosure of the personal information at issue, with the exception of the emails and attachment sent by the appellant in Records 1 and 13, would constitute an unjustified invasion of personal privacy under section 38(b) of the *Act*, subject to my assessment of whether the city properly exercised its discretion.

[39] Given my findings, I do not need to consider whether the information I have found to be exempt under section 38(b) is also exempt under section 38(a), read with sections 6(1)(b), 8(1)(d), (e) and/or 13, of the *Act*.

Issue C: Does the discretionary exemption at section 38(a), read with sections 6(1)(b), 8(1)(d), (e) and/or 13, apply to the information at issue?

[40] The only information that remains at issue is the information I have found to not be exempt under section 38(b) of the *Act*. Specifically, this information consists of

- The email sent by the appellant (in duplicate) and the attachment to that email in Records 1 and 13; and

- The second email in Record 2 (duplicated in subsequent pages)

[41] The city has applied sections 38(a), read with sections 6(1)(b), 8(1)(d), (e) and/or 13, to withhold these records from disclosure.

[42] Section 38(a) provides a number of exemptions to an individual's general right of access to their own personal information. Section 38(a) reads,

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

Section 6(1)(b)

[43] The city claims the application of the discretionary exemption in section 6(1)(b) to withhold Records 1 and 2. Section 6(1)(b) reads,

> A head may refuse to disclose a record,
>
> > that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

[44] For this exemption to apply, the city must establish the following:

1. a council, board, commission or other body, or a committee of one of them, held a meeting;
2. a statute authorizes the holding of the meeting in the absence of the public; and
3. disclosure of the record would reveal the actual substance of the deliberations of the meeting.[16]

[45] Previous orders have found that *deliberations* refer to discussions conducted with a view towards making a decision.[17] In addition, *substance* generally means more than just the subject of the meeting.[18]

[46] The only portion of Record 1 that remains at issue is an email and attachment the appellant sent to an individual. Based on my review of this record, I find that section 6(1)(b) does not apply to this portion of the record. The email and attachment were prepared and sent by the appellant. I find that this portion would not reveal the actual substance of the deliberations of a closed meeting if disclosed. While the appellant's email and attachment may have been discussed during a closed meeting, the email and attachment themselves would not reveal the actual substance of the deliberations.

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[16] Orders M-64, M-102 and MO-1248.
[17] Order M-184.
[18] Orders M-703 and MO-1344.

[47] The only portion of Record 2 that remains at issue is an email that is duplicated in the record. Based on my review of the record, which appears to be administrative in nature, I find that the disclosure of this email would not reveal the actual substance of the deliberations of a closed meeting.

[48] Therefore, I find information that remains at issue in Records 1 and 2 does not qualify for exemption under section 6(1)(b).

Section 8(1)

[49] The city relied on section 38(a) in conjunction with sections 8(1)(d) and 8(1)(e) to withhold the records in full. Those sections state,

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

[50] The term *law enforcement* is used in several parts of section 8 and is defined in section 2(1) as

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)

[51] The term *law enforcement* has been found to apply in the following circumstances:

- a municipality's investigation into a possible violation of a municipal by-law[19]
- a police investigation into a possible violation of the *Criminal Code*[20]
- a children's aid society investigation under the *Child and Family Services Act*[21]

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[19] Orders M-16 and MO-1245.
[20] Orders M-202 and PO-2085.

- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997*[22]

[52] The term *law enforcement* has been found *not* to apply in the following circumstances:

- an internal investigation by the institution under the *Training Schools Act* where the institution lacked the authority to enforce or regulate compliance with any law[23]

- a Coroner's investigation or inquest under the *Coroner's Act*, which lacked the power to impose sanctions.[24]

[53] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[25]

[54] Where section 8 uses the words "could reasonably be expected to", the institution must provide sufficient evidence to demonstrate a reasonable expectation of harm. 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 the seriousness of the consequences.[26]

[55] It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption.[27]

Section 8(1)(d): confidential source

[56] To establish that section 38(a), read with section 8(1)(d), applies, the city must demonstrate there is a reasonable expectation that the identity of the source or the

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[21] Order MO-1416.
[22] Order MO-1337-I.
[23] Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 DLR (4th) 602, reversed on other grounds (1994), 107 DLR (4th) 454 (C.A.).
[24] Order P-1117.
[25] *Ontario (Attorney General) v. Fineberg* (1994), 19 OR (3d) 197 (Div. Ct.).
[26] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-54.
[27] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, *supra* note 24.

information given by the source would remain confidential in the circumstances.[28]

[57] The city submits that an identifiable individual submitted confidential information to the city. The city submits that the individual's name should not be disclosed as the information was submitted to the city in confidence. The city believes that withholding the records is good practice because it will ensure the trust of future "whistleblowers" on committees or boards, revealing inappropriate conduct.

[58] The appellant did not address the application of section 38(a), in conjunction with section 8(1)(d), in her representations.

[59] The only information that remains at issue is the email sent by the appellant (in duplicate) and the attachment to that email in Records 1 and 13 and the second email in Record 2 (duplicated in subsequent pages). Based on my review of these emails, I find that I have not been provided with sufficient evidence to conclude that the disclosure of this information could reasonably be expected to disclose the identity of a confidential source of information. First, I find that the email and the attachment sent by the appellant do not, on their own, reveal the identity of a source of information or the information given by the source of information.

[60] With regard to the email duplicated in Record 2, I find that it does not contain information relating to a confidential source of information nor does it contain information that would have been provided by the confidential source. Rather, the email is of an administrative nature.

[61] Accordingly, I find that the exemption at section 8(1)(d) does not apply to the information that remains at issue in Records 1, 2 and 13. Because the city also claimed that sections 8(1)(e) or 13 applies to this information, I will go on to determine whether it is exempt under those sections.

8(1)(e): life or physical safety

[62] A person's subjective fear, while relevant, may not be sufficient to establish the application of the exemption.[29] The term *person* is not necessarily confined to a particular identified individual and may include any member of an identifiable group or organization.[30]

[63] The city states that it consulted the author of the email that remains at issue in Record 2. That individual does not consent to the disclosure of information relating to them and claims they are concerned about their personal safety, should the record be

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[28] Order MO-1416.
[29] Order PO-2003.
[30] Order PO-1817-R.

disclosed to the appellant.

[64] In my view, the city has not provided sufficient evidence to establish a reasonable basis for believing that someone's life or physical safety could be endangered by the disclosure of the information that remains at issue (the second email in Record 2 and the email and attachment sent by the appellant in Records 1 and 13). While I acknowledge that the appellant and the city have an antagonistic relationship, I do not accept that the city has provided me with sufficient evidence to support that the disclosure of the information that remains at issue could reasonably be expected to endanger the life or physical safety of the individuals identified in these portions of the records or any other person. Accordingly, I find that section 8(1)(e) does not apply to the information remaining at issue.

Section 13

[65] The city takes the position that the exemption in section 13 applies to all of the records at issue. Section 13 states,

> A head may refuse to disclose a record whose disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[66] For this exemption to apply, 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.[31]

[67] Again, an individual's subjective fear, while relevant, may not be sufficient to establish the application of the exemption. Further, the term *individual* is not necessarily confined to a particular identified individual and may include any member of an identifiable group or organization.[32]

[68] The city's arguments regarding section 13 are substantially similar to those made in support of its section 8(1)(e) claim. Specifically, the city states that it consulted the author of the email that remains at issue in Record 2. That individual does not consent to the disclosure of information relating to them and claims they are concerned about their personal safety, should the record be disclosed to the appellant.

[69] In my view, the city has not provided sufficient evidence to demonstrate that the disclosure of the second email in Record 2 (duplicated in subsequent pages) could reasonably be expected to seriously threaten the health or safety of an individual. I

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[31] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, *supra* note 25.
[32] Order PO-1817-R.

acknowledge that this individual is concerned about their personal safety; however, I do not accept that this subjective fear without additional evidence from the city is sufficient to establish the application of the exemption. Based on my review of the information at issue in Record 2 as well as the city's representations, I find that the city has not provided sufficient evidence to support its position that the disclosure of this information could reasonably be expected to seriously threaten the safety or health of an individual.

[70] In addition, I find that the city has not provided sufficient evidence to demonstrate that the disclosure of the appellant's email and attachment to the appellant could reasonably be expected to seriously threaten the health or safety of an individual. Therefore, I find that section 13 does not apply to the information remaining at issue.

Conclusion

[71] I have reviewed the information that remains at issue, namely, the email and attachment sent by the appellant in Records 1 and 13 and the second email in Record 2 (duplicated in subsequent pages). Based on this review and a review of the parties' representations, I find that this information is not exempt under section 38(a), read with sections 6(1)(b), 8(1)(d) or (e), or 13, of the *Act*. The city has not claimed any other discretionary exemptions to withhold this information and I find that no mandatory exemption applies to it. Therefore, I will order the city to disclose this information to the appellant.

Issue D: Did the city exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

[72] The exemption in section 38(b) 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.

[73] 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, takes into account irrelevant considerations or fails to take into account relevant considerations.

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

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

[75] The city submits that it exercised its discretion properly. The city submits that it considered the purposes of the *Act*, namely, that information should be made available to the public, that individuals should have a right of access to their own personal information, that exemptions from the right of access should be limited and specific, and that the privacy of individuals should be respected. The city submits that its decision to withhold portions of Records 1, 2, 12, 13, and 14 upholds the purposes of the *Act*. In fact, the city submits that the disclosure of the personal information found to be exempt under section 38(b) would conflict with the goal of protecting the privacy of individuals.

[76] In addition, the city submits that the appellant has not established a sympathetic or compelling need for the information withheld under section 38(b). The city also submits that the disclosure of sensitive personal information that was provided to it in confidence would decrease public confidence in the city and its operations. The city emphasises that the information at issue is "incredibly sensitive" and should not be disclosed to the appellant.

[77] The appellant does not address the city's exercise of discretion in applying section 38(b) to withhold the personal information in the records. However, it is clear from her representations that the appellant believes the city has acted in bad faith. I confirm that I have reviewed all of the materials supplied by the appellant during the inquiry. I will not address them in detail in this order because they relate to the city's treatment of her in relation to the July 2018 letter and not the city's application of section 38(b) to withhold the information at issue.

[78] Upon review of the parties' submissions and the information remaining at issue, I find that the city exercised its discretion under section 38(b) properly. Based on the evidence before me, I am satisfied the city did not exercise its discretion to withhold the information at issue in bad faith or for an improper purpose. From my review of the records, the city have withheld personal information relating to third party individuals. Where the city have withheld information relating to the appellant, I find it is inextricably intertwined with those of other identifiable individuals and cannot be reasonably severed. I find that the city considered the privacy interests of these third party individuals in its exercise of discretion. Upon review, I am satisfied the city took relevant factors into consideration and did not take into account irrelevant factors. Accordingly, I uphold the city's exercise of discretion to apply section 38(b) of the *Act* to the information I found qualifies for that exemption.

ORDER:

1. I order the city to disclose

    - the email and attachment sent by the appellant in Record 1 and the duplicate of the email in Record 13, and

- second email in Record 2 (duplicated in subsequent pages)

2. to the appellant by **November 12, 2019** but not before **November 4, 2019**.

3. I uphold the city's decision to withhold the remainder of the records under section 38(b) of the *Act*.

4. In order to verify compliance with Order Provision 1, I reserve the right to require the city to provide me with a copy of the information disclosed to the appellant.

Original Signed by: October 4, 2019

Justine Wai
Adjudicator